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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 29

No. 621 22

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

GUARDIAN TRUST COMPANY, HENRY C. FLOWER, RECEIVER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 10, 1929

CERTIORARI GRANTED FEBRUARY 25, 1929

(33,930)

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 7784

GUARDIAN TRUST COMPANY, HENRY C. FLOWER, RECEIVER, APPELLANT,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED MARCH 21, 1927.

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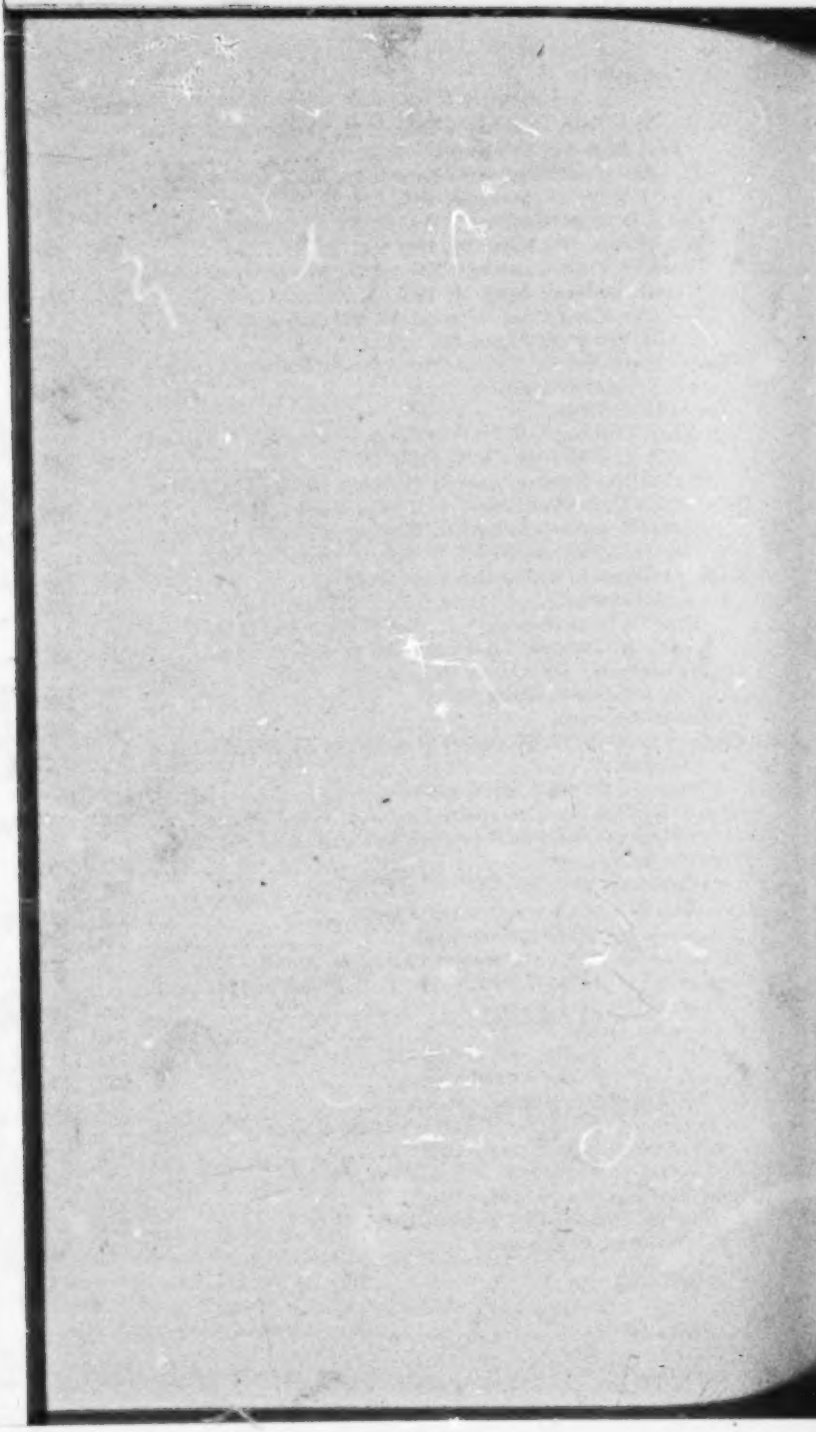

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1928, of said Court, before the Honorable Walter H. Sanborn and the Honorable Wilbur F. Booth, Circuit Judges, and the Honorable Thomas C. Munger, District Judge.

Attest: E. E. KOCH,
Clerk of the United States Circuit Court
(Seal) of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twenty-first day of March, A. D. 1927, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Guardian Trust Company, Henry C. Flower, Receiver, is Appellant and The Kansas City Southern Railway Company was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1928, of said Court, before the Honorable Walter H. Sanborn and the Honorable Wilbur F. Booth, Circuit Judges, and the Honorable Thomas C. Munger, District Judge.

Attest: E. E. KOCH,
Clerk of the United States Circuit Court
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Be it Remembered that heretofore, to-wit: on the twenty-first day of March, A. D. 1927, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Guardian Trust Company, Henry C. Flower, Receiver, is Appellant and The Kansas City Southern Railway Company was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

a (Order approving stipulation as to transcript of record and printing thereof.)

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1926.

Tuesday, December 14, 1926.

Guardian Trust Company, Appellant,
No. 7784. vs.
The Kansas City Southern Railway Company.

A stipulation of counsel for the respective parties has been brought to the attention of the Court wherein counsel have agreed as to the preparation of the transcript of the record by the Clerk of the District Court of the United States for the Western District of Missouri on the appeal to this Court, and also as to the printing of said transcript of the record by the Clerk of this Court. On condition that at least five copies of the printed record of the Supreme Court of the United States referred to in the aforesaid stipulation be furnished to the Clerk of this Court prior to the hearing and submission of this appeal, the said stipulation is approved by this Court.

December 14, 1926.

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b (Citation and Acknowledgment of Service.)

In the District Court of the United States for the Western Division of the Western District of Missouri.

Cambria Steel Company, Complainant,
Bill vs. In Equity.
Kansas City Suburban Belt Railroad Company, et al., Defendants.

Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,
No. 2468 vs. Ancilliary Bill
Cambria Steel Company, et al., Defendants.

The Kansas City Southern Railway Company, Complainant,
vs.
Guardian Trust Company, et al., Defendants.

Intervening Petition.

c United States of America—Set.

To The Kansas City Southern Railway Company, Appellee,—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, City of St. Louis, Missouri, sixty (60) days from and after the date this citation bears date, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Western Division of the Western District of Missouri, wherein the Guardian Trust Company, Henry C. Flower, Receiver, is appellant and you are appellees, to show cause, if any there be, why the judgment rendered aaginst the said appellant as in said appeal and assignment of errors mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Arba S. Van Valkenburgh, Judge of the Circuit Court of Appeals of the United States, sitting in the Western Division, Western District of Missouri, this 18th day of June, in the Year of Our Lord One Thousand Nine Hundred and Twenty Six.

ARBA S. VAN VALKENBURGH,
Judge.

We hereby acknowledge due service of the within citation this 19th day of June, 1926.

S. W. MOORE,
F. H. MOORE,
A. F. SMITH,
Solicitors for Kansas City Southern Ry. Co.

Endorsed: Filed in U. S. District Court on June 21, 1926.

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1 (Motion of Guardian Trust Company for order on Special Master as to inspection of books and papers, etc.)

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

Cambria Steel Company, Complainant,
No. 2468 vs. In Equity.
The Kansas City Suburban Belt Railroad Company, Union Terminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Bill.

Stuart R. Knott, and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants.

vs.

Cambria Seel Company, Guardian Trust Company and Francis M. Black, its Receiver, Missouri, Elevator & Terminal Company and Wash Adams, its Receiver, Central Improvement Company and Wash Adams, its Receiver, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Now comes the defendant Guardian Trust Company and shows to the court as follows:

1. On April 1st, 1902, this cause was referred to Shannon C. Douglass, Esquire, as Special Master to take proofs and report the same with his conclusion thereon to this court in connection with the issues of the original cause herein and in connection with the ancillary bill of complainants Knott & Swinney, Receivers, at the earliest practicable date; said order is recorded in Equity Record H. at page 337 and is made a part hereof.

2 2. That on the 6th day of April, 1905, the complainants in the ancillary bill herein filed with the said Special Master a motion that an order be made requiring this defendant to produce before the Master and to permit them to inspect and make a transcript or memorandum of certain books and papers in said motion specified which said motion is hereto attached marked Exhibit "A" and made a part hereof.

3. Thereupon, on the 13th day of May, 1905, this defendand filed with the Special Master its return to the said motion for inspection of books and papers, a copy of which said re-

tion is hereto attached marked Exhibit "B" and is made a part hereof.

4. Thereupon a hearing was had upon said motion and at said hearing it was represented by counsel for the said complainants that such examination as they desired to make of the books and papers of this defendant, if conducted at the office of this defendant would not take more than about a week or ten days, and thereupon the Master announced that he would neither sustain or deny the said motion but that he would treat the same in the nature of a subpoena duces tecum and that he would adjourn the said hearing to the office of the defendant where he would supervise the said examination of said books and papers, and this defendant makes a part hereof, the proceedings upon the said motion before the said Special Master as shown by the transcript of the stenographer employed by the Special Master.

5. Thereupon, at the request of said Special Master counsel for the said complainants furnished to this defendant a list of books and papers and of book entries which they desired to have under paragraph number one of the twenty-five paragraphs of said motion, which said list is hereto attached, marked Exhibit "C" and made a part hereof, and this defend-
ant shows that to have complied merely with the re-
3 quirements made in said list as to said paragraph number one alone, would require the continuous work of the accountant of defendant for a period of not less than four weeks; that the vouchers called for by said list are in some cases more than fifteen years old and are packed away in wooden cases or boxes in a storage vault and are covered with the accumulated dust of years, and are filed away with many hundreds of other vouchers having no application to any matter in controversy and that to have complied with such request would have required that all of said vouchers be gotten from said vault, the reference numbers thereof first obtained, from the books of account, which in itself would have been a long and tedious task, and that after such reference numbers had been obtained, said vouchers themselves would have had to have been assorted and arranged and produced; that all of the vouchers called for relate to transactions transpiring more than ten years before the said ancillary bill was filed and are covered by the plea of the statute of limitations interposed by this defendant to the said bill and that full details of all of said transactions are spread at large upon the books and records of the Kansas City Suburban Belt Railroad Company.

6. That the item of Fifty-six Hundred Dollars ($5600.00) mentioned in paragraph 2 of said motion is not now and never has been in dispute between this defendant and the said complainants and that all the facts and circumstances in relation thereto are fully set forth in the answer of this defendant to the amended and supplemental ancillary bill of complaint of these defendants and there is no occasion for making any examination of any books and papers in regard thereto.

7. Afterward counsel for complainants furnished to this defendant a list of books and papers which it desired
4 to have produced under items three and four and seven of said motion and of questions which it desired to have answered in relation to various matters in said motion set forth, which list is attached hereto marked Exhibit "D", and is made a part hereof.

And this defendant shows that said Johnson after his examination of the books of defendant, prepared certain tabulated statements which have been offered in evidence and which purport to show:

1. All stock of the Belt Company and its constituent companies acquired and disposed of by defendant; the price obtained therefor; consideration paid to said railroad companies, etc.;

2. The same as to bonds of said Belt Company and its constituent companies acquired and disposed of by this defendant;

3. The same as to all commissions received by this defendant from the said railroad company;

4. All profits or losses made by this defendant on stocks or bonds of the said railroad companies acquired from said railroad companies.

5. Also all interest charged by defendant to the Belt and its constituent Co's. Also all fees of defendant's building department.

That in making said statements and tabulations said Johnson examined this defendant's profit and loss account and all of the other accounts which they now seek to re-examine; that complainants are also seeking by said motion to require this defendant to classify and produce all of the vouchers pertaining to each and every item upon the tabulated statements prepared by said Johnson; that many of

said vouchers are already copied in the records herein and that the transactions covered by such tabulated statements of said Johnson took place during a period of more than ten years and were very numerous; that to produce the said vouchers would require this defendant to search through all of the vouchers in its possession relating to transactions during a period of ten years; that while said tabulated statements contain many conclusions and deductions of the said Johnson, and are inaccurate and grossly unfair to this defendant yet said statements show on their face that they were made after an examination of all the books, accounts and vouchers which complainants are now seeking to re-examine.

And defendant shows that examinations have already been made of each and every matter and thing specified in the said motion of complainants and that said examinations have been made not only by the said Johnson and his assistant Mr. Ingals, but also by R. J. McCarty, former auditor in the employ of complainants.

That contained in the record herein are literal copies of thousand of vouchers of this defendant offered in evidence by the complainants and that Volumes three to ten inclusive of the stenographer's transcript of the proceedings before the said Master consist exclusively of said vouchers; that there are three additional volumes of vouchers of said Belt Company and that there are also copied in the record in volvolumes 11 and 12 thereof, about one thousand other vouchers of this defendant, and this defendant shows to the court that each and every voucher or book entry which complainants now seek to have reexamined have already been examined by said Johnson, accountant for the said complainants, and in addition to the said vouchers having been examined by the said Johnson, they have been examined again and again by the counsel of the said complainants, and that as a result of being handled by the various attorneys in this case and having been turned over to the stenographer for copying, the vouchers of this complainant have become mixed with other vouchers and it would be a long and tedious task to separate the said vouchers called for by said motion from other vouchers not pertaining to this case, and that most of the said vouchers so called for are already contained in the record hereof.

8. As to the correspondence called for by the said motion and by the various lists furnished to this defendant by complainants, this defendant shows to the court that from the

year 1889 to the year 1900 and thereafter, this defendant was engaged in a general banking and trust company business; that it conducted operations running into hundreds of thousands of dollars in the sale of stocks and bonds, not only in connection with the said Belt Railroad Company, but in connection with various other persons and corporations; that as an incident to the conduct of a large financial institution it had correspondence of great volume with various persons and corporations, exchanging thousands of letters annually, and that the correspondence which the complainants by said motion seek to inspect took place during a period of more than ten years; that with reference to some of the subjects of correspondence mentioned in said motion, there was correspondence extending throughout the whole of said period of time and that to comply with the said motion would require this defendant to search through an enormous mass of papers in order to ascertain whether such correspondence is in existence; that most of such letters have been either destroyed or placed in storage on account of the lapse of time since the transactions referred to therein took place or else have become lost or misplaced; that unless some more definite description could be given of the papers and correspondence sought for by said motion than is given in said motion and said lists, either by reference to the date or the name of the sender of such letter, it would be a task of months to produce such correspondence even if it existed, and as to whether or not it does exist, complainants cannot state without making search, and that in addition to [look] over all of the let-
7 ters which this defendant has received during said long period of years, it would also be necessary for this defendant to search through all of the letter press impression books in its possession or under its control and that said impression books are more than 300 in number, and that to merely produce and classify and arrange such correspondence would be an interminable task and would put this defendant to great trouble and expense.

9. And the said complainants have given notice that after having made such inspection as they desire to make, they intend to again offer the said Johnson as a witness and to examine him at length in regard to said examination, and this too, in the face of the ruling of the Master that the complainants close their proofs on or before March 15th, 1905, which time has long since expired, thereby again indefinitely postponing the termination of this case.

10. And said complainants seek by said motion not only production of said books and papers, but also the right to

have the said accountant Johnson again go over all the various accounts which he has already gone over in connection with his examination made in the year 1903; that to examine the said accounts in connection with the vouchers pertaining thereto, would consume at least four weeks and the said Master has indicated that he will require this defendant to have somebody in its employ produce the various books and papers which the said Johnson desires to see and from which he desires to make copies; that to comply with the said order would require this defendant to keep an attendant to wait upon the said Johnson and to produce for him as he desires the same, the various books and papers and vouchers which he desires to examine; that this work cannot be done by an ordinary clerk of this defendant but must be done by some person who is thoroughly familiar with all of the books and records of this defendant, thereby causing a great ex-
8 pense to this defendant and great delay in the termination of this case.

11. That it is the obvious purpose of the complainants herein, after the years of time they have consumed in taking testimony in theis case, to now begin at the beginning and go over the same again.

And this defendant shows that all of the evidence heretofore taken by complainants shows that in the case of every entry, debit or credit, made by this defendant on its books in the accounts between this defendant and the various companies parties to this cause, a corresponding entry was made upon the books of such companies, and that in this account, everything that is shown on the books of this defendant is also shown on the books of the said Belt Railroad Company and of the various other companies parties to this suit; that all of said books are now and have ever been in the possession of said Belt Company and its receivers; that accounts were regularly interchanged between this defendant and the said Belt Company and all of the other said companies and that all of said companies, their officers and stockholders, were at all times familiar with all of the transactions of said companies, and were at all times familiar with the disposition made and the price obtained for any stock or bonds sold by them and that the said accounts were checked at various times by the respective auditors of said companies employed for that purpose, and that at least once in each and every month all of the accounts of this defendant and all of the various companies herein named were gone over and checked by the said auditors of the said companies respectively and found to be correct, and this defendant shows that in its

answer herein it pleads as a defense to the original and ancillary bills herein that this defendant has already fully accounted to the said Belt Railroad Company and to the vari-
other companies parties to this cause and that said
9 accounting had been made regularly during a long period of years and at regular intervals and that the officers directors and stockholders in said Belt Company at all times knew the state of said accounts and made no objection to the same and fully acquiesced in the same; that said complainants are estopped from now seeking any further accounting herein; defendant shows that on the 2nd day of February, 1905, it filed with the said Special Master its motion that he make an order requiring that all parties hereto should limit their proofs to the issues made by the pleading as to whether or not the complainant in the original bill and the complainants in the ancillary bill are entitled to have any accounting in this cause and that the said Special Master overruled the said motion; And that upon the hearing of said motion counsel for said Receivers of the Belt Company, Complainants, stated to the Master on the second day of February, 1905, that they expected to have all their testimony in within "a few days", and the said Special Master in overruling said motion, assigned as one of his reasons therefor, the said assurances of the said counsel for complainant that they would be through with their testimony within a few days and that he, the said Master, believed that in view of the said assurances it would result in an earlier termination of this case to allow said counsel to proceed with their proofs than it would if he should sustain the said motion; and defendant makes a part hereof all of the proceedings before the said Special Master upon the said motion as shown by the stenographer's transcript thereof.

12. And defendant objects generally to the said motion for inspection of its books and papers on the following grounds:

(a) Because such inspection will indefinitely prolong and postpone the termination of this case.

(b) Because such inspection and examination will put this defendant to great labor and expense.

10 (c) Because such inspection is unnecessary and will not tend to throw any light upon the issues of this case.

(d) Because such examination has already been made or opportunity given therefor by this defendant.

(e) Because such inspection will be unreasonable and oppressive.

(f) Because the issue made by the pleadings that the said complainants are not entitled to any further accounting should be first determined before putting this defendant to the expense and trouble and delay of such inspection and the testimony which it will elicit.

(g) Because most of the matters sought to be inquired into by such inspection are barred by the statute of limitations and the effect of such plea should be first determined before such inspection is granted.

(h) Because it has been shown by the complainant that all of the matters sought to be inquired into and all the details thereof appear upon the books and records which are now and ever have been in the possession of complainants or of the said Belt Company and that no objection was ever made thereto by the said Belt Company or anyone else whereby the said complainants are now estopped from questioning the same and this issue should be first determined before going on an account to which such inspection is incident.

(j) Because the papers sought to be examined are not described with sufficient particularity to enable this defendant to find the same without great trouble, delay and expense if such papers are now in existence.

(k) Because said motion is a mere search for testimony.

11 (m) Because no sufficient showing has been made that the books and papers sought to be inspected herein, and production of which is asked, are material to this controversy under the issues made by the pleadings herein.

And this defendant shows that among the defenses set up by it in its answer to the original bill herein and to the amended and supplemental ancillary bill herein, is the defense that the complainants have been guilty of laches in the premises; also a plea of the statute of limitations; also a plea of account stated.

And for greater certainty this defendant prays leave to refer to its said answers to said bills.

And defendant shows to the court that if said defenses are sustained by the proof (as defendant contends, they are sustained on complainant's own showing) it will render wholly unnecessary any further examination into the accounts of this defendant and will relieve all parties to the cause of

very great and unnecessary hardship and expense and indefinite delay; that the accounts between this defendant and the said Belt Railroad Company and its constituent companies are exceedingly long and complicated and extend over a period of more than ten years prior to the institution of this suit and that to require this defendant to go into a general accounting in advance of the determination of its said defenses hereinabove mentioned, would result in great waste of time, money and in great delay, and that it is to the interest of all parties to this cause that the said defenses should first be determined before any such general accounting should be sanctioned or prolonged; and if it should be held by the court that the complainants are entitled to an accounting to a limited extent herein, it would be to the interest of all parties to this cause that the court should determine by its preliminary decree to what extent such accounting should be had and the
12 principles upon which such accounting, if any, should be taken.

And in support of this motion for greater certainty, this defendant prays leave to refer to the transcript of the proceedings before said Special Master, which transcript has been made under the directions of said Special Master and also prays leave to refer to the said original bill of complaint and the said ancillary bill of complaint and the said amended and supplemental ancillary bill of complaint and to the answers thereto of this defendant.

Wherefore, this defendant prays that a rule be entered herein that the Master be directed to proceed no further with such inspection of books and papers and that an order be entered herein declaring the proofs of complainants closed.

H. S. MECARTNEY and
J. C. ROSENBERGER,
Solicitors for Guardian Trust Company.

State of Missouri,
County of Jackson—ss.

S. B. Willey, being duly sworn on oath states that he is Secretary of the above named Guardian Trust Company, and that the facts hereinabove set forth are true.

S. B. WILLEY.

Subscribed and sworn to before me a Notary Public within and for the above named County and State on this the 1st day of June, 1905.

My commission expires July 28, 1906.

(Seal) KERSEY COATES REED,
Notary Public.

13 To all parties to above cause and their solicitors:

The above motion will be presented to said court before the Hon. J. F. Philips, Judge, on Wednesday, June 7, 1905, at the Postoffice building in Kansas City, Mo.

J. C. ROSENBERGER,
H. S. MECARTNEY,
Solicitors for Guardian Trust Co.

Copy hereof received June 6, 1905.

S. W. MOORE.

Filed in the Circuit Court of the United States, June 7, 1905.

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14 (Recital of Court with Reference to Motion as to Inspection of Books and Papers, etc.)

June 7th, 1905.

Whereupon, this matter was fully argued before the Honorable John F. Philips, Judge of said United States Court of the Western Division of the Western District of Missouri, —both by counsel for Defendant, Guardian Trust Company and counsel for the Complainants; and thereupon, the Court stated as follows:—

The Court: It seems to me, gentlemen, that this matter in its last analysis is reduced to about this situation: The complainants are asking time from the Special Master in which to introduce further evidence, in the nature of an inspection of the books of the Trust Company, and to have the Trust Company produce their books for that purpose, with the additional statement, when that is concluded,—they want to examine the witness who has examined the books as an expert accountant, and to have him give his statement as to the result of the facts shown by the books. Now, in the very nature of these equity proceedings,—and one of this character,—the Court must necessarily depend largely upon judgment and the discretion and the better personal information of the Master. The whole evidence has been taken before him,—and, its bearing and its relevancy while it is being developed, are all present to his mind. He is familiar with the progress of the case; and, when it is proposed to extend the time in order to take testimony which has been gone into, it is familiar to him,—it is necessarily in his own mind as to the relevancy of it, and

his judgment is to be preferred to that of the Chancellor until the coming in of an examination of the whole testimony. Now, it seems to me that the Master in this case, is the one in whose sound judgment the Court must have confidence. Now, as to how far the Complainants shall be indulged to go into the examination of these books when they are produced, —it would be quite impracticable for the Court, without mere guess-work, to say in advance as to what line the examination should be limited; but, when they are brought before the Master, he can determine at once whether any matter
15 sought to be developed is a mere duplication, and, he can put a stop to it. And, I am going to make this suggestion: I am not going to determine finally upon this motion now. I am going to let the motion stand. Nor, will the Court make any written order to the Master as to the further taking of time,—further than to suggest to the master, that it is very desirable on all sides, and especially by the Court, that there should be an end to the taking of testimony in this case, and, that it should be expedited as much as possible. With the statement by Mr. Moore, that this line of proof which he proposes to develop or pursue can be accomplished in a short time,—I will leave this motion pending before the Court, with the statement of counsel, with the limit to the end of this month; and if the examination has not been accomplished by that time, then you can bring the motion up before the Court, and the Court can determine at that time whether to take control of the case in that direction. I take it, with these suggestions, that the Master will expedite the hearing as much as possible. I am not going to stop it at this time; but, if it is a duplication, the cost of it will be taxed against the Complainants,—so that the Respondent in this case will suffer no hardship in that regard. If the testimony is incompetent and irrelevant, it will be passed upon by the Master. Of course, the Master will only pass upon it in summing up the case.

Mr. Rosenberger: If the Court please, there is one matter that I bring up at the suggestion of the Master. This is a matter which is involved in this motion,—which, I understand has been disposed of, as just indicated by the Court. I think I am serving the desire of the Master in bringing this matter up now. Included in this motion is a specification that all of the correspondence of the Trust Company with all these various subsidiary companies, upon certain subjects, be produced:—and, that all of the correspondence of the
16 Trust Company with certain agents be produced. As to that feature, the application filed and which Your

Honor has taken under advisement, makes a showing; and, the question arises as to what extent it shall be complied with.

Mr. Moore: That is to be determined by the Master.

Mr. Rosenberger: I would like for the Court to determine it.

The Court: The Master can determine that. He is the Alter ego of the Court, and is to determine that when you produce the letters. You can bring them in, and he can determine that question.

Mr. Rosenberger: The Master has not indicated what his ruling will be in that respect.

The Master: I have said, in several instances,—that I will not permit a general examination and inspection of all the correspondence; and, I have said that I would only permit an examination of such matters as I think are relevant.

The Court: There being no other line of demarcation,—and the correspondence not being before the Court,—the Court cannot pass on that question now. You can bring the correspondence called for by the order, in the nature of a subpoena duces tecum; and, the Master can determine what you can do about that in advance,—otherwise, it leaves the matter wholly in you to determine.

Mr. Rosenberger: I only wanted to save the Master any embarrassment.

The Court: You can get along best by presenting these matters before the Master; but, you will create delay by resisting a full examination of the records in your possession.

Mr. Rosenberger: We are not doing that.

(After examination by Master)

The Court: This all shows the necessity of the Chancellor leaving these matters in the sound discretion of the Master; otherwise, he may interrupt the case without sufficient knowledge or information. (pp. 28269, 28270, 28271, and 28272, Douglass Transcript.)

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17 "Saturday, February 4, 1905, ten o'clock a. m. (p. 8416 Douglass Transcript .....)"

Mr. Rosenberger: I move the Master,—he having ruled that under the circumstances there shall be an accounting in

this case, that if there be an accounting, the Master require the Complainants and Cross-Complainants to sur-charge and falsify the debtor and creditor account of the Guardian Trust Company, as presented by the Complainants' witness, Mr. Willey. In other words,—I move that the Master require the adverse parties to specify the items of this long and complicated account which are in dispute here. If the Master is not prepared to rule on that motion, now, I would like to hand him some authorities—I would like to hand him Mr. Moore's brief on the subject.

The Master: I will not rule on it today.

Mr. Rosenberger: I will broaden the motion to this extent: That the Complainants and Cross-Complainants be required to specify the items in the accounts between the Guardian Trust Company and the other parties to this case, which are in dispute here, whether they appear on Mr. Willey's statement or not.

Mr. Moore: It is my present expectation to file an Amended Bill, sur-charging and falsifying; and, to do this at the request of the defendant Guardian Trust Company, in response to its motion.

The Master:—I will not pass on the motion, for the present.

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18 (Motion of Guardian Trust Company, et al., for Final Decree.)

In the District Court of the United States for the Western Division of the Western District of Missouri.

Cambria Steel Company, Complainant,

vs.

Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill in Equity.

Edward F. Swinney, as Receiver of The Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

No. 2468. vs.

Cambria Steel Company, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, its Receiver, Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

The Kansas City Southern Railway Company, Complainant,

vs.

Guardian Trust Company, Kansas City Suburban Belt Railroad Company and Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, Central Improvement Company and T. T. Crittenden, its Receiver, Cambria Steel Company, Northern Townsite Company and its Receiver, Fairmount Amusement Company, and Missouri Elevator & Terminal Company, Defendants.

Intervening Petition.

Now comes the Guardian Trust Company and Henry C. Flower, its Receiver, and move the court to enter final decree in the above entitled cause in accordance with the directions given to this court by the decree of the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to the opinion filed by said Court of Appeals December 2, 1913, and in accordance with the mandate of the Supreme Court of the United States filed in this court and cause on April 18, 1916; and your petitioners will ever pray.

GUARDIAN TRUST COMPANY and
HENRY C. FLOWERS, Its Receiver,
By J. D. Bowersock,
J. C. Rosenberger,
Their Solicitors.

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19 Notice.

To the above named Kansas City Southern Railway Company, Cambria Steel Company, Kansas City Suburban Belt Railroad Company, Union Terminal Railroad Company, Kansas City &

Independence Air Line, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, or their Solicitors:

Please take notice that the Guardian Trust Company and Henry C. Flower, its Receiver, will bring the foregoing motion on for hearing in the United States District Court for the Western Division of the Western District of Missouri, at Kansas City, before Hon. A. S. Van Valkenburgh, Judge thereof, at his chambers in the Postoffice Building, on Monday, the 30th day of October 1922, at ten o'clock a. m. or as soon thereafter as counsel can be heard.

GUARDIAN TRUST COMPANY
and HENRY C. FLOWER,
Its Receiver,
By J. D. Bowersock,
J. C. Rosenberger,
Their Solicitors.

Received copy hereof this 3rd day of October, 1922.

CYRUS CRANE,
A. F. SMITH,
Solicitors for Kansas City Southern Railway Company, Kansas City Suburban Belt Railroad Company, Union Terminal Railroad Company, Kansas City & Independence Air Line, Central Improvement Company, and Fairmount Amusement Company.

.....
Solicitors for Cambria Steel Company

.....
Solicitors for Northern Townsite Company.

.....
Solicitors for Second Street Improvement Company.

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20 Affidavit.

State of Missouri
County of Jackson—ss.

J. C. Rosenberger, being duly sworn, on oath states that he is one of the solicitors for the Gardian Trust Company and Henry C. Flower, its Receiver, and as such he, on October 3, 1922, served the annexed motion and notice on Mr. Frank Hagerman, Solicitor of record of Cambria Steel Company by delivering a true copy of said motion and notice at the office of said Frank Hagerman, Kansas City, Missouri, to Henry L. Jost, Esq., of the law firm of Hagerman & Jost.

Affiant further states that on this 4th day of October, 1922, he duly mailed a copy of the annexed motion and notice, together with a letter, of which copy is hereto annexed, all enclosed in a sealed envelope addressed to Cambria Steel Company at its main office, Widener Building, Philadelphia, Pennsylvania, by registered, United States mail, postage prepaid.

Further affiant saith not.

J. C. ROSENBERGER

Subscribed and sworn to before me this 4th day of October, 1922.

My commission expires June 11, 1925.

ROLLIE E. TALBERT
(Seal) Notary Public in and for Jackson County, Missouri.

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21 Copy

October 4, 1922.

Cambria Steel Company,
Widener Building,
Philadelphia, Pennsylvania.

For Attention your President and General Counsel.

Cambria Steel Co., Complainant,
Cause No. 2468 vs.
Kansas City Suburban Belt Railroad Co. Et Al., Defendants.

In the United States District Court at Kansas City, Mo.

Gentlemen:

There is enclosed herewith copy of a motion of the Guardian Trust Company and H. C. Flower, its Receiver, for

final decree in the above cause, in which you on September 6, 1900, filed your bill of complaint. Annexed thereto is a copy of notice served on counsel for the Kansas City Southern Railway Company and others that said motion will be brought on for hearing before the Judge of said court at ten o'clock a. m. October 30, 1922.

Copy of this motion and notice were left yesterday at the office of Mr. Frank Hagerman, your attorney of record, but he is out of the city, and to make sure that you will have notice we are sending copy to you also. The case grows out of the receivership of the Kansas City Suburban Belt Railroad Company, its reorganization, and its acquisition by the Kansas City Southern Railway Company in reorganization.

This is sent to you by registered mail.

Yours very truly,
J. D. BOWERSOCK
J. C. ROSENBERGER.
Attorney for Guardian Trust Co.
and H. C. Flower, Its Receiver.

Enc-2

Filed in the District Court of the United States October 4, 1922.

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22 Order Appointing Special Master, Etc.

In the District Court of the United States for the Western Division of the Western District of Missouri.

Cambria Steel Company, Complainant,
vs. In Equity
Kansas City Suburban Belt Railroad Company, Et Al., Defendants.

Bill

Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants.
No. 2468 vs.
Cambria Steel Company, Et Al., Defendants.

Ancillary Bill

The Kansas City Southern Railway Company, Complainant,
vs.
Guardian Trust Company. Et Al., Defendants.

Intervening Petition.

This cause having heretofore come on to be heard on motion of defendant Guardian Trust Company and Henry C. Flower, its Receiver, for the entering of a final decree in the above entitled cause, in accordance with the directions given to this court by decree of the United States Circuit Court of Appeals for the Eighth Circuit pursuant to the opinion filed by said Court of Appeals December 2, 1913, and in accordance with the mandate of the Supreme Court of the United States affirming said decree; and upon the motion of said Trust Company and its Receiver that said final decree shall allow and adjudge, in favor of the Guardian Trust Company, against the Kansas City Southern Railway Company and Cambria Steel Company, its costs and expense of litigation hereinafter mentioned; and upon the supplemental petition of Charles B. Shedd and Chas. Cossitt Shedd, et al., Executors of the last will and testament of Edward A. Shedd, deceased, directed to the same end; and upon the motion of the Kansas City Southern Railway Company to dismiss last mentioned petition; and it having been shown to the court that due notice of said hearing has been duly given by the Guardian Trust Company and its Receiver to all of
23 said parties and to Cambria Steel Company; the Guardian Trust Company and its Receiver appearing by Messrs. J. C. Rosenberger and J. D. Bowersock, their solicitors; the Kansas City Southern Railway Company appearing by Messrs. Cyrus W. Crane, A. F. Smith, and F. H. Moore; said Executors and Charles B. Shedd appearing by Messrs. Chas. M. Bush, Harry S. Mecartney, and Edmond J. Reynolds; and the court having heard the arguments of counsel and having taken the above matters under advisement upon briefs furnished by the respective parties, and the court, being duly advised in the premises, having on June 20th, 1923, filed its memorandum opinion touching said motion of Kansas City Southern Railway Company and touching the rules and principles upon which the final decree to be entered herein shall allow and adjudge the recovery by the Guardian Trust Company of certain costs and expenses of litigation of the Guardian Trust Company;

Now, therefore, it is ordered:

(1) That said motion of the Kansas City Southern Railway Company to dismiss the said supplemental petition of the said Executors and Charles B. Shedd be and the same is hereby sustained, and said petition is dismissed.

(2) That puruant to said memorandum opinion filed, the Hon. Henry D. Ashley is hereby appointed Special Master, to ascertain, take, and state an itemized account of all cost and expenses paid or incurred by the Guardian Trust Company or its various Receivers for and on account of court costs and other expenses incurred by said Trust Company and its Receivers in and about its resistance of and defense against this litigation, and in defending against the various original and dependent bills and petitions filed herein against the Guardian Trust Company or its Receiver, by or at the instance of Kansas City Southern Railway company, Cambria Steel Company, Kansas City Suburban Belt Railroad Company or its Receivers, or its subsidiary companies or their Receivers, parties to this cause, and in defending, maintaining, protecting, and preserving therein the right,
24 equity, title, and lien of the Guardian Trust Company of its Receivers as pledgee of the property described in paragraph V. of the former decree of June, 1910, or in the property of any corporation whose stock was so held in such pledge, and the right to dispose of and realize upon said pledged property in accordance with the terms of the pledges under which said property was pledged, including, among other expenses, those for attorneys' fees, counsel or solicitors' fees, stenographers' fees, expert accountants' fees, printing fees, traveling expenses, and other expenses incurred in the premises; and said Master is ordered to state said account in accordance with the findings, rules, and principals set forth in said memorandum opinion of this court. It is ordered that within a time to be fixed by said Master the Guardian Trust Company and its Receiver shall file with said Master its claim or demand, in the form of a debtor and creditor statement, for reimbursement for and on account of said costs and expenses, and that when so filed said Master shall hear and determine the same, subject to the approval of this court, and shall make his report thereon to this court with all convenient speed.

Ordered further: That in stating said account said Special Master shall set out the taxable court costs as between

party and party separately from the other expenses of the Guardian Trust Company hereinabove mentioned.

Ordered further: That pending the ascertainment by said Special Master of the amount of said costs and expenses, and the filing of his report as aforesaid, the matter of the form of the final decree to be entered herein is taken under further advisement.

Done this 25th day of June, 1923.

ARBA S. VAN VALKENBURGH
Judge.

Filed in the District Court of the United States June 25th, 1923.

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25 (Motion of Kansas City Southern Railway Co. to set aside order appointing Special Master.)

The Kansas City Southern Railway Company moves the court to set aside the ruling and order of the court herein, dated June 25, 1923, appointing a Master herein for the purpose of ascertaining the costs and expenses incurred by the Guardian Trust Company, and its receiver, in this litigation for the following reasons:

1. The court erred in its refusal to find that the Cambria Steel Company and The Kansas City Southern Railway Company were not liable for any costs or expenses paid or incurred by the Guardian Trust Company, or any of its receivers, for or on account of any expenses incurred by said Trust Company and its receivers in and about this litigation or any of the proceedings in reference thereto
26 other than the items of court costs fixed by statute.

2. The court erred in appointing a Master and authorizing him to take account of any costs or expenses paid or incurred by the Guardian Trust Company other than the costs regulated by statute.

3. The court erred in directing the Master to take an account of the expenses, or any of them, of the Guardian Trust Company, or any of its receivers, for attorneys' fees, counsel or solicitors' fees, stenographer' fees, expert accountants' fees, printing fees, traveling expense or other expenses incurred in this litigation other than court costs fixed by statute.

4. The court erred in its conclusion that the Circuit Court of appeals found that there was a plan formed by the guiding

and controlling powers of The Kansas City Southern Railway Company to despoil the Trust Company of its property or to deprive it of moneys due it from the Belt Company, or to recover a judgment over against it for a very large sum of money, unless it was legally entitled thereto.

5. The court erred in its intimation that this litigation was not instituted in good faith and on reasonable grounds.

6. The court erred in its conclusion that the appellate court has found that this litigation was wholly baseless and unwarranted.

7. The court erred in its conclusion that the foundation of this litigation was the charge that the Guardian Trust Company was liable because of its misconduct as trustee of an express trust.

8. The court erred in its conclusion that if a trustee is charged in legal proceeding with misconduct the party making the charge must pay all of the expenses or costs of the trustee in such litigation in case the charges are not sustained, however substantial and reasonable may be the grounds for making such charges.

9. The court erred in its conclusion that the Court of Appeals found that the charges made by the Cambria
27 Steel Company and The Kansas City Southern Railway Company were without reasonable foundation. The evidence on which such charges were made was not before the Court of Appeals. The report of the Master shows that there was substantial ground and reasonable cause for such charges.

10. The court erred in directing the Master to ascertain and report all of the costs and expenses incurred by the Guardian Trust Company and its receivers in this litigation without regard to the issues upon which such expenses were incurred, and without discriminating between those issues upon which expenses must have been incurred in determining the controversies that must have been determined betwen th parties to this litigation, as distinguished from those issues upon which expenses, if any, might have been incurred in defending against charges of misconduct, if any, on the part of the Guardian Trust Company.

11. The court erred in its conclusion that the Trust Company is entitled to an allowance on the theory on which allowances are made to a trustee for protecting a trust fund in its possession. The only fund that could in any wise be said

to be involved in this case was property on which the Trust Company claimed to have a lien superior to the claim of the Kansas City Southern Railway Company thereto, which lien it was seeking to enforce for its own benefit only, against said Railway Company.

12. The court erred in its conclusion that the Guardian Trust Company did not initiate this litigation. The controversy was the outcome of a long course of dealing of which there were reasonable grounds for asking an accounting; and this immediate litigation followed immediately upon the notice of the Trust Company that it would sell certain collateral securities upon which it claimed a lien superior to that of The Kansas City Southern Railway Company, and which sale would take from the creditors of the Kansas City Suburban Belt Railroad Company all of the assets of that company, leaving all other creditors of that company without any assets out of which to realize their claims; and which preference was acquired by the Guardian Trust Company when the said Kansas City Suburban Belt Railroad Company was insolvent.

28 13. The court erred in its conclusion that this litigation involved the conduct of trust estates and the disposition of securities and funds pledged and held in trust. The status of the Trust Company in reference to its conduct as to the securities and funds in question involved in such charges was that of a promoter, and not of an express trustee.

14. If punitive costs or costs as between solicitor and client can be taxed in a case of this kind the court erred in its conclusion that it is unecessary to take any evidence or any new issues in reference thereto. If any such costs are taxable it must be on the ground that the charges authorizing the taxation of such costs were made without foundation and in bad faith. There has been no trial of any such issue, and the evidence would not establish any such fact. On the contrary, the evidence would establish that the suits were brought in good faith and on reasonable grounds.

15. This court's action is contrary to the order and direction of the Circuit Court of Appeals in this case which was stated, in its opinion (210 Fed. 722-723,) as follows:

Counsel for three of the stockholders of the Trust Company have been heard upon their petition that this court adjudge that certain of the litigation herein instituted by the Cambria Company, the Belt Company, and the Southern

Company was commenced and prosecuted in bad faith, and that it direct the court below to find the amount of attorneys' fees, stenographers' fees, and expert accountants' fees necessarily incurred by the Trust Company in that litigation and, after the entry of the main decree, to render a further decree in favor of the Trust Company and against the Southern Company for the aggregate of these amounts, or that this court direct the court below to insert in its decree an adjudication that it is rendered without prejudice to the right of the Trust Company to sue the Southern Company for those sums, that this court also direct the court below to include in the costs herein the damages, costs, fees, and expenses incurred by the Trust Company in the injunction suit reported in Guardian Trust Co. vs. Kansas City Southern Ry. Co., 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620, and also to insert in the decree an adjudication that the decree shall not prejudice the right of the Trust Company to move for such damages, costs, fees, and expenses in the injunction suit reported in Guardian Trust Co. vs. Kansas City Southern Ry. Co., 146 Fed. 337, 76 C. C. A. 615. A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as
29 the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them, and as the evidence upon the issues tried in this case was not brought to this court, it would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them, and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules, and practice in equity.

16. The court erred in refusing to hold that the guardian Trust Company was sued upon its individual liability and not as a trustee of an express trust.

17. The court erred in refusing to hold that the Guardian Trust Company was suing to recover a debt due it upon its individual liability and therefore has no right, in any event, to extraordinary costs.

18. The court erred in refusing to hold that the Trust Company was suing to recover a debt due to it individually

and therefore has no right, in any event, to extraordinary costs.

19. The court erred in refusing to hold that the purpose of the Trust Company in this litigation was to establish its debts against the Kansas City Suburban Belt Railroad Company and to establish the liability of The Kansas City Southern Railway Company as a constructive trustee because of its ownership of the property of the Kansas City Suburban Belt Railroad Company; and the Court erred in refusing to hold that the purpose of the complainants in this litigation was to establish the liability of the Guardian Trust Company as a constructive trustee; and the court erred in refusing to hold that in such circumstances neither of the parties was entitled to anything more than ordinary costs.

20. The court erred in refusing to hold that the Guardian Trust Company was personally interested in this litigation and therefore it was not entitled to any allowances even if there had been a trust fund out of which such allowances could be made.

21. The court erred in refusing to hold that there was no trust fund in this case out of which any allowances could be made or on account of which any extraordinary costs could be taxed.

F. H. MOORE
CYRUS CRANE
A. F. SMITH
Attorneys for The Kansas City Southern Railway Company.

Filed in the District Court of the United States Sept. 22, 1923.

(Exceptions of Kansas City Southern Railway Company to order appointing Special Master.)

The Kansas City Southern Railway Company excepts to the ruling and order of the court herein dated June 25, 1923, and to the opinion of the court handed down on June 20th, 1923, upon which said order was based, for the following reasons:

1. The court erred in its refusal to find that the Cambria Steel Company and The Kansas City Southern Railway Company were not liable for any costs or expenses paid or incurred by the Guardian Trust Company, or any of its receivers, for or on account of any expenses incurred by said Trust Company and its receivers in and about this litigation or

any of the proceedings in reference thereto other than
32 the items of court costs fixed by statute.

2. The court erred in appointing a Master and authorizing him to take account of any costs or expenses paid or incurred by the Guardian Trust Company other than the costs regulated by statute.

3. The court erred in directing the Master to take an account of the expenses, or any of them, of the Guardian Trust Company, or any of its receivers, for attorney's fees, counsel or solicitor's fees, stenographer's fees, expert accountants' fees, printing fees, traveling expenses or other expenses incurred in this litigation other than court costs fixed by statute.

4. The court erred in its conclusion that the Circuit Court of Appeals found that there was a plan formed by the guiding and controlling powers of The Kansas City Southern Railway Company to despoil the Trust Company of its property or to deprive it of moneys due it from the Belt Company, or to recover a judgment over against it for a very large sum of money, unless it was legally entitled thereto.

5. The court erred in its intimation that this litigation was not instituted in good faith and on reasonable grounds.

6. The court erred in its conclusion that the appellate court has found that this litigation was wholly baseless and unwarranted.

7. The court erred in its conclusion that the foundation of this litigation was the charge that the Guardian Trust Company was liable because of its misconduct as trustee of an express trust.

8. The court erred in its conclusion that if a trustee is charged in legal proceedings with misconduct the party making the charge must pay all of the expenses or costs of the trustee in such litigation in case the charges are not sustained, however substantial and reasonable may be the grounds for making such charges.

9. The court erred in its conclusion that the Court of Appeals found that the charges make by the Cambria
33 Steel Company and The Kansas City Southern Railway Company were without reasonable foundation. The evidence on which such charges were made was not before the Court of Appeals. The report of the Master shows that there was substantial ground and reasonable cause for such charges.

10. The court erred in directing the Master to ascertain and report all of the costs and expenses incurred by the Guardian Trust Company and its receivers in this litigation without regard to the issues upon which such expenses were incurred, and without discriminating between those issues upon which expenses must have been incurred in determining the controversies that must have been determined between the parties to this litigation, as distinguished from those issues upon which expenses, if any, might have been incurred in defending against charges of misconduct, if any, on the part of the Guardian Trust Company.

11. The court erred in its conclusion that the Trust Company is entitled to an allowance on the theory on which allowances are made to a trustee for protecting a trust fund in its possession. The only fund that could in any wise be said to be involved in this case was property on which the Trust Company claimed to have a lien superior to the claim of The Kansas City Southern Railway Company thereto, which lien it was seeking to enforce for its own benefit only, against said Railway Company.

12. The court erred in its conclusion that the Guardian Trust Company did not initiate this litigation. The controversy was the outcome of a long course of dealing of which there were reasonable grounds for asking an accounting; and this immediate litigation followed immediately upon the notice of the trust company that it would sell certain collateral securities upon which it claimed a lien superior to that of The Kansas City Southern Railway Company, and which sale would take from the creditors of the Kansas City Suburban Belt Railroad Company all of the assets of that company, leaving all other creditors of that company without any assets out of which to realize their claims; and which preference was acquired by the Guardian Trust Company when the said Kansas City Suburban Belt Railroad Company was insolvent.

34 13. The court erred in its conclusion that this litigation involved the conduct of trust estates and the disposition of securities and funds pledged and held in trust. The status of the Trust Company in reference to its conduct as to the securities and funds in question involved in such charges was that of a promoter, and not of an express trustee.

14. If punitive costs or costs as between solicitor and client can be taxed in a case of this kind the court erred in its conclusion that it is unnecessary to take any evidence or try

any new issue in reference thereto. If any such costs are taxable it must be on the ground that the charges authorizing the taxation of such costs were [make] without foundation and in bad faith. There has been no trial of any such issue, and the evidence would not establish any such fact. On the contrary, the evidence would establish that the suits were brought in good faith and on reasonable grounds.

15. This court's action is contrary to the order and direction of the Circuit Court of Appeals in this case which was stated, in its opinion (210 Fed. 722-723), as follows:

Counsel for three of the stockholders of the Trust Company have been heard upon their petition that this court adjudge that certain of the litigation herein instituted by the Cambria Company, the Belt Company, and the Southern Company was commenced and prosecuted in bad faith, and that it direct the court below to find the amount of attorneys' fees, stenographers' fees, and expert accountants' fees necessarily incurred by the Trust Company in that litigation, and, after the entry of the main decree, to render a further decree in favor of the Trust Company and against the Southern Company for the aggregate of these amounts, or that this court direct the court below to insert in its decree an adjudication that it is rendered without prejudice to the right of the Trust Company to sue the Southern Company for those sums, that this court also direct the court below to include in the costs herein the damages, costs, fees, and expenses incurred by the Trust Company in the injunction suit reported in Guardian Trust Co. vs. Kansas City Southern Ry. Co., 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620, and also to insert in the decree an adjudication that the decree shall not prejudice the right of the Trust Company to move for such damages, costs, fees, and expenses in the injunction suit reported in Guardian Trust Co. vs. Kansas City Southern Ry. Co., 146 Fed. 337, 76 C. C. A. 615. A deliberate consideration of this petition and of the exhaustive arguments
of counsel have, however, persuaded that inasmuch as
35 the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them, and as the evidence upon the issues tried in this case was not brought to this court, it would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there

are established rules of practice concerning them, and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules, and practice in equity.

16. The court erred in refusing to hold that the Guardian Trust Company was sued upon its individual liability and not as a trustee of an express trust.

17. The court erred in refusing to hold that the Guardian Trust Company was suing to recover a debt due it upon its individual liability and therefore has no right, in any event, to extraordinary costs.

18. The court erred in refusing to hold that the Trust Company was suing to recover a debt due to it individually and therefore has no right, in any event, to extraordinary costs.

19. The court erred in refusing to hold that the purpose of the Trust Company in this litigation was to establish its debts against the Kansas City Suburban Belt Railroad Company and to establish the liability of The Kansas City Southern Railway Company as a constructive trustee because of its ownership of the property of the Kansas City Suburban Belt Railroad Company; and the Court erred in refusing to hold that the purpose of the complainants in this litigation was to establish the liability of the Guardian Trust Company as a constructive trustee; and the court erred in refusing to hold that in such circumstances neither of the parties was entitled to anything more than ordinary costs.

20. The court erred in refusing to hold that the Guardian Trust Company was personally interested in this litigation and therefore it was not entitled to any allowances
36 even if there had been a trust fund out of which such allowances could be made.

21. The court erred in refusing to hold that there was no trust fund in this case out of which any allowances could be made or on account of which any extraordinary costs could be taxed.

F. H. MOORE
CYRUS CRANE
A. F. SMITH
Attorneys for The Kansas City Southern Railway Company.

Filed in the District Court of the United States September 22, 1923.

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37 (Motion of Kansas City Southern Railway Company to require Guardian Trust Company to file Petition setting forth its claim for costs, etc.)

Now comes The Kansas City Southern Railway Company and without waiving and still insisting on its exceptions and claim that the court has committed error in entering into an inquiry as to anything but ordinary costs, moves the court to require the Guardian Trust Company to file its petition herein setting forth specifically and clearly the ground or grounds upon which it bases its claim for extraordinary or punitive costs, or costs as between solicitor and client, or costs other than those ordinarily taxable, or costs other than those fixed by statute, and specifying how much of such costs or expenses are claimed against The Kansas City Southern Railway Company or the Cambria Steel Company, or either of them, on account of each of the various charges of bad
38 faith, if any, or other grounds, if any, and in what bills, cross bills, petitions or intervening petitions they are contained, and how much was expended or incurred on each of such issues, and at what stages of the litigation they were so incurred or expended. For grounds of this motion The Kansas City Southern Railway Company says that, if any such costs are taxable some of the same may have been incurred, and undoubtedly were incurred, in the litigation of issues for which costs of that kind would not be taxable.

The Kansas City Southern Railway Company further moves the court to set this cause down for trial before the court on the issues as to whether or not this litigation was instituted or maintained, or the charges made in the bills or petitions of the Cambria Steel Company or the Kansas City Southern Railway Company or the receivers of the Kansas City Suburban Belt Railroad Company, in bad faith and with no reasonable ground for making the same, or carrying on the said litigation.

For ground of this motion the defendant says that there has been no trial of these issues and no finding of any court thereon, and defendant is entitled to have the issues definitely tendered in order that it may answer the same, introduce evidence thereon, and have a trial and determination thereof in the regular way.

Defendant further states that it is prepared to introduce evidence to show that this litigation was prosecuted not only by itself but by receivers appointed by this court; that the same was brought in good faith, after careful investigation, upon the advice of competent counsel, and upon reasonable cause, and that the litigation was necessary in order to settle the rights and obligations of the various parties thereto.

F. H. MOORE
CYRUS CRANE
A. F. SMITH
Attorneys for The Kansas City Southern Railway Company.

Filed in the District Court of the United States, September 22, 1923.

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39 (Order overruling Motion to set aside order appointing Special Master and to require Guardian Trust Company to file Petition, etc.)

The motion of The Kansas City Southern Railway Company to set aside the ruling and order of the Court herein filed June 25, 1923, appointing a master herein for the purpose of ascertaining the costs and expenses incurred by the Guardian Trust Company and its Receiver in this litigation filed in this Court and cause on, to-wit, September 22, 1923, came on for hearing on October 26, 1923, said Railway Company appearing by its solicitors, and H. C. Flower, Receiver of the Guardian Trust Company, appearing by his solicitors,
40 and the said motion having been duly considered by the Court, the same is hereby overruled.

The Motion of The Kansas City Southern Railway Company, filed September 22, 1923, to require the Guardian Trust Company to file a petition herein setting forth the ground or grounds upon which it bases its claim for extraordinary or punitive costs, and for a trial before this Court on the issue as to whether or not this litigation was instituted or maintained in bad faith and with unreasonable ground for making the same, came on for hearing on the same day, said parties appearing by their respective solicitors, and the same having been duly heard and considered by the Court, is overruled.

The defendants, The Kansas City Southern Railway Company and the Cambria Steel Company, asked and were

allowed exceptions to the action of the Court in overruling each of said motions.

ARBA S. VAN VALKENBURGH
Judge.

Filed in the District Court of United States November 2, 1923.

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41 Motion By The Kansas City Southern Railway Company and Cambria Steel Company for Leave to File Herein Its Petition "For Leave to Introduce Testimony Proving that this Litigation was Instituted and Conducted on the Part of Each of the Complainants in Entire Good Faith and that Therefore No Costs as Between Soliciton and Client should be Taxed Against them of Any of Them."

Comes now the Cambria Steel Company and The Kansas City Southern Railway Company, complainants as stated in the above entitled causes, and pray the court for leave to file the duly verified petition hereto attached, which
42 petition asks leave to introduce testimony proving that this litigation was instituted and conducted on the part of each of the complainants in good faith and that, therefore, no costs as between solicitor and client should be taxed against them or any of them; and further pray that the court after permitting the same to be filed will entertain said petition and grant the relief therein prayed for.

THE KANSAS CITY
SOUTHERN RAILWAY
COMPANY.
By F. H. Moore, Cyrus Crane,
A. F. Smith, Its Atorneys.

CAMBRIA STEEL
COMANY,
By R. E. Ball.

Filed in the United States District Court Dec. 8, 1923.

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43 Petition of the Kansas City Southern Railway Company for Leave to Introduce Testimony Proving That this Litigation was Instituted and Conducted on the Part of Each of the Complainants

In Entire Good Faith, and that, Therefore, no Costs as between Solicitor and Client Should be Taxed Against Them or Any of Them.

44 Comes now The Kansas City Southern Railway Company, herein referred to as your petitioner, and shows to the court:

1. Your petitioner protests against the statement and finding contained in the opinion of the court herein, dated June 20, 1923, to the effect that the United States Circuit Court of Appeals for the Eighth Circuit has found and determined in this case that this litigation was not instituted in good faith, and that it involved wanton, wilful and oppressive charges of misconduct, and respectfully insists that no such finding and determination were in fact made by such appellate court, and, further, that no such finding or determination could lawfully have been made by said court, since no such issue by appropriate pleadings has ever been made in this or in any other court, and no opportunity has ever been afforded your petitioner or any of said complainants to meet such issue by the introduction of evidence in the orderly course of procedure; and your petitioner further respectfully insists that the only duty devolving upon this court under the mandate of the Supreme Court, affirming the decision of the Circuit Court of Appeals, is to tax the costs in this case in the ordinary manner as between party and party, and that no right, duty or authority exists on the part of this court to tax costs against your petitioner as between solicitor and client.

2. Although no charge of bad fainth in the institution or conduct of this litigation has ever been made so that your petitioner could meet such issue by the introduction of testimony, as is its right under the law of the land, and although it is not now advised, and never has been advised of any definite and specific charges, nevertheless it now prays the court for leave, subject to the protest contained in the foregoing paragraph, to offer testimony proving the facts and circumstances surrounding the institution of this liti-
45 gation and its conduct from beginning to end, as follows:

(a) This litigation was instituted on September 6, 1900, by the filing of a creditor's bill by the Cambria Steel Company, referred to herein as the Cambria bill. The Kansas City, Pittsburg & Gulf Railway Company, herein called the Gulf Company, went into the hands of the receivers April 1, 1899. The Kansas City Suburban Belt Railroad Company,

herein called the Belt Company, was one of its allied or subsidiary companies. The Gulf Company, together with other allied or subsidiary companies, had been organized by the Guardian Trust Company, herein called the Trust Company, or by its officers in its behalf, and the Belt Company, shortly after its incorporation, had passed under the control of the Trust Company; and both the Gulf Company and the Belt Company had been financed by or through the Trust Company, and the said companies had common or interlocking officers and directors. The property of the Gulf Company was sold at foreclosure sale in March, 1900, and your petitioner became the owner thereof, and at about that time your petitioner became the owner of a majority of the stock and bonds of the Belt Company. After the appointment of receivers for the Gulf Company, as aforesaid, the books and records of the Belt Company came into the possession of said receivers, and afterwards into the possession of your petitioner. Prior to the filing of the Cambria bill, and between the first of January and the first of August, 1900, an examination had been made of the books of account and records of the Belt Company, and likewise an examination of the books of the Trust Company relating to the state of accounts between these two companies by auditors acting in the interest and at the request of the Belt Company. Such accounts covered a period of approximately ten years, during which period, as above stated, the Belt Company and
46 the Trust Company had largely common officers and directors, and the Trust Company thereby dominated and controlled the affairs of the Belt Company, and was in a position, if it so desired, to impose excessive charges and enforce unjust demands against the Belt Company. The investigation of such records, accounts and books of account, so made as aforesaid, indicated that the Trust Company had in fact in numerous instances imposed excessive demands on the Belt Company, and had made unjust charges against it, covering said period. The results of this investigation were carefully considered by the Kansas City counsel for the Belt Company, who were also counsel for your petitioner, at the request of the General Counsel of these companies, then located in Chicago, and after numerous conferences and consultation between them, the said Kansas City counsel in July, 1900, reached the conclusion, which the results of said investigation fully warranted and justified, that an action of accounting should be had between the Belt Company and the Trust Company, in the belief, in good faith entertained by them, that such an accounting would result in materially reducing the apparent indebtedness of the Belt Company to

the Trust Company, or in wiping it out altogether. At the same time the said Kansas City counsel, from a consideration of the results of said investigation, reached the conclusion, which was fully warranted and justified, that the Belt Company was then hopelessly insolvent and that a receiver should be appointed for it, and that the lien of its mortgage should be foreclosed and its property sold at foreclosure sale. These conclusions were duly reported to said General Counsel, who, together with his law partner, had previously been advised of the results of the investigation conducted by said accountants. After giving careful consideration and study to the said report and recommendation of the Kansas City counsel and to the said statements of the accountants, and to other facts and circumstances bearing upon the question, said General Counsel and his said law partner concurred in
47 the recommendation made by said Kansas City counsel, and the latter was directed to prepare a bill or petition for an accounting between said companies. Accordingly, in August, 1900, the said Kansas City counsel prepared a petition for an accounting between the Belt Company and the Trust Company, and forwarded same to the said General Counsel, the allegations of said petition being based upon the investigation so made by said accountants, as aforesaid.

About the middle of August, 1900, the Belt Company and your petitioner were reliably advised that the Trust Company had itself conceived the idea of procuring the appointment of a receiver for the Belt Company, and that it was then endeavoring to persuade one of the creditors of the Belt Company to institute such an action. Thereupon counsel for your petitioner and for the Belt Company advised the officers of the Cambria Company, which was then a creditor of the Belt Company in a large amount, of the situation as it then existed and pointed out to them certain assets of the Belt Company, then held as collateral by the Trust Company, which would be released and become subject to the demands of creditors if an accounting between the Belt Company and the Trust Company were had and should result in substantially reducing or altogether wiping out said alleged indebtedness of the Belt Company to the Trust Company. On September 1, 1900, the Trust Company served notice upon the officers of the Belt Company that it, the Trust Company, would proceed to sell at an early date the collateral then held by it as security for the alleged indebtedness of the Belt Company to it and apply the proceeds upon said indebtedness. There-

upon, and during the first week in September, 1900, the Cambria Company, through its counsel then residing in Philadelphia, Pa., caused a bill for an accounting to be prepared by its counsel, residing in Chicago, Illinois, and said
48 bill, when prepared, was forwarded to local counsel of the Cambria Company in Kansas City, Missouri, and said bill was revised by the latter, and when so revised by him, was by him verified and filed in the Circuit Court of the United States at Kansas City, Missouri, on September 6, 1900. In said proceeding, Stuart R. Knott and Edward F. Swinney were appointed Receivers of the Belt Company and an injunction was issued against the Trust Company, forbidding the sale by it of said collateral security. In the order appointing said Receivers, the Judge of the United States Circuit Court at Kansas City, Missouri, having jurisdiction of the proceeding, authorized and directed said Receivers to institute such actions of accounting as they might deem necessary to recover the assets of the Belt Company, the purpose and intent of the court at the time being to authorize and direct said Receivers to institute an action of accounting against the said Trust Company. On the same day, September 6, 1900, an action to foreclose the mortgage on the property of the Belt Company was filed in the same court by the Trustee in its mortgage, and the same Receivers were appointed in said action.

It was the opinion of said Kansas City counsel, said General Counsel and his law partner, and said counsel for the Cambria Company that the investigation of the state of the accounts, records and books so made by the accountants aforesaid, together with other facts and circumstances then known to them, fully justified and warranted, and in fact required, an accounting to be held and taken between the Belt Company and the Trust Company; and the said action of accounting was instituted as a result of the belief in good faith entertained by them, and each and all of them, that such an accounting would materially reduce or entirely wipe out the alleged indebtedness of the Belt Company to the Trust Company.

49 Your petitioner prays leave to offer in this case oral evidence, together with records and other documentary evidence, conclusively proving the facts above stated, together with other facts and circumstances demonstrating that the Cambria suit was instituted in good faith and in the sincere and honest belief that an accounting between the two named companies was proper, necessary and indispensable to

ascertain which of them was indebted to the other and in what amount.

(b) After the institution of the Cambria suit as aforesaid, Messrs. Knott and Swinney, Receivers of the Belt Company, in 1901 filed in said cause a cross-bill against the Trust Company and others, demanding an accounting similar to the accounting prayed for in the ancillary bill of the Belt Company and its Receivers, afterwards filed as hereinafter stated. The filing of this cross-bill was within the authority and direction of the court in its order appointing them as Receivers as aforesaid. The said cross-bill was filed in good faith, and the said Receivers and their counsel believed, and were fully justified in believing that it would result in materially reducing or in entirely wiping out the alleged indebtedness of the Belt Company to the Trust Company. At that time Hon. Francis M. Black was the Receiver of the Trust Company, appointed by the Federal Court at Kansas City, Missouri, and filed, or caused to be filed, a demurrer to said cross-bill, on the ground that it was not germane to the original cause and could not be maintained therein. It was the opinion of counsel for said Receivers that this position was probably well taken, and that the desired accounting would have to be by an independent action unless counsel for the Trust Company would consent to have the accounting carried on in the Cambria case. Accordingly, counsel for said Receivers initiated negotiations with Judge Black to secure, if possible, a withdrawal of his demurrer and the filing of an answer and the making up of the issues in the Cambria case. This was in October or November, 1901. At that time the Trust Company was insisting, in certain litigation which was then pending in the Federal Court at Kansas City, to which it was a party, that your petitioner, under the reorganization plan of the Gulf Company and in other ways, had become liable for the floating debt of the Gulf Company, the Belt Company and other associated companies, and that it was therefore personally liable for any indebtedness of the Belt Company that might be proven to exist in favor of the Trust Company. This, in the opinion of counsel for your petitioner and for said Receivers, accentuated the necessity for an accounting between the Belt Company and the Trust Company, in order to determine the true state of the accounts between said companies. The said negotiations with Judge Black disclosed the fact that the Trust Company was willing that there should be an accounting between the Belt Company and the Trust Company provided the Belt Company should be made a party complainant so that if the Trust Company should be suc-

cessful in the accounting, it might have a judgment against the Belt Company for the amount so found to be due. This was agreed to by all parties in interest, and accordingly, on November 20, 1901, a stipulation was entered into, which, omitting caption, is as follows:

It is hereby stipulated and agreed by and between Stuart R. Knott and Edward F. Swinney, receivers of the Kansas City Suburban Belt Railroad Company, complainants in the cross bill in the above entitled cause, and the defendants, The Guardian Trust Company and Francis M. Black, its receiver, Second Street Improvement Company and Cambria Steel Company, as follows:

First: That the said complainants shall withdraw or dismiss their cross bill heretofore filed herein, and shall
51 file an amended cross bill, in the nature of an ancillary bill in this cause, making the Kansas City Suburban Belt Railroad Company a co-plaintiff with them in said amended ancillary cross bill, and also making the Cambria Steel Company, the complainant in the original bill herein, a defendant in said amended ancillary cross bill, and that said amended ancillary cross bill shall be filed on or before the 15th day of November, 1901, and that the defendants, the Guardian Trust Company and its receiver and the Second Street Improvement Company and the Cambria Steel Company, shall have leave to plead or answer to said amended ancillary cross bill, on or before the first Monday in December, 1901.

Second. That the accounting between the Kansas City Suburban Belt Railroad Company and its receivers and the Guardian Trust Company and its receiver, sought by the said amended ancillary cross bill, shall be expended by all of the parties hereto, and whatever balance, if any, that may be found due to the said Guardian Trust Company or its receiver, from the said Kansas City Suburban Belt Railroad Company or its receivers shall be entered up in this cause as a judgment in favor of the said Trust Company and its receivers and against the Suburban Belt Railroad Company and its receivers without the necessity of presenting any claim therefor by way of cross bill; or other affirmative pleading; and whatever balance, if any that may be found due to the said Suburban Belt Railroad Company, or its receivers, from said Guardian Trust Company or its receivers, shall be entered up in this cause as a judgment in favor of the said Kansas City Suburban Belt Railroad Company and its re-

ceivers, and against the Guardian Trust Company and its receiver.

Dated this ..... day of November, 1901.

STUART R. KNOTT and
EDWARD F. SWINNEY,
Receivers of the Kansas City Suburban Belt Railroad Company
By Thomas R. Morrow,
S. W. Moore,
Their Solicitors.

52

GUARDIAN TRUST COMPANY
and FRANCIS M. BLACK,
Its Receiver.

TRIMBLE & BRALEY,
Its Solicitors.

SECOND STREET IMPROVEMENT COMPANY,

TRIMBLE & BRALEY,
Its Solicitors.

CAMBRIA STEEL COMPANY,
By .....
Its Solicitors.

I consent and agree to the foregoing stipulation with the understanding that it shall in no wise prejudice the right, if any, which the Cambria Steel Company has to subject any debt found to be due from the Guardian Trust Company, or to subject any property or collateral or the proceeds thereof, heretofore or now in the hands of the Guardian Trust Company or its receiver, or its or his assigns, and all the testimony introduced by any party herein shall be with the understanding that the Cambria Steel Company can, if it so desires, use the same upon final hearing of its bill in the case above entitled.

FRANK HAGERMAN,
Solicitor for Cambria Steel Company.

By said stipulation the Trust Company consented to an accounting between it and the Belt Company, and that such accounting should be had in the Cambria case, upon condition that the Belt Company should become a party complainant in an ancillary bill for an accounting, and that such

accounting should be expedited. All parties in interest construed said stipulation as a mutual consent that such an accounting should take place. This was also the ruling of this court, which, after reciting the foregoing stipulation,
53 said, among other things, in an opinion handed down by it in this case on the ..... day of March, 1908, denying a motion filed by the Trust Company:

The Guardian Trust Company, by its stipulation, its appearance and answer in said cause has consented to the submission to said Master the hearing and finding on all the matters involved in controversy between it and the parties to said litigations. It has consented that the Master take an accounting, finding and report as to the respective rights and claims of the parties to the property, notes, bonds and claims involved.

No appeal was ever taken by the Trust Company from the order therein made. The Trust Company has not at any time withdrawn or attempted to withdraw from the terms of said stipulation or to disavow its consent to an accounting therein made. At the time of the making of said stipulation, little, if any, expense had been incurred by the Trust Company on account of this litigation.

Your petitioner prays leave to offer documentary and oral proof herein demonstrating the truth of the allegations in this paragraph contained.

(c) After the filing of an ancillary bill by the Belt Company and its Receivers, as was done in December, 1901, as contemplated by the foregoing stipulation, the issues were made and the taking of testimony thereunder and under the bill of the Cambria Company was commenced in January, 1903. In February, 1905, your petitioner became a party to the litigation and by stipulation, signed by counsel for the Trust Company consenting thereto, filed its intervening petition, claiming the right as purchaser, under the after-acquired property clauses in the mortgages of the Belt Company and other companies, to the collateral held by the Trust Company to secure the alleged indebtedness of the
54 Belt Company to it. The Trust Company answered said intervening petition, and testimony was taken upon the issue so made. In 1905, the Trust Company sought to file its cross-bill in the Cambria case, but the court denied it leave to do so, because, in the opinion of the court, the said cross-bill set up matters constituting an attack upon the integrity of the foreclosure proceedings referred to above.

Thereupon the Trust Company, in 1905, filed its suit or suits in the Circuit Court of Jackson County against your petitioner to recover upon the notes and account involved in the accounting then in progress in the Cambria case. Your petitioner made two unsuccessful efforts to enjoin said proceedings in the State court, on the ground that a prior jurisdiction to hear and determine said issues was vested in the Federal Court, the lower court in each instance granting the injunction, and in each case the injunction order being reversed by the Circuit Court of Appeals. The testimony in the Cambria case was closed early in 1906, and the case was argued continuously for two weeks in the summer of 1906 before Special Master Hon. Shannon C. Douglass. He filed his report in this court in May, 1910. Upon the issue of debt or no debt as between the Belt Company and the Trust Company, he eliminated three items complained of by the Belt Company and its Receivers, and found in favor of the Trust Company as to the other items. He held that your petitioner was entitled to certain lands, the title to which stood in the name of the Central Improvement Company, the value of which at the time was approximately $200,000. He also found that your petitioner was not liable for the debts of the Belt Company. The report of the Master was confirmed by this Court in June, 1910, and a decree entered accordingly.

Your petitioner prays leave to offer evidence, both record and documentary, in support of the foregoing allegations in this paragraph, conclusively proving them to
55 be true as stated; and your petitioner further offers to prove, by both record and oral testimony, that the counsel for your petitioner and for the Belt Company and its Receivers, in filing said ancillary bill, as contemplated in said stipulation, in filing said intervening petition, in making the two applications for injunction to stay proceedings in the State Court, and generally in conducting said litigation, acted in absolute good faith from beginning to end, in the honest belief that an accounting between the Belt Company and the Trust Company should and would result in the reduction or wiping out of the alleged indebtedness of the Belt Company to the Trust Company, in the belief that your petitioner was entitled to the collateral, or the more valuable portion of the collateral held by the Belt Company as aforesaid, in the belief that the said applications for an injunction to stay proceedings in the State court were well taken and should be granted, and that your petitioner was not in any way liable for the debts of the Belt Company, and your pe-

titioner offers to prove the same by other and further testimony, both oral and documentary.

(d) The Trust Company in 1910 appealed from the decree so entered by this court as aforesaid, and said cause was determined adversely to your petitioner by the Circuit Court of Appeals. The case was afterwards reargued before the Circuit Court of Appeals, and again the decree of this court was reversed. An appeal was thereupon taken to the Supreme Court of the United States, where, in 1916, the judgment of the Circuit Court of Appeals was affirmed, the Chief Justice and Mr. Justice VanDevanter dissenting.

Your petitioner offers to prove by both record and oral testimony that the conduct of this cause in the Circuit Court of Appeals and in the Supreme Court, as aforesaid, was carried on by counsel in entire good faith, and in the full
56 and honest belief that the decree of this court entered in June, 1910, holding that your petitioner was not liable for the debts of the Belt Company, and that your petitioner was entitled to the lands of the Central Improvement Company, was right, and that such decree should be affirmed.

5. No pleadings have ever been filed in this cause by the Trust Company, or anyone else, tendering the issue of the good faith of your petitioner, or of the Cambria Company, or of the Belt Company or of its Receivers, in instituting and carrying on this litigation, or any part or branch of it. Neither your petitioner nor the others named have had an opportunity to establish and demonstrate, as they and each of them are prepared to do, that said litigation, and each and every part and branch of it, was instituted and carried on in good faith. None of them has ever had its day in court. To deny them an opportunity to be heard at this time is a violation of the guaranty of due process of law contained in the Federal and State constitutions. This result, your petitioner asserts, was never contemplated by the decision of the Supreme Court or of the Circuit Court of Appeals for the Eighth Circuit.

Wherefore your petitioner prays that an opportunity may be afforded it absolutely to demonstrate, as it is prepared to do, that this Cambria litigation, and each and every part and branch of it, was instituted in good faith and carried on from beginning to end in the honest belief that the complaining parties were entitled, respectively, to the relief which they sought; that the Trust Company be required to formulate its charges in writing, if any it has, of bad faith in the institu-

tion and prosecution of said litigation, of any branch or part of it; and that such charges be served upon your petitioner, and an opportunity afforded it to answer the same and
57 to support its answer by the introduction of evidence in due and orderly course of procedure; and that, even if the court shall decline to require the Trust Company to formulate and serve its charges, nevertheless this petition be granted and that the matter be set down for hearing before this court at such time as may be convenient to the court and to the interested parties; and for such other and further relief as may be agreeable to equity and good conscience.

FRANK H. MOORE
CYRUS CRANE
A. F. SMITH
Solicitors for Petitioner.

Samuel W. Moore
Of Counsel.

State of Missouri,
County of Jackson—ss.

Frank H. Moore, being first duly sworn on his oath, deposes and says that he is General Solicitor of The Kansas City Southern Railway Company, and that he makes this affidavit for and on behalf of the said company; that he has read the foregoing petition and that the matters therein stated are true to the best of his information and belief.

FRANK H. MOORE

Subscribed and sworn to before me this 5th day of December, 1923.

(Seal)

CLARENCE R. HALL,
Notary Public, Jackson County, Mo.

My commission expires Oct. 18th, 1924.

The Cambria Steel Company, complainant herein, hereby adopts the above petition on its own behalf and prays for the relief therein asked for.

.....
Solicitor for the Cambria Steel Company.

58 (Order overruling Motion of Kansas City Railway Company, et al., for leave to introduce testimony, etc.)

In the District Court of the United States for the Western Division of the Western District of Missouri

Cambria Steel Company, Complainant

vs.

Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, Kansas City Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants

Bill In Equity.

Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants

No. 2468 vs.

Cambria Steel Company, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver, Northern Townsite Company, and Fairmount Amusement Company, Defendants

Ancillary Bill.

The Kansas City Southern Railway Company, Complainants

vs.

Guardian Trust Company, Kansas City Suburban Belt Railroad Company and Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, Central Improvement Company and T. T. Crittenden, Its Receiver, Cambria Steel Company, Northern Townsite Company, and Its Receiver, Fairmount Amusement Company, and Missouri Elevator and Terminal Company, Defendants

Intervening Petition.

Comes now The Kansas City Southern Railway Company and the Cambria Steel Company, complainants as designated in the above entitled causes, by their solicitors and
59 present to the court their Motion and Application for leave to file a verified petition asking therein leave to introduce testimony to prove that the above entitled litiga-

tion was instituted and conducted on the part of each of the complainants in good faith and that, therefore, no costs as between solicitor and client should be taxed against them or either of them, and the court having seen, read and considered said Motion and Application and petition, and being made acquainted with the contents thereof, doth order that the same be and they are hereby denied and permission to file the same is refused, and leave to introduce testimony of the kind and character set out in said petition is also refused, to which orders and rulings of the court The Kansas City Southern Railway Company and the Cambria Steel Company both duly excepted.

ARBA S. VAN VALKENBURGH
Judge.

Dated at Kansas City, Missouri, this 8th day of December, 1923.

Filed in the United States District Court December 8, 1923.

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61 Report of Henry D. Ashley, Special Master.

Comes now Henry D. Ashley, Special Master in Chancery, heretofore appointed by the Honorable Arba S. Van Valkenburgh, Judge of this court, by order made June 25, 1923, directing him "to ascertain, take and state an itemized account of all costs and expenses paid or incurred by the Guardian Trust Company, or its various receivers, for and on account of court costs and other expenses incurred by said Trust Company and its receivers in and about its resistance of and defense against this litigation and in defending against the various original and dependent bills and petitions filed herein against the Guardian Trust Company, or its receiver, by or at the instance of Kansas City Southern Railway Company, Cambria Steel Company, Kansas City Suburban Belt Railroad Company, or its receivers, or its subsidiary companies, or their receivers, parties to this cause, and in defending, maintaining, protecting and preserving therein the right, equity, title and lien of the Guardian Trust Company, or its receiver, as pledgee of the property described in paragraph V of the former decree of June, 1910, or in the property of any corporation whose stock was so held in such pledge and right to dispose of and realize upon said pledged property according to the terms and pledges under which said property was pledged, including among other expenses, those for attorney fees, counsel or solicitor fees, stenographer fees, expert accountants' fees, printing fees, traveling expenses and other expenses incurred in the premises",

this Master being ordered therein to state said account in accordance with the findings, rules and principles, as set forth in the memorandum opinion of said Arba S. Van Valkenburgh, Judge, filed June 20, 1923, and files this his report as follows:

62

The Master finds costs as between party and party due and owing to H. C. Flower, Receiver of the Guardian Trust Company from the Kansas City Southern Railway Company and Cambria Steel Company under Group 1 of claim of said H. C. Flower, Receiver as aforesaid, filed October 23, 1922, as follows:

Items 1, 2 and 3 of said claim, allowed by the Master in the sum of	$8,553.50
Items 4 to 32 of said claim, inclusive, allowed for originals in the sum of	2,725.77

and disallowed for the balance of said items, amounting to $3,948.93, paid for carbons. The Master allows for amount paid for originals and disallows for amount paid for carbons on the testimony of Jetmore as to the amount paid for original and carbons and manner in which bills were rendered and collected (See Southern Company's Exhibit "B", found at page 826-A of this record).

Item 33. disallowed as costs between party and party but included in disbursements for which judgment was rendered by the Supreme Court of Missouri in Case of Mecartney against Guardian Trust Company, and allowed under Group 2.

Item 34. allowed for	1.15

Voucher No. 477 regarding this item has note attached, signed by J. McD Trimble; "Ordered for use in Cambria Case" (see page 89 of this record).

Items 35 to 40, inclusive, disallowed as costs be-

	Amt. Fwrd.
63	$11,280.42

tween party and party but included in disbursements for which judgment was rendered by the Supreme Court of Missouri in case of Mecartney against Guardian Trust Company and allowed under Group 2 of claim.

Item 41, disallowed by the Master as the Master is of opinion that he has no power to re-tax costs in these injunction cases already taxed in the United States Court of Appeals.

Items 42 to 56, inclusive, disallowed under Group 1, being included in judgment of Supreme Court of Missouri for expenses incurred in suit of Mecartney against Guardian Trust Company and allowed under Group 2.

Item 57, allowed for 170.80
Voucher No. 1998 for this item contains the following note: "Correct S. C. Douglass, Special Master". This Master finds that Special Master Douglass ordered Lightburne to report oral arguments for his own use. (For voucher, see page 91 of this record).

Items 58 to 67, inclusive, disallowed under Group 1 but included under Group 2, for same reasons as Items 35 to 40.

Item 68, disallowed for same reasons as stated on Item 41.

Items 69 and 70, disallowed. No proof except voucher and that fails to show what use was made of those copies of documents (see record, pages 92 and 93 of this record).

Items 71, 72 and 73, disallowed for the same reasons as stated as to Item 41.

Item 74, allowed for the sum of 35.00

Amt. Fwrd.

64

$11,486.22

Voucher shows $19.70 was paid out by Gates & English for recording lis pendens and final decree and order for appeal in Cambria case and $15.30 was paid for certified copies of said final decree and order of appeal (see this record, page 98).

Item 75, allowed for 3.10
Voucher shows amount disbursed by Gates & English for certified copies of documents in Cambria case (see this record, page 98.)

Item 76, allowed for 5.00
Disbursed by Gates & English for certified copy of decree in Belt suit.

Item 77, disallowed for same reason as stated as to Item 41.

Item 78, allowed for 5.00
Voucher shows paid for certified copy of opinion in Cambria case.

Items 79 and 80, credits to be stricken from account as Master has disallowed all items of cost in Court of Appeals, being of the opinion that he lacks power to re-tax such costs.

$11,499.32

The Master allows and finds as costs between party and party, in favor of H. C. Flower, Receiver of Guardian Trust Company and against K. C. Southern Railway Company and Cambria Steel Company under Group 1, the total amount of $11,499.32

65 Claim of H. C. Flower, Receiver, prays for interest on all items in Group 1 from date of disbursement of each item at six per cent. The Master, however, is of opinion that in equity allowance of interest on claims under Group 1 is in the discretion of the Master sitting as a Master in Chancery. In view of the allowance of substantial costs in this entire report and of all the surrounding circumstances in this protracted litigation; of the delays in this matter of taxation of costs not chargeable against the Southern Company or Camrbia Company; and in view also of the fact that interest would not be allowed at law on these claims for many reasons, including lack of demand and the unliquidated character of claim, the Master therefore finds and recommends that interest should be awarded on claims allowed under Group 1 only from the date of confirmation of this report, if confirmed, by the United States District Court, and from the date of such confirmation until the payment of such costs.

Group II

Costs and Expenses as Between Solicitor and Client.

Item 81, allowed on testimony of Mr. Braley for .. $1,000.00
(See page 269 of this record).

Item 82, allowed for 5,343.75
on testimony of Mr. Rosenberger, Mr. Braley and Mr. Willey (see pages 514, 266, 402 of this record.)

Items 83 to 107, inclusive, all disallowed, for the reason that at the directors' meeting of October 22, 1902, J. McD Trimble was elected general

Amt. Fwrd. $6,343.75

counsel of the Guardian Trust Company at a salary of $500.00 per month and the Master finds Guardian Trust Company would have been liable for this salary whether any services have been rendered in the Cambria litigation or not and that while such services were unquestionably of great value to the Trust Company the salary of J. McD Trimble as general counsel as fixed by the directors is not properly chargeable in this case as costs between solicitor and client.

Item 108, Allowed for 5,000.00
The amount paid by order of directors of Guardian Trust Company as a retainer to Mecartney in the Cambria and Channel and Dock litigation and credit having given by Mecartney in his suit against the Guardian Trust Company and such amount credited on the final judgment rendered in said suit by the Supreme Court of Missouri. The Master finds that the Channel and Dock litigation in Texas was, under the memorandum opinion and order appointing this Master, part and parcel of the plan of the Kansas City Southern Railway and its representative, the Provident Life & Trust Company, "to despoil the Guardian Trust Company of its property". Testimony offered before the Master shows the Pittsburg & Gulf Railroad Company carried on its traffic from Port Arthur to the Gulf, a distance of about twelve miles, over the terminals owned by the Port

Amt. Fwrd. $11,345.75

Arthur Channel & Dock Company; that such terminals were part of the reorgan-

ization effected by the Kansas City Southern Railway. The Master notes that Judge Bryant in his order of dismissal of the Texas case provides inter alia as follows: "This order of dismissal is entered on the stipulation that it shall in no manner affect the merits of companion litigation pending in the courts of Missouri between the parties, or some of them, herein named". (Page 374 of this record.)

Item 109, allowed for 6.000.00
although part of the services for which this voucher was paid were in the Texas case, for reason stated under Item 108.

Item 110, disallowed, for same reasons as to Items 35 to 40 inclusive, being a Mecartney item included in Mecartney judgment by Supreme Court of Missouri.

Item 111, allowed for 5,000.00
for same reasons stated in allowance of Item 108.

Items 112 and 113, disallowed, for same reasons as disallowance of Items 35 to 40, inclusive, being Mercartney items included in Mecartney judgment by Supreme Court of Missouri.

Item 114, allowed for 5,000.00
for same reason as Item 108.

Item 115, disallowed for reasons as disallowance of items 35 to 40, inclusive, being Mecartney items included in Mecartney judgment by Supreme Court of Missouri.

Amt. Fwrd.

68

$27,343.75

Item 116, allowed for 5,000.00
for same reasons as Item 108.

Item 117, allowed for 7,500.00
for same reasons as Item 108.

Item 118, disallowed, for same reasons as Items 35 to 40 inclusive; Mecartney item; included in Mecartney judgment by Supreme Court of Missouri.

Item 119, allowed for 3,000.00
Voucher shows services rendered in Cambria litigation (see voucher, page 115, of this record).

Item 120, allowed for 4,000.00
Voucher shows for services rendered in Belt Line lititgation (see this record, page 118).

Item 121, allowed for 2,000.00
Voucher shows for services performed in Cambria litigation (see this record, page 120)

Item 122, allowed for 3,000.00
Voucher shows that it was for services rendered in Cambria litigation (see this record, page 120).

Item 123, allowed for 4,000.00
Voucher shows it was for services rendered in Suburban Belt Railway Company litigation (see voucher, page 120 of this record).

Item 124, allowed for 1,000.00
Letter attached to voucher shows it was for retainer in Belt litigation (see this record, page 122.)

Item 125, allowed for 4,000.00
Amt. Fwrd.

69

$60,843.75

Voucher shows it was for services performed in the Belt and Kansas City Southern litigation (see page 124 of this record).

Item 126, allowed for 1,500.00
It was for balance of services in Cambria litigation for which Guardian Trust Company had contracted to pay $2500.00. (See page 124, this record).

Item 127, allowed for 9,555.74
It is to be noted that first item under Item 127 should have been for principal sum of $2550.00 instead of 2250.00, as stated in claim, but is only allowed for amount claimed. This first item, however, is not to be confused with item of $2250.00 disallowed by the Supreme Court of Missouri in the case of Trimble & Braley against the Guardian Trust Company for services "in

procuring discharge of such receiver" (of the Trust Company) (See Supreme Court opinion in Trimble & Braley against Guardian Trust Company, 244 Mo. l. c. 251, 267).

Item 128, allowed for 7,500.00
Voucher shows was paid Gates & English for services in Cambria case (see this record, page 130).

Item 129, allowed for 1,000.00
Voucher shows paid for additional services of Mr. D. J. Haff in United States Circuit Court of Appeals at St. Louis. The Master finds the services were rendered in Belt litigation. (See page 132 of this record.)

Amt. Fwrd.

70

$80,399.49

Item 130, allowed for 5,000.00
Voucher shows paid for services rendered by Gates & English in Belt ligitation, (See this record, page 132.)

Item 131, allowed for 200.00
Voucher shows paid Clephane & Clephane, Washington lawyers, for filing motion in United States Supreme Court in Cambria case (See page 133, of this record).

Item 132, allowed for 1,000.00
Voucher shows paid for retainer to F. W. Lehmann on his employment to argue Cambria case in the Supreme Court of the United States. (See page 133 of this record.)

Item 133, allowed for 5,000.00
Voucher shows paid for services rendered by Gates & English in Cambria case (see voucher, page 135 of this record).

Item 134, allowed for 15,000.00
Paid by order of this court to Mr. F. W. Lehmann for services in arguing Cambria case in Supreme Court of the United States.

Item 135, allowed for 135,013.56
In claim of H. C. Flower, receiver, this item is given credit of $7,745.07 for sundry expense

items enumerated in itemized statement annexed to plaintiff's petition in said suit, paid by the Guardian Trust Company and "charged to Kansas City Southern Railway Company elsewhere in this statement of account". Above amount, $135,013.56, was paid on final judgment of Supreme Court of Missouri after vigor-

Amt. Fwrd.

71

$241,613.05

ous defense made in good faith by the Guardian Trust Company represented by able counsel when Guardian Trust Company was subject to execution on such judgment. The Master finds that under order of the United States District Court of June 25, 1923, and under memorandum opinion of Judge Van Valkenburgh, filed June 20, 1923, the Master is foreclosed from consideration of the reasonableness of either the amount allowed Mecartney for counsel fees or expenses included in the judgment. The Master therefore allows $135,013.56 under this item, finding, as hereinbefore stated, that the Texas case was a part of the Kansas City Southern Company's plan to despoil the Guardian Trust Company of its property. As to these expenses allowed by the State Supreme Court in the case of Mecartney against Guardian Trust Company, it is to be noted that Mr. Rosenberger testified that all expenses allowed in the Mecartney judgment were expenses in the Cambria litigation (see this record, page 556). The Master therefore strikes out from this claim credit of $7,745.07 given on item 135 by the receiver of the Guardian Trust Company and also eliminates from the entire claim of Henry C. Flower, Receiver of Guardian Trust Company, both under Group 1 and Group 2, all the Mecartney items of expense incurred in the Cambria litigation enumerated in such itemized claim for reimbursement for its costs and expenses, filed October 22, 1923.

Item 136, allowed for 47,000.00
Paid under order made by this court September 15, 1922 (page 137 of this record).

72 Amt. Fwrd. $288,613.05

Item 137, allowed for 5,859.40
This item was heretofore passed on by this Master, reported to the United States District Court and such allowance confirmed and paid by order of this court. (See pages 138 and 139 of this record).

Items 138 to 164, inclusive, disallowed and stricken from the claim, for reason stated under Item 135.

Item 165, allowed for 55.95
(See page 139 of this record for voucher).

Item 166, allowed for 24.60
(See page 141 of this record for voucher).

Item 167, allowed for 6.00
(See page 142 of this record for voucher.)

Item 168, allowed for 10.00
(See page 143, of this record for voucher.)

Item 169, allowed for 71.00
(See page 144 of this record for voucher).

Item 170, allowed for 42.45
(See pages 144, 145 of this record for voucher).

Item 171, allowed for 77.00
(See page 146 of this record for voucher).

Item 172, disallowed as not necessary expenditure, being for 100 printed copies of opinion in Central Improvement Company vs. Cambria Steel Company.

Item 173, disallowed, voucher fails to show what it was that was printed, although claim says briefs, and no evidence in support was offered. (For voucher, see this record, page 147.)

73 Amt. Fwrd. $294,759.45

Item 174, allowed for 9.90
The Master finds suggestions must mean something in the nature of briefs (see voucher, this record, page 148).

Item 175, disallowed as not necessary expense incurred in the litigation. (See voucher, page 149 of this record).

Item 176, allowed for 6.30
(See voucher, page 151 of this record).

Item 177, disallowed as not necessary expense in Cambria litigation (see voucher, page 152 of this record).

Item 178, allowed for 19.80
(See voucher, page 153 of this record).

Item 179, allowed for 9.00
(See voucher, page 153 of this record).

Item 180, disallowed. Master finds that although the testimony shows that Mr. Willey gave a large amount of time as an expert accountant in connection with this Cambria litigation, still he was auditor of the Guardian Trust Company on regular monthly salary; the Master finds that he would have drawn that salary whether he gave his time to the Cambria litigation or not.

Item 181, disallowed. The Master finds that although Miss Gott did a large amount of work in connection with prepartion for hearings before the Master in the Cambria case, as she was in the monthly employment of the Guardian Trust Company she would have received her salary of $60.00 per month whether she had given her time to the preparation of these documents prepared under the supervision of Mr. Willey in the Cambria litigation or not.

Amt. Fwrd.

74

$294,804.45

Items 182 to 199, inclusive, disallowed for same reasons as other Mecartney items on the ground stated under Item 135.

Item 200, allowed for 5.00
(See voucher 154-D of this record).

Item 201, disallowed for same reasons as other Mecartney items, on ground stated under Item 135.

Item 202, allowed for 5.00
(See voucher, page 156 of this record).

Item 203, allowed for 175.00
(See voucher, page 157 of this record).

Item 204, allowed for 175.00
(See voucher, page 158 of this record).

Item 205, allowed for 175.00
(See voucher, pages 160-162 of this record).

Item 206, allowed for 150.00
(See voucher, pages 163-165 of this record).

Item 207, allowed for 175.00
(See voucher, page 166 of this record).

Item 208, allowed for 112.50
(See voucher, pages 167-168 of this record).

Item 209, allowed for 43.75
(See voucher, page 169 of this record).

Item 210, allowed for 175.00
(See voucher, pages 169 and 170 of this record).

In allowance of above items, 200 to 210 inclusive, being premiums on bonds, the Master relies as an authority on decision of Mr. Chief Justice Taft rendered May 12, 1924, in case of Charles B. Newton vs. Con. Gas Company of New York, reported in U. S. Supreme Court advance opinions #15, 1923-1924, page 537.

Items 211 to 245, inclusive, disallowed, Mecartney items, on the grounds stated under Item 135.

Amt. Fwrd.

75 $295,995.70

Item 246, disallowed as not necessary expense.

Item 247, disallowed as not necessary expense.

Item 248, disallowed as not necessary expense.

Item 249, disallowed as not necessary expense.

Item 250, disallowed as not necessary expense.

Items 251 to 411, inclusive, disallowed, Mecartney items, on grounds stated under Item 135.

Item 412, allowed for 28.00
(See voucher, page 117 of this record).

Item 413, allowed for 60.00
(See voucher, page 117 of this record).

Item 414, allowed for 65.00
(See voucher page 117 of this record).

Item 415, allowed for 105.50
(See voucher, page 175 of this record).

Item 416, allowed for 74.00
(See voucher, page 176 of this record).

Item 417, allowed for 25.00
(See voucher, page 124 of this record).

Item 418, allowed for 2.37
(See voucher, page 125 of this record).

Item 419, disallowed as not necessary expense.

Item 420, allowed for ..... .75
(For Voucher, see page 178 of this record).

Item 421, allowed for 146.05
(For voucher, see page 179 of this record).

Item 422, allowed for..... 18.00
(See voucher, page 179 of this record).

$296,520.37

Item 423, disallowed as not necessary expense.

Item 424, disallowed as not necessary expense.

Item 425, disallowed as not necessary expense.

76 Item 426, disallowed, payment of $200.00 to Clephane & Clephane, Washington attorneys, allowed under Item No. 131 seems to make this unnecessary expense.

Item 427, disallowed as unnecessary expense.

Item 428, disallowed. Voucher shows this includes expense of J. A. Prescott to New York. It is impossible for the Master to find what part of this item is properly allowable and hence Master disallows the entire item.

Items 429 to 439, inclusive, credits on Mecartney expense items, all stricken from the claim as taken into the account in the Mecartney judgment.

Supplemental Claim.

Item 440, being a credit for $1,482.55 on costs in United States Circuit Court of Appeals paid to Gates & English, stricken from the claim as Master has elsewhere in this report declined to re-tax these costs in the United States Circuit Court of Appeals.

Item 441, disallowed. Neither voucher nor proof show what part of the services for which this voucher was paid were rendered by Wollman, Solomon & Cooper in protecting the $132,000.00 Claim for switching charges assigned by the Kansas City, Pittsburg & Gulf Railroad to the Trust Company as collateral and what part of such services were rendered to Francis M. Black and Wash Adams for other services rendered to those receivers. (For voucher and bill attached, see page 733 of this record.)

Item 442, disallowed for same reaosn as Item 441.

Item 443, disallowed as not necessary expense. The Master finds that this expense might have been avoided by the Trust Company as Mr. Mecartney on prospective employment would pro-
77 bably have made the report without charge if demanded and in view of the substantial judgment of the Supreme Court allowed in full by this Master without regard to reasonablenss of service charges allowed, the Master considers himself bound by such judgment in view of the terms of the order of appointment and memorandum opinion of Judge Van Valkenburgh.

The Master therefore finds that no allowance should be made in equity for this preliminary report of Mr. Mecartney and expenses incident thereto.

The Master allows and finds as costs between solicitor and client under Group II in favor of Henry C. Flower, Receiver of Guardian Trust Company and against Kansas City Southern Railway Company and Cambria Steel Company the total amount of $296,520.37

Claim of H. C. Flower, Receiver, prays for interest on all items in Group II from date of disbursement of each item at six per cent. The Master, however, is of opinion that in equity allowance of interest on claims under Group II is in the discretion of the Master sitting as a Master in Chancery. In view of the allowance of substantial costs in this entire report and of all the surrounding circumstances in this protracted litigation; of the delays in this matter of taxation of costs not chargeable against the Southern Company or Cambria Company; and in view also of the fact that interest would not be allowed at law on these claims for many reasons, including lack of demand and the unliquidated character of claim, the Master therefore finds and recommends that interest should be awarded on claims allowed under Group II only from the date of confirmation of this report, if confirmed, by the United States District Court, and from the date of such confirmation until the payment of such costs, at six per cent interest, and no more.

78 The Master has not seen fit in this report to burden this court with citations of authorities or by lengthy discussion of the legal questions involved. The Master has carefully read all opinions offered in evidence by reference, or cited in connection with this litigation. The Master has read all the cases referred to in the memorandum opinion and has carefully read the briefs of counsel and patiently listened to their oral arguments and sends up with this report all briefs of counsel filed before the Master.

The Master also sends up with this report Volumes I and II of the testimony taken by him;

Exhibit "A", claim of H. C. Flower, Receiver, filed October 22, 1923;

Exhibit "B", motion to require Trust Company to restate account filed December 1, 1923;

Exhibit "C", motion for leave to offer evidence, filed February 8, 1924;

Exhibit "D", supplemental claim of H. C. Flower, Receiver, filed February 15, 1924; also

Guardian Trust Company's Exhibit 5-A, 5-B and 5-C, being, respectively, Volumes I, II and III of printed transcript of record on appeal, entitled, Guardian Trust Co., et al., Appellants, vs. Edward A. Shedd and Charles B. Shedd, Appellees, in U. S. Circuit Court of Appeals, and Exhibit 6, be-

ing Appellant's printed abstract of the record on appeal in the Supreme Court of Missouri in cause entitled, Harry S. Mecartney, Respondent, vs. Guardian Trust Company, Appellant.

From the memorandum opinion of his Honor, Judge Van Valkenburgh, filed June 20, 1923, in pursuance of which the order appointing the undersigned Special Master in this case was made, is taken the following:

79 "There are also in dispute or at least undetermined, some matters involved in the principal judgment which counsel thought might be substantially settled by agreement. This court deems it best that the entering of the decree should await the finding upon all the items above referred to. All such matters are therefore referred to Henry D. Ashley, Esquire, the Special Master heretofore appointed and acting in this cause, with directions to report his findings and conclusion, with all reasonable despatch".

The Master has had hearings and taken testimony directed to the matters in the principal judgment referred to. The matters in dispute between counsel are as follows:

Counsel for the receiver of the Guardian Trust Company claims that notwithstanding the decree of June 25, 1910, allowing six per cent interest on note for $7,162.40, dated October 23, 1899, and notwithstanding the fact that said decree has been affirmed by the United States Circuit Court of Appeals as to paragraph IV of said decree and such decree was affirmed by the Supreme Court of the United States it is not now too late to correct the error made in not figuring interest on such note at eight per cent, the rate of interest which said note actually calls for, said fact being admitted by counsel for both sides. On this matter the Master finds that the final decree should credit the receiver of the Guardian Trust Company in this regard by allowing to said Guardian Trust Company two per cent simple interest on $7,162.40 from October 23, 1899 to the date of entry of final decree, without any compounding of iterest. In coming to this conclusion the Master calls attention to the following stipulation made between the parties to this controversy on the 15th of April, 1916; "It is agreed that this is an approximation only, and that it shall be checked and verified as soon as possible, and that any errors of computation which

80 have been made are subject to correction, and that an adjustment will be made as between the parties by paying any balance found to be due from one to the other. (See page 714 of this record).

Another matter in dispute affecting the principal judgment is as follows: on April 15, 1916, the Kansas City Southern Railway Company paid by draft $821,623.28 and gave credit as follows: "By receipt by Guardian Trust Company as its own to the special deposit referred to in paragraph V of the decree of the Circuit Court and directed by the Circuit Court of Appeals to be deducted from the amount of the judgment $40,001.25. By interest actually earned on said special deposit to this date $17,268.01".

It is now admitted by counsel for all parties to this controversy that this credit of interest actually earned should have been $21,907.38, for the following reasons:

On October 25, 1902, there was actually earned on said special deposit interest in the sum of $737.02; that on April 15, 1916, there was actually earned on said special deposit the sum of $3,874.47.

The Master finds that there should be credited to the Kansas City Southern Railway Company on the final judgment the sum of these two payments of interest, with interest on said aggregate sum from April 15, 1916, to the date of entering of final decree.

For the purpose of assisting the court in preparation of the final decree the Master calls attention to statement of securities by witness H. B. Leavens, Assistant to Receiver of Guardian Trust Company, set out at page 991 of this record and also to liquidation divided by Northern Townsite Company, reported by witness H. B. Leavens and set forth at page 992 of this record.

Respectfully submitted.

HENRY D. ASHLEY
Special Master.

Filed in District Court of United States, September 15, 1924.

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81 "Exhibit A."

October 15, 1923.

Cambria Steel Company, and Kansas City Southern Railway Company, Debtors.

To Henry C. Flower,
Receiver of Guardian Trust Company.

To costs and expenses incurred and paid by Guardian Trust Company and its Receiver in resisting the various

claims, charges, and demands made against it in Cambria Steel Company—Guardian Trust Co.—Kansas City Southern Railway Company litigation, and the various bills and petitions filed by, for, or at the instance of Kansas City Southern Railway Company, in its own name and in the name of others, in aid of said claims and demands, as follows:

Note: Interest is claimed by Guardian Trust Company on each of the disbursements enumerated below, at the rate of six (6%) per cent. per annum from date of each disbursement until reimbursement is made.

References to voucher numbers are to vouchers of Guardian Trust Company and its various Receivers, on file in the office of Henry C. Flower, Receiver.

References to "Mecartney items" are to expense bills of H. S. Mecartney annexed as exhibits to his petition in his suit vs. Guardian Trust Company, in Circuit Court of Jackson County, Missouri, Cause No. 38412, judgment in which was affirmed by Supreme Court of Missouri in 274 Mo. 224—see printed abstract of the record in said case in Supreme Court of Missouri, filed herewith.

Items in Group I. are claimed as costs taxable as between party and party; items in Group II. are claimed as costs as between solicitor and client.

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Group I.

Costs As Between Party And Party.

To fees paid from time to time to Hon. Shannon C. Douglass for services as Special Master in Cambria Steel Co.-Guardian Trust Co.-Kansas City Southern litigation, as follows:

Item No.	1905.		
(1)	Sept. 18, 1908.	Voucher No. 957	$ 2,000.00
(2)	May 1, 1910.	Voucher No. 2324	$ 1,500.00.
(3)	Dec. 29,	Voucher No. 2726	$ 5,053.50.
		Total	$ 8,553.50

To fees paid from time to time Harry A. Jetmore, official reporter for Shannon C. Douglass, Esq., Special Master, for taking and transcribing testimony and proceedings before Special Master in Cambria Steel Co.-Kansas City Surburban Belt R. R. Co.-Kansas City Southern Ry. Co.-Guardian Trust Co. litigation, as follows:

	1903			
(4)	July 14,	Voucher No. 317	$	437.73.
(5)	Dec. 5,	Voucher No. 448		168.90.
	1904			
(6)	Feb. 16,	Voucher No. 510		77.16.
(7)	June 30,	Voucher No. 621		296.87.
(8)	Aug. 1,	Voucher No. 660		26.17.
(9)	Oct. 27,	Voucher No. 719		43.16.
	1905			
(10)	March 1,	Voucher No. 831		96.00.
(11)	March 30,	Voucher No. 845		209.17.
(12)	April 20,	Voucher No. 867		132.50.
(13)	May 15,	Voucher No. 890		124.92.
(14)	July 1,	Voucher No. 914		515.50.
(15)	July 11,	Voucher No. 923		137.75.
(16)	Aug. 14,	Voucher No. 940		172.08.
(17)	Aug. 25,	Voucher No. 944		252.25.
(18)	Sept. 12,	Voucher No. 953		54.00.
(19)	Oct. 4,	Voucher No. 968		504.33.
(20)	Nov. 14,	Voucher No. 1000		308.58.
(21)	Dec. 16,	Voucher No. 1023		346.88.
	1906.			
(22)	Jan. 9,	Voucher No. 1031		212.58.
		Amount forwarded	$	4,425.53

Item No.				
		Amount forwarded (H. A. Jetmore)	$	4,425.53
	1906.			
(23)	Jan. 22,	Voucher No. 1035		342.00.
(24)	Feb. 13,	Voucher No. 1040		193.05.
(25)	Feb. 21,	Voucher No. 1048		159.56.
(26)	March 25,	Voucher No. 1075		180.50.
(27)	March 27,	Voucher No. 1079		315.58.
(28)	March 29,	Voucher No. 1080		208.60.
(29)	April 25,	Voucher No. 1097		614.78.
(30)	Sept. 5,	Voucher No. 1171		214.25.
	1907.			
(31)	April 1,	Voucher No. 2032		15.83.
(32)	Sept. 28,	Voucher No. 2236		5.00.
		Total		$ 6,674.70

(33) To Brown, Barnett & Adams, for stenographic services rendered in taking testimony before Special Master on Dec. 20, 21, 22, 1904, in Cambria Steel

Co. matter, and transcribing same—Mecartney Item No. 6.....$ 22.50.

$ 22.50

Total fees reporting testimony before Master, etc..... $ 6,697.20

Other Court Costs. Exemplified Copies Of Records, Etc., As Follows:

(34)	1904 Jan.	2,	To Adelaide Utter, Clerk, for certified copy intervening petition Knott and Swinney, Receivers K. C. Sub. Belt R. R. Co., vs. Guardian Trust Co., and of order made thereon,.....Voucher	477....	$	1.15.
(35)	1905. April	1,	To A. Utter, Clerk, copy order case No. 2468.....Mecartney item	25...		0.55.
(36)	April	1,	To docket fee, Guardian Trust Co. vs. K. C. S. Ry. Co..... Mecartney item	25...		3.00.
(37)	July	10,	To A. Utter, Clerk, copy of decree of foreclosure and sale, for use in record in Cambria case,.....Mecartney item	26...		15.50.
(38)	July	10,	To A Utter, Clerk, for copy affidavit T. L. Chadbourne filed in Bierce vs. Guardian Tr. Co., offered in evidence before Master in Cambria case,..... .....Mecartney item	38...		1.65
(39)	July	10,	To A. Utter, Clerk, for copy records offered in evidence before Special Master in Cambria case,...Mecartney item	38...		2.15
			Amount forwarded.....		$	24.00

84 Other Court Costs, Etc. Continued.

			Amount forwarded.....		$	24.00
Item No.	1905			Mecartney Item No.		
(40)	Sept.	14,	To cash paid D. W. Amram, attorney Philadelphia, for certified copy bill of complaint in suit filed by K. C. S. Ry. Co. vs. its reorganization committee to enjoin settlement with deGoeijen,.....	42...	$	12.75.
(41)	Sept.	23,	To Adelaide Utter, Clerk, transcript of record for use in cases No. 2464-5 on appeal from injunction order sued out by K. C. S. Ry. Co. vs. Guardian Trust Co.,.....Voucher No.	950...		200.70.
(42)	Sept.	28,	To J. D. Jordan, Clerk U. S. Circuit Court of Appeals, docketing appeal from injunction order,.....	52...		25.00.

(43)	Oct.	6,	To J. D. Jordan, Clerk U. S. Circuit Court of Appeals, printing fees for printing record on appeal from order of temporary injunction obtained by K. C. S. Ry. Co. vs. Guardian Trust Co.,	52...	547.00
(44)	Nov.	13,	To certified copy final judgment in suit First Natl. Bank vs. Guardian Trust Co., etc.,	52...	2.00.
(45)	Dec.	10,	To fee paid A. Utter, Clerk, for certified copy of order	68...	3.35.
(46)	Dec.	20,	To J. J. Linton, for notarial services in taking deposition at Detroit, Mich. of witness R. B. Cone, filed in Cambria case,	68...	20.00
	1906				
(47)	Jan.	3,	To Jennie T. Powers, shorthand reporter, New York City, for certified copy transcript of depositions taken in New York of Herman Sielcken et al.,	71...	65.20.
(48)	April	10,	To A. Utter, Clerk, for certified copy record entries in suits #2464-2466, for use as evidence before Special Master,	86...	4.80
(49)	April	12,	To A. Utter, Clerk, certified copy bill of complaint in cause #2464, ordered by H. A. Jetmore for incorporation in record before Special Master,	86...	0.95
(50)	May	8,	To Miles F. Powers, New York City, Notary Public, notarial services in taking depositions in New York of Herman Sielcken et al.,	86...	10.00
(51)	May	14,	To certified copies of sundry affidavits and Special Master's report,	86...	13.00
(52)	June	2,	To A. Utter, Clerk, for copy petition, order, notice, etc	103...	7.25
			Amount forwarded		$ 1,125.30

85 Other Court Costs, Etc. Continued.

			Amount forwarded		$ 1,125.30
Item No.	1906.			Mccartney Item No.	
(53)	June	20,	To J. D. Jordan, Clerk U. S. C. C. A., for copy of opinion on injunction appeal in suit K. C. S. Ry. Co. vs. Guardian Trust Co.,	99...	5.00.
(54)	July	2,	To docket fee suit Guardian Trust Co. vs. K. C. S. Ry. Co.,	103...	5.00.
(55)	July	13,	To W. B. Lightburne, shorthand reporter for Special Master, for reporting oral arguments made before Special Master,	103...	50.00.
(56)	Aug.	18,	To Geo. F. Sherritt, Clerk U. S. Court, for copy of report of sale and order confirming sale of Union Terminal R. R. Co.,	103...	4.50

(57)	1907. Jan. 5,	To W. B. Lightburne, shorthand reporter, balance due for services in reporting oral arguments made before Special Master,.....Voucher No.	1908...		170.80.
(58)	Dec. 14,	To Oscar Hockland, Clerk, for copy of record in State Court suits vs. K. C. S. Ry. Co.,.....	141...		4.50.
(59)	1908. Jan. 8,	To A. Utter, Clerk, for copy supplemental bill of complaint K. C. S. Ry. Co. vs. Guardian Trust Co. in Cambria suit,...	140...		12.35.
(60)	Jan. 29,	To Brown, Adams & Brown, court reporters, for reporting arguments on application for temporary injunction of K. C. S. Ry. Co. vs. Guardian Trust Co.,	144...		107.00.
(61)	March 23,	To Brown, Adams & Brown, shorthand reporters, balance due account services last above,.....	154...		10.50.
(62)	March 26,	To A. Utter, Clerk, for copy of appearance docket entries in K. C. Sub. Belt R. R. Co. foreclosure suit #2468,.....	150...		5.00.
(63)	March 26,	To A. Utter, Clerk, copy petition T. T. Crittenden, Receiver, for leave to transfer real estate of Central Improvement Co.,.....	150...		2.25.
(64)	March 26,	To A. Utter, Clerk, copy order overruling demurrer and order of temporary injunction of Judge McPherson in Cambria suit,.....	150...		0.95
(65)	March 26,	To A. Utter, Clerk, for copy petition of Crittenden, Receiver, for instructions of court as to management of property of Central Improvement Co., in Cambria suit,.....	150...		2.05.
		Amount forwarded.....			$ 1,504.70

88 Other Court Costs, Etc. Continued

		Amount forwarded.....			$ 1,504.70
Item No.	1908.		McCartney Item No.		
(66)	March 26,	To A. Utter, Clerk, for copy order in Cambria suit appointing T. T. Crittenden Receiver of Central Improvement Co.,.....	159...		0.85.
(67)	March 26,	To A. Utter, Clerk, for copy order denying motion to dissolve injunction order and striking motion of Guardian Trust Co. from files, entered in Cambria suit,	159...		1.40.
(68)	April 2,	To J. D. Jordan, Clerk U. S. C. C. A., fees for printing and preparing record on			

			appeal, in suit Guardian Trust Co., Appellant, vs. K. C. Southern Ry. Co., Appellee,.....Voucher No. 2311...	1,070.00.
(69)	April	10,	To A. Utter, Clerk, for copy of opinions filed in Cambria suit on March 30th and April 8, 1908,.....Voucher No. 2319...	4.20.
	1910.			
(70)	June	29,	To A. Utter, Clerk, for copy of decree in case #2468,.....Voucher No. 2663...	6.65.
(71)	Sept.	30,	To A. Utter, Clerk, making certified transcript of record on appeal from order of temporary injunction sued out by K. C. S. Ry. Co. vs. Guardian Trust Co.,.....Voucher No. 2692...	764.35.
(72)	Oct.	26,	To J. D. Jordan, Clerk U. S. C. C. A., account deposit for Clerk's costs on appeal entitled Central Improvement Co., and Guardian Trust Co. vs. Cambria Co.,.....Voucher No. 2698...	50.00.
(73)	Oct.	28,	To J. D. Jordan, Clerk U. S. C. C. A., balance due account printing record in appeal last above,.....Voucher No. 2700...	910.00.
	1911.			
(74)	Feb.	7,	To Gates & English, to reimburse them for fees paid for sundry certified copies of records in Cambria case,..Voucher No. 2743...	35.00.
(75)	May	9,	To A. Utter, Clerk, for certified copies of records in Cambria case, Voucher No. 2762...	3.10.
	1912.			
(76)	Nov.	19,	To J. D. Jordan, Clerk, for copy opinion United States Circuit Court of Appeals, Voucher No. 2998...	5.00.
	1913.			
(77)	May	7,	To J. D. Jordan, Clerk, for additional deposit to secure Clerk's costs in appeals Central Improvement Co. and Guardian Trust Co. vs. Cambria Co.,..... Voucher No. 3057...	40.00.
(78)	Dec.	17,	To J. D. Jordan, Clerk U. S. C. C. A., for copy of opinion on appeals last above, ...Voucher No. 3128...	5.00.
			Total carried forward.....	$ 4,400.25

Total carried forward..... $ 4,400.25

Credits Against Items Last Above:

Item No.				
	1906.			
(79)	Aug.	18,	By amount refunded by Clerk U. S. C. C. A. on account costs injunction appeal, Mecartney Credit Item No. 7.....$ 45.70.	

	1907.				
(80)	April	27,	By amount refunded account costs injunction appeal, Mecartney Credit Item No. 10	$935.06.	
			Total Credits	$980.76	
					890.76
			Total Other Court Costs, etc., after deducting Credits		$ 3,419.49

Group II

Costs And Expenses As Between Solicitor And Client.

Counsel Fees.

Item No.				Voucher No.	
	1900.				
(81)	Sept.	22,	To amount paid Trimble & Braley, Attorneys, as retainer fee in Cambria Steel Co., case,	*See Foot-Note.	$ 1,000.00.
	1902.				
(82)	Oct.	8,	To three-fourths (¾) of $7125.00, allowed to Trimble & Braley by Judge Thayer, and paid under order of court entered by Judge Thayer in Bierce case, dated October 4, 1902, discharging Receiver of Guardian Trust Co., covering services rendered in Cambria Steel Co. litigation during period of receivership of Judge F. M. Black and Wash Adams, November 30, 1900, to October 4, 1902,	146...	5,343.75.
(83)	Oct.	31,	To J. McD. Trimble,	30...	150.00.
(84)	Nov.	29,	To J. McD. Trimble,	68...	500.00.
(85)	Dec.	31,	To J. McD. Trimble,	131...	500.00.
(86)	1903. Jan.	31,	To J. McD. Trimble,	154...	500.00.
			Amount forwarded		$ 7,993.75

*Note: For item No. (81) see Guardian Trust Co. Expense Ledger No. 4, Page 126.

88 Counsel Fees Continued.

			Amount forwarded		$ 7,993.75

Item No.				Voucher No.	
	1903.				
(87)	Feb.	28,	To J. McD. Trimble,	176...	500.00.
(88)	March	31,	To J. McD. Trimble,	205...	500.00.
(89)	April	30,	To J. McD. Trimble,	244...	500.00.
(90)	May	31,	To J. McD. Trimble,	273...	500.00

(91)	June 30,	To J. McD. Trimble,.....	299...		500.00.
(92)	July 30,	To J. McD. Trimble,.....	325...		500.00.
(93)	Sept. 3,	To J. McD. Trimble,.....	358...		500.00.
(94)	Sept. 29,	To J. McD. Trimble,.....	374...		500.00.
(95)	Oct. 31,	To J. McD. Trimble,.....	401...		500.00.
(96)	Nov. 30,	To J. McD. Trimble,.....	439...		416.66.
(97)	Dec. 31,	To J. McD. Trimble,.....	473...		416.66.
	1904.				
(98)	Jan. 30,	To J. McD. Trimble,.....	492...		416.66.
(99)	Feb. 29,	To J. McD. Trimble,.....	513...		416.66.
(100)	March 31,	To J. McD. Trimble,.....	537...		416.66.
(101)	April 30,	To J. McD. Trimble,.....	564...		416.66.
(102)	May 31,	To J. McD. Trimble,.....	592...		416.66.
(103)	June 30,	To J. McD. Trimble,.....	618...		416.66.
(104)	July 31,	To J. McD. Trimble,.....	638...		416.66.
(105)	Aug. 31,	To J. McD. Trimble,.....	665...		416.66.
(106)	Sept. 30,	To J. McD. Trimble,.....	686...		416.66.
(107)	Oct. 25,	To J. McD. Trimble,.....	716...		416.66.
(108)	Dec. 8,	To H. S. Mecartney, payment on account,	769...		5,000.00.
	1905.				
(109)	June 31,	To Wash Adams, in settlement his bill for services in Cambria case,.....	*908...		6,000.00.
		*See Guardian Trust Co. Cash Book, Page 119.			
(110)	Sept. 14,	To fee paid D. W. Amram, Attorney, Philadelphia, for examining court files and obtaining copy of records in suit K. C. Southern Ry. Co. vs. Members Reorganization Committee,.....	Mecartney No. 42...		10.00.
(111)	Sept. 27,	To H. S. Mecartney, payment on account,	960...		5,000.00.
		Amount forwarded.....			$ 33,503.67

89 Counsel Fees Continued.

Amount forwarded..... $33,503.67

Item No.			Voucher No.	
	1905.			
(112)	Nov. 16,	To C. O. Tichenor, for consultation and written opinion as to liability K. C. S. Ry. Co. for debt of Guardian Trust Co. in Cambria suit, Mecartney item No.	55...	500.00.
(113)	Dec. 28,	To Sullivan & Cromwell, Attorneys New York City, for assisting at taking of depositions there of witnesses Sielcken and Hawkes, Mecartney item No.	68...	150.00.
	1906.			
(114)	Feb. 13,	To H. S. Mecartney, payment on account,	1041...	5,000.00.
(115)	June 1,	To C. H. Aldrich, for written opinion in Cambria case,....Mecartney item No.	117...	350.00

(116)	Aug.	15,	To H. S. Mecartney, payment on account, 1164...	5,000.00.
	1907			
(117)	July	31,	To H. S. Mecartney, payment on account, 2190...	7,500.00.
	1908.			
(118)	March	27,	To fee paid James C. Jones, of St. Louis, for consultation and advice in Cambria suit,.....Mecartney item No. 163...	250.00.
(119)	March	28,	To Gates & English, retainer..... 2309...	3,000.00.
	1909.			
(120)	June	25,	To Gates & English, payment on account, 2500...	4,000.00.
(121)	Dec.	14,	To Gates & English, payment on account, 2569...	2,000.00.
	1910.			
(122)	Aug.	1,	To Gates & English, payment on account, 2673...	3,000.00.
	1911.			
(123)	Feb.	15,	To Gates & English, payment on account, 2747...	4,000.00.
(124)	Oct.	27,	To D. J. Haff, services on appeal,..... 2824...	1,000.00.
	1912.			
(125)	Jan.	16,	To Gates & English, payment on account, 2881...	4,000.00.
(126)	Jan.	18,	To D. J. Haff, account services on appeal, 2881...	4,000.00
(127)	July	31,	To Amount paid Trimble & Braley, in satisfaction of final judgment rendered August 5, 1912, for $12,580.41, in suit Trimble & Braley vs. Guardian Trust Co., filed Aug. 40, 1905, in Circuit Court of Jackson County, Missouri, Cause No. 25446, reported in 244 Missouri 228 which suit was brought to recover for sundry legal services rendered to Guardian Trust Company the items recovered for services rendered in Cambria Steel Co.—K. C. Southern Ry. Co.—Guardian Trust Co. litigation being as follows:	

(Item No. 127 continued on next page.)

Amount forwarded.....$ 74,753.67

90 Counsel Fees Continued.

Amount forwarded .....$ 74,753.67

Item No. (127) Continued. Voucher No.

For services rendered by Trimble & Braley in suit of Cambria Steel Co. prior to appointment, on November 30, 1900, of F. M. Black as Receiver of Guardian Trust Co., less retainer paid Sept. 1900, of $1,000.00..$2,250.00

Interest paid by Guardian Trust Co. on above amount of $2250.00 from date of

			filing of Trimble & Braley suit, on August 30, 1905, to August 5, 1912, date of satisfaction of judgment, at six (6%) per cent..	935.24	
				$3,185.24	
			For services rendered by Trimble & Braley prior to appointment, on November 30, 1900, of F. M. Black as Receiver of Guardian Trust Co., in protecting interests of said Trust Co., in respect to its claims in Cambria suit, in four suits filed by Kansas City Southern Railway Company in name of Provident Life & Trust Co., Trustee, to foreclose railroad mortgages executed by Kansas City Suburban Belt Railroad Co. and its constituent companies.....	$4,500.00	
			Interest paid by Guardian Trust Co. on above sum of $4500.00 from August 30, 1905, date of filing of Trimble & Braley suit, to August 5, 1912, date of satisfaction of final judgment, at six (6%) per cent....	1,870.50	
			Total Item No. (127).....	2954...	9,555.74.
Item No.					
1913.					
(128)	Feb.	21,	To Gates & English, payment on account,	3034...	7,500.00.
(129)	Feb.	21,	To D. J. Haff, account services on appeal,	3035...	1,000.00.
1914.					
(130)	April	1,	To Gates & English, payment on account..	3154..	5,000.00.
(131)	April	9,	To Clephane & Clephane, services in U. S. Supreme Court,.....	3155...	200.00.
(132)	Nov.	10,	To F. W. Lehmann, retainer account services on appeal,.....	3189...	1,000.00.
1915.					
(133)	Nov.	9,	To Gates & English, payment on account,	3238...	5,000.00.
			Amount forwarded.....		$104,009.41

Counsel Fees Continued.

Amount forwarded..... $104,009.41

Item No.				Voucher No.	
1917.					
(134)	Dec.	2,	To Fred W. Lehmann, St. Louis, Mo., per order U. S. District Court made November 24, 1917, for balance due account services rendered in briefing and arguing appeals in Cambria Steel Co. suit in United States Circuit Court of Appeals and in United States Supreme Court,.....	896...	15,000.00.

1918.					
(135) May	11,	To H. S. Mecartney, in satisfaction of final judgment rendered by Circuit Court of Jackson County, Missouri, in suit Mecartney vs. Guardian Trust Co., affirmed by Supreme Court of Missouri in 274 Missouri 224, said suit being to recover balance due account professional services rendered December, 1904, to March 25, 1908, in Cambria Steel Co. suit.....$135,013.56			
		Less sundry expense items enumerated in itemised statement annexed to plaintiff's petition in said suit, paid by Guardian Trust Co. and charged to Kansas City Southern Ry. Co. elsewhere in this statement of account,.....$ 7,745.07			
				1203...	127,268.49.
1922.					
(136) Sept.	15,	To H. S. Mecartney, in satisfaction of decree United States District Court per mandate United States Circuit Court of Appeals, for expenses incurred and services rendered to Guardian Trust Co. in United States Circuit Court of Appeals subsequent to March 25, 1908, in Cambria Steel Co. suit, all as more fully shown in opinion of United States Circuit Court of Appeals reported in 280 Federal 64,.....	3371...		47,000.00.
(137) Oct.	27,	To George H. English, as surviving partner of firm of Gates & English, per order made by United States District Court covering balance in full account services rendered in Cambria Steel Co. suit.....	3385...		5,859.40.
		Total Counsel Fees.....$			299,137.30.

92 Cash Paid For Printing Briefs, Etc.

Item No.			Mecartney Item No.		
1905.					
(138) April	1,	To Riley Publishing Co., printing cross-bills, Cambria case,.....	25...	$	42.75.
(139) June	12,	To Riley Publishing Co., printing answer to ancillary bill and answer to intervening petition,.....	34...		121.25.
(140) June	19,	To Barnard & Miller, printing brief, case vs. K. C. Southern Ry. Co.,.....	36...		104.00.

(141)	Sept. 18,	To Barnard & Miller, printing brief, injunction matter before Judge Philips,..		44...	12.75.
(142)	Nov. 20,	To Barnard & Miller, printing 108 copies of opinion of C. O. Tichenor,.....		58...	20.50.
(143)	Nov. 29,	To Barnard & Miller, printing brief for appellant, case vs. K. C. S. Ry. Co.,..		62...	45.00.
(144)	Dec. 29,	To Barnard & Miller, printing cross-bill in Cambria case,.....		69...	29.25.
	1906.				
(145)	Jan. 17,	To printing reply brief in injunction suit vs. Kansas City Southern Ry. Co.,.....		75...	9.75.
(146)	May 8,	To Franklin Hudson Publishing Co.,.....		86...	17.00.
(147)	May 8,	To Franklin Hudson Publishing Co.,.....		86...	12.00.
(148)	May 8,	To Frank T. Riley Publishing Co., printing answer and pleas to Second Amended and Supplemental Ancillary Bill,.....		86...	9.10.
(149)	May 8,	To Franklin Hudson Publishing Co.,.....		86...	11.00.
(150)	May 8,	To Franklin Hudson Publishing Co.,.....		86...	5.25.
(151)	May 31,	To Barnard & Miller, printing argument case Cambria Steel Co. vs. Belt R. R. Co., also argument on issues of intervention,.....		92...	123.00.
(152)	June 18,	To Barnard & Miller, printing analysis of bill for Special Master,.....		97...	31.50.
(153)	June 18,	To Barnard & Miller, printing report in connection with negotiations for settlement,.....		98...	30.00.
	1907				
(154)	Feb. 13,	To Barnard & Miller, printing supplemental argument, Cambria Steel Co. vs. K. C. Sub. Belt R. R. Co.,.....		112...	57.75.
(155)	March 4,	To Barnard & Miller, balance account printing supplemental argument, Cambria Co. vs. K. C. Sub. Belt R. R. Co.,		113...	64.50.
(156)	March 4,	To Barnard & Miller, printing 66 copies of Supplemental Analysis of Item 15,		114...	4.50.
		Amount forwarded.....			$ 750.85

Printing Briefs, Etc. Continued.

		Amount forwarded.....			$ 750.85
Item No.				Mecartney Item No.	
	1907.				
(157)	May 19,	To Barnard & Miller, printing suggestions for plaintiff in State Court cases, outlining petition, etc.,.....$10.50 Printing Supplemental Argument in Intervention and Cross-Bill, consolidation issue,.....85.00		122...	95.50.
(158)	June 17,	To Barnard & Miller, printing suggestions of plaintiff in support of motion to speed cause and in opposition to motion to stay,.....		123...	30.00.

(159)	June 18,	To Barnard & Miller, reprinting corrected Supplemental Argument on consolidation issue, etc.,	124...	28.00.
(160)	Dec. 18,	To Barnard & Miller, printing "Suggestions in Opposition," etc., also printing answer, Cambria case,	136...	29.50.
(161)	Dec. 19,	To Barnard & Miller, printing draft of decree, Cambria case,	137...	13.50.
	1908.			
(162)	Jan. 8,	To E. L. Mendenhall, printing brief on intervention of Kansas City Southern Ry. Co.,	141...	59.60.
(163)	Jan. 17,	To Barnard & Miller, printing affidavit of H. S. Mecartney,	142...	55.87.
(164)	March 26,	To Barnard & Miller, printing bill, Cambria case, etc.,	155...	32.07.
(165)	Nov. 9,	To John C. Bovard, printing brief filed with Special Master on liability of K. C. S. Ry. Co., also brief filed in U. S. Circuit Court of Appeals at St. Louis.....Voucher No.	2405...	55.95.
	1911.			
(166)	April 25,	To E. L. Mendenhall, printing brief in case Guardian Trust Co. vs. Cambria Steel Co. et al.,.....Voucher No.	2755...	24.60.
(167)	May 9,	To E. L. Mendenhall, printing brief in Cambria case,.....Voucher No.	2763...	6.00.
(168)	May 31,	To E. L. Mendenhall, printing reply brief, suit Guardian Trust Co., Appellant, vs. Cambria Steel Co. et al., Appellees, Voucher No.	2774...	10.00.
(169)	Nov. 9,	To E. L. Mendenhall, printing Additional Brief in above case (60 copies),..... Voucher No.	2846...	71.00.
(170)	Dec. 22,	To E. L. Mendenhall, printing 60 copies Reply Brief of Guardian Trust Co. to Supplemental Brief of K. C. S. Ry. Co. in suit Central Improvement Co. et al., Appellants, vs. Cambria Steel Co. et al., Appellees,.....Voucher No.	2867...	42.45.
		Amount forwarded.....		$ 1,304.89

94 Printing Briefs, Etc. Continued.

		Amount forwarded.....		$ 1,304.89
Item No.			Voucher No.	
	1911.			
(171)	Dec. 22,	To Smith-Grieves Typesetting Co., printing 75 copies Reply Brief, suit Central Improvement Co. et al. vs. Cambria Steel Co. et al.,.....	2868...	77.00.

	1912.				
(172)	Nov.	19,	To E. L. Mendenhall, printing 100 copies opinion of U. S. Circuit Court of Appeals, Guardian Trust Co. vs. Cambria Co., Central Improvement Co. vs. Cambria Co.,	2997...	21.00.
	1913.				
(173)	Feb.	24,	To Smith-Grieves Typesetting Co., 75 copies briefs, case #3489, Guardian Trust Co. vs. Cambria Co., case #3490, Central Improvement Co. vs. Cambria Steel Co.,	3037...	77.40.
(174)	Feb.	24,	To E. L. Mendenhall, printing Suggestions in suit Central Improvement Co. et al. vs. Cambria Steel Co. et al.,	3039...	9.90.
(175)	May	8,	To E. L. Mendenhall, printing opinion of U. S. Supreme Court in case of Northern Pacific Ry. Co. et al. vs. Jos. H. Boyd, for use in Cambria case,	3061...	18.75.
(176)	Aug.	21,	To E. L. Mendenhall, printing answer in case Guardian Trust Co. vs. Cambria Steel Co.,	3083...	6.30.
(177)	Dec.	20,	To E. L. Mendenhall, printing 150 copies opinion in case Central Improvement Co., Appellant, vs. Cambria Steel Co. et al., Appellees, and case Guardian Trust Co., Appellant, vs. Cambria Steel Co. et al., Appellees,	3130...	35.00.
	1914.				
(178)	May	14,	To E. L. Mendenhall, printing Notice of Motion, Motion to Dismiss, and brief, K. C. S. Ry. Co., Appellant, vs. Guardian Trust Co., Appellee,	3160...	19.80.
(179)	May	14,	To E. L. Mendenhall, printing 50 copies brief and argument of Guardian Trust Co. in opposition to petition for certiorari, case K. C. S. Ry. Co., Petitioner, vs. Guardian Trust Co. et al., Respondents,	3160...	9.00.
			Total Cash Paid for Printing Briefs, etc.,		$ 1,579.04

95 Payments to Expert Accountants.

Item No.

(180) to one-half (½) of salary paid by F. M. Black, Receiver of of Guardian Trust Co., to S. B. Willey, expert accountant, during period December 1, 1900, to June 1, 1901, during all of which period more than half of said Willey's time was necessarily consumed in preparing tabulations and data for use of Receiver and counsel touching state of the accounts between Guardian Trust Company and various companies involved in the Cambria suit, as follows:

½ of salary December 1, 1900 to June 1, 1901, at rate of $250.00 per month—6 months @ $125.00...		$ 750.00	$ 750.00

To salary paid by Guardian Trust Co. and F. M. Black and Wash Adams, its Receivers, to S. B. Willey, expert accountant, during the period June 1, 1901, to December 1, 1904, during which period all of said Willey's time was consumed in examining records and books and in preparing tabulations therefrom for use of Receiver and counsel of Trust Co. at hearings in Cambria suit before Special Master, in assisting Guardian Trust Company and its Receivers in said Cambria suit, and in attendance upon such hearings as expert witness, to-wit:

June 1, 1901, to October 15, 1902, 16½ months, @ $150.00	$2,475.00		
Plus allowance for overtime acct. work on Cambria case, June, 1901	83.35		
	$2,558.35		
Less deduction for lost time during salary period of:			
June 1-15, 1902	$05.00		
June 15-30, 1902	30.00	35.00	
		2,523.35	
October 15, 1902, to August 1, 1903, 9½ months, @ $300.00	$2,850.00		
Less deduction for lost time during salary period of Oct. 15-31, 1902,	30.00		
		2,820.00	
August 1, 1903, to November 1, 1903, 3 months, @ $150.00	$ 450.00	450.00	
November 1, 1903, to November 1, 1904, 12 months, @ $125.00	$1,500.00	1,500.00	
Salary for month of November, 1904, @ $50.00	50.00	50.00	
Total salary for period June 1, 1901, to December 1, 1904			7,343.35
Total Item No. (180)			$8,093.35

(Note: for voucher numbers see next page.)

Amount forwarded $8,093.35

96 Payment to Expert Accountants Continued.

Amount forwarded ..... $ 8,093.35

Voucher Numbers for Item No. (180):

No. 46, 105, 132½, 147, 176, 190, 222, 240, 283, 294, 329, 331, 341, 365, 377, 416, 433, 458, 472, 499, 516, 545, 556, 586, 617, 643.

658, 693, 710, 744, 757, 791, 802, 828, 1, 23, 28, 55, 61, 80, 84, 106, 113, 179, 31, 51, 70, 101, 129, 143, 156, 169, 175, 192, 206, 229, 2[illegible], 262, 272, 293, 298, 315, 324, 342, 348, 365, 376, 390, 403, 430, 441, 458, 472, 488, 494, 509, 511, 528, 535, 554, 565, 582, 593, 612, 620, 632, 640, 655, 663, 682, 688, 713, 717, and 750.

Item No.

(181) To one-half (½) of salary of $80.00 per month paid by F. M. Black, Receiver of Guardian Trust Co., to Jennie L. Gott stenographer, during period December 1, 1900, to June 1, 1901, during which period more than one-half of her time was consumed in preparing tabulations and exhibits for use at hearings before Special Master and for the Receiver, in re Cambria suit,—

6 months @ $30.00 ..... $ 180.00

To full salary of said Jennie L. Gott of $60.00 per month paid by Guardian Trust Co. and F. M. Black and Wash Adams, its Receivers, during period June 1, 1901, to December 1, 1904, during which period all of her time was consumed in said work,—

42 months @ $60.00 ..... $2,520.00

Less deduction account time off during February, 1902 ..... 10.00

$2,510.00

2,510.00

Total Item No. (181) ..... $ 2,690.00

For Voucher Numbers for Item No. (181) see vouchers above enumerated, also Vouchers Nos. 20, 43, 94, 106, 745, and 749.

Amount forwarded $10,783.35

97 Payments To Expert Accountants Continued.

Amount forwarded $10,783.35

Item No.				Mecartney Item No.	
	1905.				
(182)	March 1,	To Frank B. Wilcox,		18...	450.00.
(183)	April 19,	To Frank B. Wilcox,		28...	50.00.
(184)	July 10,	To F. M. Cook (assisting S. B. Willey)...		38...	12.00.
(185)	July 10,	To F. M. Cook,	" "	38...	24.00.
(186)	July 10,	To F. M. Cook,	" "	38...	24.00.
(187)	Sept. 14,	To F. M. Cook,	" "	42...	24.00.
(188)	Sept. 14,	To F. M. Cook,	" "	42...	24.00.
(189)	Sept. 14,	To F. M. Cook,	" "	42...	24.00.
(190)	Sept. 14,	To F. M. Cook,	" "	42...	18.00.

(191)	Sept. 14,	To F. A. Wright, payment on account,...	42...		300.00.
(192)	Sept. 14,	To N. S. Doran,.....	42...		150.00.
(193)	Nov. 13,	To F. M. Cook,.....	52...		96.00.
(194)	Nov. 13,	To F. A. Wright,.....	52...		500.00.
(195)	Dec. 29,	To F. M. Cook,.....	68...		18.00.
	1906.				
(196)	Jan. 22,	To S. B. Willey,.....	77...		300.00.
(197)	Jan. 22,	To C. W. Hastings,.....	78...		100.00.
(198)	Jan. 22,	To F. A. Wright, account services.....	79...		458.00.
(199)	Feb. 8,	To F. A. Wright, account services.....	82...		100.00.
		Total Payments To Expert Accountants.....			$13,455.35

Premiums Paid on Bonds.

			Voucher No.	
	1905.			
(200)	Sept. 23,	To Hunter, Ridge & Bryant, Agents U. S. F. & G. Co., premium on appeal bond, on appeal from order of Judge Philips' granting an injunction restraining Guardian Trust Co. from prosecuting suit in State Court against Kansas City Southern Ry. Co.,.....	958...	5.00.
	1908.			
(201)	March 26,	To T. S. Ridge, prem. on bond for costs on appeal,.....Mecartney item	159...	5.00.
	1909.			
(202)	March 27,	To T. S. Ridge, prem. on appeal bond, 2nd year, case 2827, K. C. S. Ry. Co. vs. Guardian Trust Co.,.....	2479...	5.00.
		Amount forwarded.....		$ 15.00

98 Premiums Paid On Bonds Continued.

		Amount forwarded.....		$ 15.00
Item No.			Voucher No.	
	1910.			
(203)	Sept. 1,	To Globe Surety Co., prem. appeal bond Central Improvement Co. in K. C. Sub. Belt R. R. Co. suit.....$150.00 prem. appeal bond Guardian Trust Co. in Belt suit,..... 25.00	2686...	175.00.
	1911.			
(204)	Aug. 4,	To Globe Surety Co., prem. on above appeal bonds 2nd yr.,.....	2807...	175.00.
	1912.			
(205)	July 31,	To Globe Surety Co., premium on appeal bonds last above mentioned, for third year,.....	2951-2955...	175.00.

	1913.				
(206)	July	31,	To Globe Surety Co., premium on appeal bonds last above mentioned, for fourth year,.....3076-3084...		175.00.
	1914.				
(207)	Aug.	27,	To Globe Surety Co., prem. on above appeal bonds, for fifth year,.....	3173...	175.00.
(208)	Nov.	20,	To United States Fidelity and Guaranty Co., prem. on appeal bond Central Imp. Co. U. S. Circuit Court of Appeals, Cambria Steel Co. vs. K. C. Sub. Belt R. R. Co. et al., for yrs. 1912, 1913, and 1914, @ $37.50,.....	3196...	112.50.
	1915.				
(209)	Aug.	31,	To prem. on bond KC-1740, $37.50, and bond KC-1741 $6.25, in suit Cambria Steel Co. vs. K. C. Sub. Belt R. R. Co. et al.,.....	3227...	43.75.
(210)	Nov.	5,	To Globe Surety Co., prem. on appeal bond Central Improvement Co., in K. C. Sub. Belt R. R. Co. suit $150.00; prem. appeal bond Guardian Trust Co. in Belt Suit.....25.00	3236...	175.00.
			Total Premiums Paid On Bonds.....		$ 1,221.25

Miscellaneous Stenographic Expense.

				Mecartney Item No.		
	1905.					
(211)	Jan.	17,	To R. C. Pearson, preparing brief.....	6...	$	20.70.
(212)	March	15,	To J. M. Orr, 50 folios transcript.....	25...		12.50.
(213)	March	17,	To incidental stenographic work,.....	22...		3.75.
(214)	April	1,	To R. J. Holmden, petition,.....	25...		3.00.
(215)	April	1,	To Genevieve Parlin, steno. work on intervening petition,.....	25...		4.75.
			Amount forwarded.....		$	44.70

Miscellaneous Stenographic Expense Continued.

			Amount forwarded.....		$ 44.70
Item No.				Mecartney Item No.	
	1905.				
(216)	April	1,	To R. J. Holmden, copying exhibits,.....	25...	1.50.
(217)	April	1,	To R. J. Holmden, petition Guardian Trust Co. vs. K. C. Southern Ry. Co...	25...	2.00.
(218)	April	1,	To R. J. Holmden, misc. steno. services,.	25...	10.00.
(219)	April	1,	To Brown et al., steno. work on petiton Guardian Trust Co. vs. K. C. S. Ry. Co.	25...	7.50.
(220)	April	1,	To Brown, et al., steno. services for Mr. Mecartney in Cambria case,.....	25...	19.20.

(221) April	1,	To Incidental stenographic services,.....	25...	0.60.
(222) April	19,	To R. J. Holmden, work on petiton Guardian Trust Co. vs. K. C. Southern.....	28...	3.50.
(223) July	10,	To R. J. Holmden, steno. services.....	38...	40.00.
(224) July	10,	To R. J. Holmden, work on amended petition Guardian Trust Co. vs. K. C. S. Ry. Co.....	38...	1.50.
(225) Sept.	14,	To Ida E. Ladd, stenographer.....	42...	15.15.
(226) Nov.	13,	To R. J. Jetmore, stenographer,.....	52...	2.00.
(227) Dec.	9,	To W. H. Edwards & Co., stenographers, emergency brief work and copying from Oct. 7th to Nov. 9, 1905,.....	63...	28.52.
(228) Dec.	29,	To R. J. Holmden, steno., letters to Sullivan & Cromwell.....	68...	2.00.
1906.				
(229) Feb.	21,	To L. E. Taliaferro, making typewritten copies,.....	82...	10.00.
(230) Feb.	21,	To M. R. Jennings, copying answer and plea to second amended and supplemental ancillary bill,.....	82...	2.00.
(231) Feb.	21,	To R. J. Holmden, stenographer.....	82...	3.00.
(232) May	1,	To cost making typewritten copy of abstract of testimony and exhibits,.....	85...	37.60.
(233) May	8,	To Myrtle Christine, steno. services abstracting record.....	86...	12.60.
(234) June	1,	To Edwards & Co., copying certain documents, Cambria case,.....	93...	14.75.
(235) Aug.	18,	To L. M. Perry, Stenographer.....	103...	1.95.
(236) Aug.	18,	To R. J. Holmden, steno. work on petition in suit filed 7/2/1906,.....	103...	1.00.
1907.				
(237) June	13,	To stenographic services in preparing Suggestions and Brief, Cambria case,...	120...	6.00.
		Amount forwarded.....		$ 267.07

100 Miscellaneous Stenographic Expense Continued.

		Amount forwarded.....		$ 267.07
Item No.			Mecartney Item No.	
1908.				
(238) Jan.	8,	To Quick Service Writing Co., for 3 copies Supplemental Bill for Injunction of K. C. Southern Ry. Co. et al., in Cambria case.....	141...	5.70.
(239) Jan.	8,	To Quick Service Writing Co., for 3 copies of brief in Cambria case.....	141...	3.90
(240) March	14,	To Brown, Adams & Brown, court reporters, supplementary items,.....	153...	17.00.

(241) March 26,	To stenographic services in emergency matters.....		158...	41.00.
(242) March 26,	To R. J. Holmden, steno. services in writing memorandum in Cambria case,		159...	7.00.
(243) March 26,	To Quick Service Writing Co., copying letters, Cambria case,.....		159...	1.25.
(244) March 26,	To Miss Thompson, steno. services,.....		159...	2.50.
(245) March 26,	To Geo. H. Williams, steno. services,....		161...	10.00.
(246) May 6,	To Margaret Clements, making 3 copies of attorneys' arguments in Cambria Steel Co. vs. Guardian Trust Co.,	Voucher No.	2327...	25.00.
(247) May 6,	To Lillian Rawson, making 3 copies of attorneys' arguments in suit Cambria Steel Co. vs. K. C. Suburban Belt R. R. Co. et al.,.....	Voucher No.	2329...	31.50.
1911.				
(248) June 29,	To J. I. Levin, reporting oral argument in Central Improvement Co. vs. Cambria Steel Co., and Guardian Trust Co. vs. Cambria Steel Co., in U. S. Circuit Court of Appeals, at St. Paul, Minn., 6/21/11.....	Voucher No.	2786...	18.50.
(249) Oct. 6,	To J. I. Levin, St. Paul, Minn., transcript testimony 5/26/-27/1911, U. S. Circuit Court of Appeals, St. Paul, Central Imp. Co. vs. Cambria Steel Co., and Guardian Trust Co. vs. Cambria Steel Co.,	Voucher No.	2821...	86.70.
1913.				
(250) Feb. 24,	To Watson Law Reporting and Process Serving Co., stenographic services Jan. 20-22, 1913, at St. Louis, Mo., Cambria case,.....Voucher No.		3038...	12.50.
	Total Miscellaneous Stenographic Expense.....			$ 589.62

101 Miscellaneous Incidental Expense.

Item No.			Mecartney Item No.	$
1904.				
(251) Dec. 6-8,	To H. S. Mecartney, expense trip Chicago to Kansas City,.....		1...	41.00.
(252) Dec. 21,	To H. S. Mecartney, expense trip Chicago to Kansas City, Dec. 14-21, 1904,.....		2...	94.25.
(253) Dec. 21,	To express on 2 packages, Chicago to K. C.		3...	1.30.
1905.				
(254) Jan. 7,	To express on package, Chicago to K. C...		5...	1.10.
(255) Jan. 19,	To telegrams, Rosenberger to Mecartney		6...	1.06.
(256) Jan. 23,	To H. S. Mecartney, expense trip Chicago to Kansas City,.....		7...	32.00.
(257) Jan. 24,	To telegrams,.....		8...	2.13.

(258)	Jan.	27,	To H. S. Mecartney, expense trip Chicago to Kansas City, 1/25-27/1905,.....	9-10...	22.50.
(259)	Jan.	31,	To express on trunk of records, Chicago to Kansas City,.....	11...	2.30.
(260)	Feb.	3,	To H. S. Mecartney, expense trip Chicago to Kansas City 2/2/05,.....	12...	69.50.
(261)	Feb.	6,	To long distance telephone call to Mr. Harris, Champaign, Illinois,.....	13...	3.00.
(262)	Feb.	9,	To express on trunk of records, Chicago to Kansas City,.....	14...	2.32.
(263)	Feb.	13,	To express charges, 2 packages papers..	15...	1.30.
(264)	Feb.	15,	To telegrams,.....	16...	3.04.
(265)	Feb.	17,	To express on trunk of records, Cambria case, K. C. to Chicago,.....	17...	2.69.
(266)	March	9,	To telegrams and postage,.....	19...	1.46.
(267)	March	10,	To telegrams,.....	20...	2.55.
(268)	March	10,	To H. S. Mecartney, expense trip Chicago to Kansas City and return,.....	21...	23.85.
(269)	March	17,	To H. S. Mecartney, expense trip Chicago to Kansas City 3/13-17,.....	22...	89.75.
(270)	March	31,	To expense Mr. Brown, Attorney, Chicago to Kansas City, (assisting Mr. Mecartney), March 12-29, 1905,.....	23...	73.25.
(271)	March	31,	To expense H. S. Mecartney, Chicago to Kansas City and return,.....	24...	34.50.
(272)	April	1,	To drayage on testimony 50¢, drayage on trunk 50¢; express on trunk of records 35¢,.....	25...	1.35.
			Amount forwarded.....		$ 507.32

102 Miscellaneous Incidental Expense Continued.

			Amount forwarded.....		$ 507.32
Item No.				Mecartney Item No.	
	1905.				
(273)	April	1,	To telegrams, Rosenberger to Mecartney,	25...	1.78.
(274)	April	1,	To messenger service,.....	25...	0.15.
(275)	April	1,	To meals (Rosenberger and Wilcox), account work on Cambria case,.....	25...	4.80.
(276)	April	1,	To drayage on law books,.....	25...	1.25.
(277)	April	1,	To telegram, K. C. to Chicago,.....	25...	0.25.
(278)	April	1,	To locksmith, opening desk for papers,	25...	0.50.
(279)	April	1,	To telephone call, K. C. to Chicago.,....	25...	2.50.
(280)	April	17,	To telegrams,.....	26...	7.84.
(281)	April	19,	To expense H. S. Mecartney, Chicago to K. C. 4/19-21,.....	27...	31.50.
(282)	April	19,	To cash paid for court costs, Cambria case,.....	28...	3.00.
(283)	April	19,	To telegrams,.....	28...	2.83.
(284)	April	19,	To MacDonald, copy Knott letter,.....	28...	25.00.
(285)	April	19,	To long distance call, K. C. to Chicago,..	28...	2.75.

(286) May	5,	To H. S. Mecartney, expense Chicago to K. C., April 30th-May 5th, inc.,	29...	54.45.
(287) May	10,	To Barnard & Miller, printing report on litigation,	30...	1.00.
(288) May	10,	To Barnard & Miller, printing second report on litigation,	31...	5.25.
(289) June	12,	To H. S. McCartney, expense trip Chicago to K. C., June 6-8th,	32...	47.50.
(290) June	12,	To telegrams,	33...	2.05.
(291) June	23,	To H. S. Mecartney, expense trip Chicago to K. C.,	35...	46.50.
(292) July	8,	To H. S. Mecartney, expense trip Chicago to Kansas City,	37...	41.93.
(293) July	10,	To express charges (5 items)	38...	2.35.
(294) July	10,	To index to record, Cambria case,	38...	2.45.
(295) July	10,	To telegrams (4 items),	38...	2.60.
(296) July	10,	To Thos. E. Moore, for trunk for shipment of record,	38...	5.50.
		Amount forwarded		$ 803.05

103 Miscellaneous Incidental Expense Continued.

		Amount forwarded		$ 803.05
Item No.			Mecartney Item No.	
1905.				
(297) July	10,	To drayage on record,	38...	0.25.
(298) Aug.	19,	To express, Chicago to K. C.,	39...	1.00.
(299) Aug.	26,	To telegrams,	40...	2.00.
(300) Aug.	26,	To telegrams,	41...	2.04.
(301) Sept.	12,	To H. S. Mecartney, expense trip Chicago to K. C. 9/12,	43...	13.35.
(302) Sept.	14,	To telegrams, Rosenberger to Mecartney (2 items),	42...	0.56.
(303) Sept.	14,	To A. D. Flinton, services searching for record of drafts drawn by K. C. Sub. Belt Co., etc.,	42...	20.00.
(304) Sept.	14,	To drayage (2 items), ...50¢ messenger service (2 items), ...60¢	42...	1.10.
(305) Sept.	14,	To Postal Tel. & Cable Co., cablegram to Kuhn & Co., London,	42...	10.20.
(306) Oct.	4,	To express on pgk., K. C. to Chicago,	45...	0.25.
(307) Oct.	12,	To H. S. Mecartney, expense trip Chicago to K. C., Oct. 9-12th, inc.,	46...	19.80.
(308) Oct.	12,	To telegram to Johnson, Philadelphia	47...	0.45.
(309) Oct.	18,	To expenses of A. M. Strong, Atty., assistant to H. S. Mecartney, while in Kansas City, 4 weeks,	48...	91.35.
(310) Oct.	19,	To expense H. S. Mecartney, Chicago to Kansas City, Oct. 17-19,	49...	71.50.
(311) Oct.	28,	To telegrams,	50...	0.60.
(312) Nov.	6,	To express on record, Chicago to K. C.,	51...	1.15.

(312) Nov.	12,	To drayage on books,.....	52...	0.70.
(314) Nov.	13,	To H. P. Wright, time and trouble in attending as witness before Special Master, ...	52...	75.00.
(315) Nov.	13,	To drayage on record,.....	52...	0.35.
(316) Nov.	13,	To telegram, Rosenberger to Mecartney,	52...	0.46.
(317) Nov.	13,	To J. C. Rosenberger, railroad fare Kansas City to Chicago,.....	52...	15.00.
(318) Nov.	13,	To J. C. Rosenberger, expense trip Aurora to K. C. (railroad fare, meals, and incidentals),.....	52...	21.30.
		Amount forwarded.....		$ 1,151.66

104 Miscellaneous Incidental Expense Continued.

		Amount forwarded.....		$ 1,151.66
Item No.			Mecartney Item No.	
	1905.			
(319) Nov.	15,	To telegrams,.....	53...	2.94.
(320) Nov.	15,	To expenses A. M. Strong, Atty., assistant H. S. Mecartney, in Kansas City Oct. 15-Nov. 15,.....	54...	64.00.
(321) Nov.	17,	To cost of mailing opinion of C. O. Tichenor to directors and others,.....	56...	2.00.
(322) Nov.	20,	To express charges,.....	57...	0.35.
(323) Nov.	24,	To express, Chicago to K. C.,.....	59...	0.55.
(324) Nov.	25,	To H. S. Mecartney, expense trip Chicago to K. C., Nov. 23-25,.....	60...	73.60.
(325) Nov.	29,	To postage and express on briefs, etc.....	61...	2.18.
(326) Dec.	16,	To express on 2 trunks of records, K. C. to Chicago,.....	64...	4.10.
(327) Dec.	18,	To H. S. Mecartney, expense trip Chicago to K. C., Dec. 18-20/05,.....	65...	14.70.
(328) Dec.	20,	To express on record, Chicago to K. C.,..	66...	1.20.
(329) Dec.	20,	To telegrams,.....	67...	2.19.
(330) Dec.	29,	To telegrams, Rosenberger to Mecartney, (2 items),.....	68...	0.89.
(331) Dec.	29,	To L. Heynecker, for cablegram to Holland,.....	68...	7.00.
(332) Dec.	29,	To express on papers from New York,.....	68...	1.60.
(333) Dec.	29,	To J. C. Rosenberger, expense trip K. C. to Chicago, Detroit, and New York, Dec. 7-16/05,.....	68...	178.50.
(334) Dec.	31,	To telegrams,.....	70...	2.72.
	1906.			
(335) Jan.	3,	To express on papers,.....	71...	0.50.
(336) Jan.	6,	To express on papers, K. C. to Chicago,	72...	1.75.
(337) Jan.	13,	To H. S. Mecartney, trip Chicago to St. Louis, Jan. 10-13/06,.....	73...	29.65.
(338) Jan.	17,	To H. S. Mecartney, exp. trip Chicago to St. Louis, Jan. 14-17/06,.....	74...	36.25.

(339) Jan.	22,	To express on 2 trunks of records,.....	76...	4.30.
(340) Feb.	5,	To H. S. Mecartney, exp. trip Chicago to Kansas City (3 days),.....	80...	38.42.
(341) Feb.	24,	To H. S. Mecartney, exp. trip Chicago to Kansas City (2 days),.....	81...	39.07.
(342) Feb.	21,	To telegrams (15 items),.....	82...	6.87.
		Amount forwarded.....		$ 1,666.89

105 Miscellaneous Incidental Expense Continued.

Amount forwarded..... $ 1,666.89

Item No.			Mecartney Item No.	
1903.				
(343) Feb.	21,	To express charges (2 items),.....	82...	1.25.
(344) Feb.	21,	To Hurry-up Transfer Co., drayage on record,.....	82...	0.75.
(345) April	3,	To express 2 packages, and 1 telegram,..	83...	1.50.
(346) April	21,	To H. S. Mecartney, exp. trip Chicago to Kansas City,.....	84...	80.30.
(347) May	8,	To express charges on record.....	86...	1.40.
(348) May	8,	To Franklin Hudson Publishing Co.,.....	86...	0.25.
(349) May	8,	To Wulser Contracting Co., for cabinet for records,.....	86...	10.00.
(350) May	8,	To rent of typewriter for 2 months, acct. work on record, Cambria case,.....	86...	1.50.
(351) May	8,	To Hurry-up Transfer Co., drayage,.....	86...	0.50.
(352) May	8,	To R. B. Cone, New York, for time and trouble in attending as witness and giving deposition,.....	86...	25.00.
(353) May	8,	To expense trip J. C. Rosenberger to Hinsdale,.....	86...	1.11.
(354) May	8,	To express on record, Chicago to K. C.,..	87...	1.50.
(355) May	18,	To telegrams,.....	89...	1.14.
(356) May	19,	To H. S. Mecartney, expense trip Chicago to Kansas City (3 days),.....	90...	46.90.
(357) May	26,	To express on three packages,.....	91...	0.80.
(358) June	1,	To express on papers to New York,.....	94...	0.32.
(359) June	7,	To H. S. Mecartney, exp. trip to Philadelphia and New York,.....	95...	47.75.
(360) June	15,	To express on papers to New York,.....	95...	1.23.
(361) June	21,	To H. S. Mecartney, exp. trip Chicago to Kansas City (3 days),.....	100...	19.40.
(362) June	21,	To telegrams,.....	101...	2.18.
(363) June	20,	To H. S. Mecartney, exp. trip Chicago to Kansas City (4 days),.....	102...	78.05.
(364) Aug.	18,	To telephone call to Excelsior Springs,..	103...	0.20.
(365) Aug.	18,	To telegrams (14 items),.....	103...	11.90.
(366) Aug.	18,	To I. L. Broadwin, New York, services in re New York depositions,.....	103...	15.00.
(367) Aug.	18,	To telegrams,.....	104...	7.62.
		Amount forwarded.....		$ 2,024.44

106 Miscellaneous Incidental Expense Continued.

Amount forwarded.....$ 2,024.44

Item No.				Mecartney Item No.	
	1906.				
(368)	Aug.	18,	To H. S. Mecartney, exp. 2 trips Chicago to K. C., between July 4th and 14th, in argument of case (9 days in all),....	105...	75.00.
(369)	Oct.	25,	To H. S. Mecartney, exp. trip Chicago to Kansas City (2 days).....	106...	37.50.
(370)	Nov.	23,	To expense trip J. C. Rosenberger, K. C. to Chicago, Nov. 20-22,.....	107...	39.50.
(371)	Dec.	20,	To telegram, Chicago to K. C.,.....	108...	0.30.
	1907.				
(372)	Jan.	10,	To H. S. Mecartney, trip Chicago to K. C., 3 days,.....	109...	39.40.
(373)	Feb.	12,	To telegrams, express, and postage,.....	110...	2.10.
(374)	Feb.	12,	To H. S. Mecartney, expense trip to K. C. (2 days).....	111...	66.25.
(375)	May	20,	To H. S. Mecartney, expense trip to K. C. (2 days),.....	115...	21.55.
(376)	May	24,	To H. S. Mecartney, expense trip to Kansas City (2 days),.....	116...	66.35.
(377)	June	5,	To H. S. Mecartney, expense trip to Kansas City,.....	119...	12.60.
(378)	June	14,	To H. S. Mecartney, expense trip to Kansas City,.....	121...	65.25.
(379)	June	18,	To express and postage,.....	125...	1.90.
(380)	June	20,	To telegrams,.....	126...	1.62.
(381)	June	20,	To express and postage,.....	127...	1.93.
(382)	June	26,	To H. S. Mecartney, exp. trip to Kansas City, June 21-23,.....	129...	16.75.
(383)	June	26,	To Postage on briefs to directors,.....	129...	0.50.
(384)	July	7,	To telegrams,.....	130...	1.85.
(385)	Nov.	18,	To telegram,.....	131...	1.21.
(386)	Nov.	23,	To H. S. Mecartney, exp. trip Chicago to Kansas City, Nov. 21-22,.....	132...	23.20.
(387)	Dec.	1,	To H. S. Mecartney, exp. trip Chicago to St. Louis,.....	133...	19.60.
(388)	Dec.	14,	To H. S. Mecartney, exp. trip to K. C. and return, Dec. 14-16,.....	134...	34.20.
(389)	Dec.	18,	To express on papers to K. C.,.....	135...	0.75.
(390)	Dec.	19,	To express on papers to Judge McPherson,.....	138...	0.45.

Amount forwarded.....$ 2,557.25

107 Miscellaneous Incidental Expense Continued.

Amount forwarded.....$ 2,557.25

Item No.				Mecartney Item No.	
	1907.				
(391)	Dec.	28,	To telegrams,.....	139...	1.47.
	1908.				
(392)	Jan.	8,	To book-case for Judge Douglass, for Master's Record,.....	141...	10.00.
(393)	Jan.	8,	To messenger service,.....	141...	0.50.
(394)	Jan.	8,	To telegrams (7 items),.....	141...	3.66.
(395)	Jan.	8,	To long distance call to Hinsdale, Ill..	141...	2.75.
(396)	Jan.	8,	To messenger service, taking books to Judge Douglass,.....	141...	5.00.
(397)	Jan.	8,	To Geo. H. Roberts, steno. services drawing replies in State Court cases,.....	141...	1.00.
(398)	Jan.	8,	To J. C. Rosenberger, expense trip K. C. to St. Louis, 11/25-27/1907,.....	141...	18.75.
(399)	Jan.	24,	To H. S. Mecartney, expense trip to Kansas City, Jan. 21-24,.....	143...	37.60.
	1908.				
(400)	Jan.	29,	To telegrams,.....	145...	1.97.
(401)	Feb.	18,	To 2 telegrams,.....	146...	1.05.
(402)	Feb.	24,	To telegram from K. C.,.....	147...	0.50.
(403)	Feb.	17,	To H. S. Mecartney, expense trip Chicago to Kansas City (3 days),.....	148...	38.14.
(404)	Feb.	27,	To H. S. Mecartney, expense trip Chicago to Kansas City (2½ days),.....	149...	38.35.
(405)	Feb.	29,	To telegrams from K. C.,.....	150...	1.44.
(406)	March	6-14,	To express on papers.....0.35 Feb. telegrams.....1.50 express on brief.....0.60 cases to contain records.....2.85	151...	5.30.
(407)	March	20,	To telegram from K. C.,.....	152...	0.40.
(408)	March	26,	To H. S. Mecartney, expense trip Chicago to K. C., March 23-29,.....	156...	76.30.
(409)	March	26,	To express on papers,.....	157...	0.50.
(410)	March	26,	To sundry telegrams,.....	160...	5.70.
(411)	March	26,	To Kansas City View Co., for photographs of record for use on appeal,.....	162...	19 00.
	1909.				
(412)	June	25,	To E. P. Gates, expense trip K. C. to St. Paul, Minn., to attend U. S. Circuit Court of Appeals, suit Guardian Trust Co. vs. K. C. S. Ry. Co., June 15-17, 1908,.....Voucher No. 2500...		28.00.
			Amount forwarded.....		$ 2,849.13

108 Miscellaneous Incidental Expense Continued.

Amount forwarded.....$ 2,849.13

Item No.				Voucher No.	
	1909.				
(413)	June	25,	To E. P. Gates and Geo. H. English, Jr., exp. trip to St. Louis on first setting of Guardian Trust Co. vs. K. C. S. Ry. Co. in U. S. Circuit Court of Appeals, Dec. 13-15, 1908,.....	2500...	60.00.
(414)	June	25,	To E. P. Gates and Geo. H. English, Jr., exp. trip to St. Louis, on hearing Guardian Trust Co. vs. K. C. S. Ry. Co. in U. S. Circuit Court of Appeals, Jan. 1-5, 1909,.....	2500...	65.00.
	1911.				
(415)	May	31,	To Gates & English, railroad fare and expenses at argument of appeal from final decree, Guardian Trust Co. vs. Cambria Steel Co., May 24-28th, inc.,	2773...	105.50.
(416)	June	29,	To Gates & English, expenses trip St. Paul, Minn., June 20-22, inc., to attend hearing of motion of Shedd et al. in Guardian Trust Co. vs. Cambria Steel Co., appeal,.....	2787...	74.00.
	1912.				
(417)	Jan.	16,	To Gates & English, expense trip to St. Louis to attend United States Circuit Court of Appeals 12/4/11, Belt and K. C. S. Ry. Co. suits,.....	2881...	25.00.
(418)	Jan.	18,	To Haff, Meservey, German & Michaels, 2 telegrams Cambria case,.....$1.87, express on briefs, " "..... .50	2884...	2.37.
(419)	Nov.	19,	To Gates & English, expense trip St. Louis 10/26/12, to inspect opinion of U. S. Circuit Court of Appeals,.....	2998...	50.00.
(420)	Dec.	6,	To Haff, Meservey, German & Michaels, account telegram Cambria case,.....	3007...	0.75.
	1913.				
(421)	Jan.	31,	To expense Gates & English and D. J. Haff, attending hearing Belt case in U. S. Circuit Court of Appeals,.....	3025...	146.05.
(422)	Feb.	24,	To Gates & English, expense trip St. Louis to attend U. S. Circuit Court of Appeals, Cambria case, 1/19/13,.....	3036...	18.00.
(423)	Dec.	20,	To Gates & English, expense trip St. Louis to examine and make synopsis of opinion of U. S. C. C. A. in Guardian Trust Co. vs. K. C. S. Ry. Co.....	3131...	50.00.

	1914.				
(424)	May	24,	To Gates & English, expense trip to St. Louis, in respect to perfecting record and allowing of appeal, etc., Jan. 22-23, 1914,.....	3162...	58.00.
			Amount forwarded.....		$ 3,503.80
109			Miscellaneous Incidental Expense Continued.		
			Amount forwarded.....		$ 3,503.80
Item No.				Voucher No.	
	1914.				
(425)	May	14,	To Gates & English, expense trip to Washington, D. C., to examine record to Supreme Court, prepare for hearing, etc., March 21-29, 1914,.....	3162...	260.40.
(426)	May	14,	To Gates & English, expense trip to Washington, D. C., to submit motion to dismiss and resist application for certiorari and intervention, April 22-29, 1914,.....	3162...	252.00.
	1915.				
(427)	Nov.	9,	To Gates & English, expense trip to St. Louis to consult with F. W. Lehmann in preparing briefs in Belt case,..	3238...	54.00.
(428)	Dec.	31,	To expenses Gates & English, F. W. Lehmann, and others, to Washington, D. C., to attend hearing U. S. Supreme Court, K. C. Sub. Belt R. R. Co. case,	3249-3250-	300.17.
			Total Miscellaneous Incidental Expense.....		$ 4,370.37

Credits Against Miscellaneous Incidental Expense:

Item No.				
(429)	By amount refunded by Western Passenger Assn. on six 2M. mile tickets, $19.50 on each,.....		$ 117.00.	
	Mecartney Credit item No. 1-			
(430)	By proportion of telegrams charged to Channel & Dock case, Mecartney credit, Item No. 2.....		6.80.	
(431)	By reduction account hotel bills, Mecartney Credit Item No. 3.....		40.00	
(432)	By amount transferred to general account, being proportion of railway fare, berths, meals, and hotel expenses in attending seven meetings of the Executive Committe at Kansas City, Mecartney Credit Item No. 4.....		200.00	
	1906.			
(433)	July	16,	By refund on mileage ticket, Mecartney Credit Item No. 5.....	19.50.
(434)	July	18,	By refund on mileage ticket, Mecartney Credit Item No. 6.....	19.50.

(435)	Aug. 27,	By refund on mileage ticket, Mecartney Credit Item No. 8.....	9.16.	
(436)	Oct. 26,	By refund on mileage ticket, Mecartney Credit Item No. 9.....	19.50.	
	1907.			
(437)	June 15,	By refund on mileage ticket, Mecartney Credit Item No. 11.....	9.50.	
(438)	June 26,	By refund on mileage ticket, No. 12.....	9.50.	
(439)	Dec. 2,	By refund on " " " 14.....	9.50.	
		Total Credits.....		459.96
		Total Miscellaneous Incidental Expense after deducting Credits		$3,910.41

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Recapitulation.

Group I:		
Master's Fees.....	$ 8,553.50	
Reporting Testimony before Master, Etc.....	$ 6,697.20	
Other Court Costs, Exemplified Copies of Records, (after deducting Credits of $980.76),.....	$ 3,419.49	
Total Group I.....		$18,670.19
Group II:		
Counsel Fees,.....	$ 299,137.30	
Printing Briefs, Etc.,.....	$ 1,579.04	
Expert Accountants, Etc.,.....	$ 13,455.35	
Premiums Paid on Bonds,.....	$ 1,221.25	
Miscellaneous Stenographic Expense,.....	$ 589.62	
Miscellaneous Incidental Expense (after deducting Credits of $459.96),.....	$ 3,910.41	
Total Group II.....		$319,892.97
Grand Total.....		$338,563.16

Received copy hereof this 19th day of October, 1923.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
By F. H. Moore
Cyrus Crane A. F. Smith
Its Solicitors.

CAMBRIA STEEL COMPANY
By R. E. Ball
Its Solicitor.

111 "Exhibit D."

Supplemental Claim of H. C. Flower, Receiver of Guardian Trust Company, for Reimbursement for its Costs and Expenses.

In the District Court of the United States for the Western Division of the Western District of Missouri.

Cambria Steel Company, Complainant,
vs.
Guardian Trust Company et al., Defendants.

Swinney, Receiver, et al., Complainant.
No. 2468. vs. In Equity.
Cambria Steel Company, et al., Defendants.

The Kansas City Southern Railway Company, Complainant,
vs.
Guardian Trust Company et al., Defendants.

Now comes Guardian Trust Company, and files this, its supplemental claim for reimbursement for its costs and expenses, filed with leave of the Special Master, Hon. H. D. Ashley, as follows:

February 14, 1924.

Cambria Steel Company and Kansas City Southern Railway Company, Debtors,

To Henry C. Flower, Receiver of Guardian Trust Company:

Group I.

Costs As Between Party And Party.

Item No.		Credit.	
(440)	1909 Oct. 27.	By check from Messrs. Gates & English, account costs received from Kansas City Southern Ry. Co. account injunction order of Judge McPherson reversed on April 2, 1909 by U. S. C. C. A. (See 171 Federal 43), costs of which appeal were taxed against Kansas City Southern Ry. Co. (See entry on Guardian Trust Co. Cash Book, page 240, under date Oct. 27, 1909; Trust Company's ledger, page 90).....	$1,482.55

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Group II.

Costs And Expenses As Between Solicitor And Client.

Item No.				Voucher No.	
1902.					
(441)	Oct.	8,	To amount allowed as attorneys' fees by Judge Thayer, by paragraph 6 of his order of Oct. 11, 1902, discharging Wash Adams as Receiver of Guardian Trust Co. in Bierce case, to Wollman, Solomon & Cooper, for services rendered Judge F. M. Black, Receiver, and Wash Adams, his successor, in and about effort to protect and realize on certain items of collateral security held by Guardian Trust Co. as collateral to indebtedness of K. C. Sub. Belt R. R. Co. to Guardian Trust Co., contested by Cambria Co., Kansas City Southern Ry. Co., and Belt Receivers, in this cause during period of receivership of Messrs. Black and Adams, Nov. 30, 1900, to October 11, 1902,—Trust Co. Voucher No.....	145	$ 3,500.00
1904.					
(442)	Jan.	20,	To amount paid Wollman, Solomon & Cooper, Attorneys for Guardian Trust Co., for further services rendered in the matters last aforesaid, being settlement with them in full to that date. (See Guardian Trust Co. Ledger, page 100, covered by Trust Co. Voucher No. 480, missing,.....	480	1,500.00
1905.					
(443)	Jan.	14,	To amount paid to N. S. Mecartney, $1500.00 attorneys' fees, and $277.51 expenses, for examining into the status of the Cambria Steel Co. litigation and Port Arthur, Channel & Dock Co. litigation— (See Trust Co. voucher No. 802; also minutes of meeting of Executive Committee of Guardian Trust Co. held Nov. 4, 1904, set forth at Page 2334 of the record on appeal in U. S. C. C. A. in case Guardian Trust Co. Et Al., Appellants, vs. E. A. Shedd and C. B. Shedd, Appellees; also minutes of same Committee of meeting held Dec. 7, 1904, set forth at Page 2386 et seq. of same record; and see copy of Mr.		

Mecartney's report, dated Dec. 1, 1904, on said litigation, set forth at Page 556 in printed abstract of the record in suit H. S. Mecartney vs. Guardian Trust Co.,	802..		1,777.51
Total Items in Group II. of Supplemental Claim..			6,777.51
Amount of items in Group II. carried forward from statement heretofore filed with the Master, dated October 15, 1923,		$	319,892.97
Total Group II			$326,670.48
Amount Forward		$	326,670.48
113 Amount Forward		$	326,670.48
Amount of items in Group I. carried forward from said statement dated Oct. 16, 1923, filed with the Master,	$18,670.19		
Less amount of above Credit in Group I. for costs refunded on injunction appeal,	$ 1,482.55		
	$17,187.64		
			17,187.64
Grand Total			$343,858.12

Received copy hereof this 15th day of February, 1924.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
F. H. Moore
By Cyrus Crane A. F. Smith
Its Solicitors.

CAMBRIA STEEL COMPANY
By R. E. Ball
Its Solicitor.

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114 (Exceptions of Guardian Trust Company to Report of Special Master.)

In the District Court of the United States for the Western Division of the Western District of Missouri.

Cambria Steel Company, Complainant,
vs.
Guardian Trust Company et al., Defendants.

Swinney, Receiver, et al., Complainant,
No. 2468. vs. In Equity
Cambria Steel Company et al., Defendants.

The Kansas City Southern Railway Company, Complaint,
vs.
Guardian Trust Company et al., Defendants.

Now comes Guardian Trust Company, by Henry C. Flower, its Receiver, hereinafter called the Trust Company, and excepts to the report of Hon. H. D. Ashley, Esq., Special Master, filed in this cause on the 15th day of September, 1924, and for cause of exception shows:

(Legend; References to items are the items as numbered and set forth in the itemized statement of account, dated October 15, 1923, filed by the Trust Company with the Special Master October 23, 1923, and in the supplemental statement of said account dated February 14, 1924, filed with the Master.

References to vouchers are the vouchers specified in said statement of account of the Trust Company.

Page references, except where otherwise stated, are to the transcript of the testimony taken by said Master and returned with said report.

The record of proceedings and testimony before Shannon C. Douglass, deceased, former Master in this cause, filed with said Douglass' report in 1910, is referred to as the "Douglass record."

First: Items 4-32, inclusive, being moneys paid by the Trust Company to H. A. Jetmore, Court Reporter, for taking and transcribing the record of proceedings had before Shannon C. Douglass Special Master in this cause, aggregating $6,674.70:

The Trust Company excepts to the allowance of these items to the extent only of $2725.77, and to the disallowance of them as to the balance claimed of $3,948.93 not only as costs
115 between party and party, but as other expense of litigation; whereas the Master should have allowed said items to the full extent claimed, to-wit, for $6,674.70, as costs between party and party, and in any event the Master should have allowed said balance as a necessary expense of the Trust Company in the litigation described in the order appointing the Master, for reasons following:

(a) The full amount of these items and each of them were taxable court costs as between party and party. The payment of them by the Trust Company, and the necessity therefor, is shown by the vouchers given by it to Jetmore in payment of his bills, and by his bills attached to said vouchers, set forth at pages 46 to 87. The nature and magnitude of the case, as shown by the pleadings herein, the unusual size of the record of evidence taken by said Douglass, contained in 57 volumes, totaling 35,554 pages of testimony; the various orders made by this court allowing fees to said Douglass as Special Master (875, 878, 881); and the evidence taken before the Master herein, show that the case could not have been presented to Master Douglass or decided by him or by the court without said testimony being taken and transcribed and copies of the transcript furnished not only to the Master but to parties litigant, and that the fees paid to said Jetmore, as specified in said items and supporting vouchers, were for a single item of service, namely, the furnishing of said transcript to court and Master and requisite counterparts thereof to parties litigant. And it was error for the Master to hold that merely because said Jetmore, in obtaining progress payments from the parties account his charges, billed them at one rate for original transcript and at another rate for such counterparts, according to which party had introduced the testimony transcribed, that the Master is bound by such method of the stenographer of obtaining such advances against his fees. It is shown by the orders of the court, making progress allowances of fees to the Special Master, that throughout the cause the Trust Company was being required to advance to court officers one-third of their fees and the Southern Company and Cambria Company two-thirds thereof, and said order provides that "the question of how said allowance in favor of said Master, as well as other
116 items of costs and expenses herein, shall be taxed and charged against said parties" should await the final determination of the cause (see court orders, Record 875, 878, and 881; see also testimony of Jetmore, 596-602, 610). It was therefore error to disallow these Jetmore disbursements of $6,674.70 as court costs between party and party and to limit such allowance to $2725.77.

(b) But even were the Master right in holding that these items, to the extent of the disallowed balance of $3,948.93, paid to Jetmore were not costs between party and party (and we contend they were such costs), still the balance of the items claimed, to-wit, $3,948.93, were clearly necessary expenses of the litigation, which, in any event, should, by the

express mandate of the order of reference, have been allowed as such, whereas the Master disallowed said balance not only as costs as between party and party, but also as a necessary expense of litigation, thus depriving the Trust Company of reimbursement therefor. This was error. These items paid by the Trust Company for transcript of testimony before Master Douglas were a necessary expense of the litigation, and under the opinion of this court and the order made pursuant thereto appointing said Master, and under the evidence, it was the duty of the Master to allow these items in full as costs between party and party, and, in any event, as a necessary expense of litigation, whereas the Master failed to allow them either as the one kind of costs or the other, except only to the extent of $2725.77, wherein the Master erred (see evidence above cited.)

Second: Items 33, 35-40, inclusive, 41-56, inclusive, 58-67, inclusive:

The Trust Company excepts to the disallowance of these items as costs between party and party separately and as a group. The Master states he disallows all of these items for one and the same reason, which is set forth by him under the head of item 135 in his report; the reason so as-
117 signed for disallowing these items as costs between party and party is shown by said portion of his report to be founded on manifest mistake.

It there appears in said Master's report that merely because the items of costs between party and party specified in this exception were included in the itemized statement of expenses annexed to the petition of H. S. Mecartney in his State court suit against the Trust C mpany, and were included in the judgment recovered by him against the Trust Company in said suit, the Master erroneously concluded that the items herein specified were not costs between party and party, disallowed them as such, and allowed them only as so-called costs between solicitor and client. This was error. It appears from said itemized statement of account of said Mecartney, sued on by his petition in said State court suit, and from the judgment of the State court rendered thereon, that the said State court judgment against the Trust Company included therein all expenses laid out by Mr. Mecartney on behalf of the Trust Company without regard to whether they were costs between party and party or other expenses necessary to the conduct of the litigation (Rec. 235-255.) By

paying said State court judgment the Trust Company paid all of said expenses so sued for and recovered by Mecartney. It was the plain duty of the Master, under the order of reference, to take and state an account of the Trust Company's court costs and other expenses; said order expressly directed the Master to "set out the taxable court costs as between party and party separately from the other expenses of the Guardian Trust Company hereinabove mentioned." This duty the Master failed to perform. Instead of so doing, and ascertaining which of said costs enumerated in said Mecartney's statement in his State court suit were costs between party and party, and which thereof were other expenses of this litigation, the Master erroneously allowed all of the items in Mecartney's account as so-called costs between solicitor and client. The items first above specified in this exception were in fact costs between party and party and taxable as such; no finding to the contrary is made by the Master, but they are nevertheless disallowed by him as such.

118 These items represent court costs, fixed by statute, actually paid by the Trust Company, through Mecartney, to the officers of this and appellate courts for making and printing the record in successful appeals taken herein by the Trust Company from decrees of this court, in the taking of despositions introduced and read in evidence before Master Douglass, and the like, and exception is taken to their disallowance as costs between party and party and to their classification as costs between solicitor and client.

Third: Items 41, 68, 71-73, inclusive, and 77, being court costs paid by the Trust Company to officers of this court and of Appellate courts for making written and printed transcript of the record on appeal as required by the rules of such Appellate courts:

The Trust Company excepts to the disallowance of this group of items separately and as a group as costs between party and party, and to their disallowance by the Master not only as such costs but as costs between solicitor and client. They were clearly costs between party and party (see the vouchers specified in these items of charge, viz., Item 41, p. 89; Item 68, p. 91; Item 71, p. 94; Item 72, p. 95; Item 73, p. 96; Item 77, p. 101).

The sole reason assigned by the Master for the disallowance of these items as costs between party and party is assigned by him as follows:

"Disallowed by the Master as the Master is of opinion that he has no power to retax costs already taxed in the United States Court of Appeals."

This conclusion of the Master is erroneous, because he was directed by the order of reference to ascertain the amount of these costs from the files and state them without regard to whether they had been taxed by the Court of Appeals or not, so that the court could conveniently include in its decree the unpaid court costs properly recoverable by the Trust Company without need of searching through the files or Clerk's records for that purpose. The order of reference does not purport to authorize the Master to tax any costs whatever, but simply requires him to ascertain the court costs separately from other expenses of litigation and to state and file separate account of same, without regard to whether said costs have heretofore been taxed or not. The refusal, therefore, of the Master to make any finding touching these items and to ascertain and state the amount thereof, imposes upon this court a duty which it was the purpose of the order of reference to avoid, and the Master erred in failing to perform it. Attention is directed to the fact that while some of the items in this group are included in Mecartney's expense account recovered by him from the Trust Company in his State court suit, many of them, amounting to considerable sums, are not so included, to-wit, items No. 41, 68, 71-73, inclusive, and 77, aggregating $3,244.05, being direct payments made by the Trust Company by its own checks for fees of court officers for furnishing record on appeals from decrees of this court, required by rules of appellate courts. By the action of the Master in excluding and disallowing said items the Trust Company is prevented from obtaining reimbursement for such court costs not only as costs as between party and party, but as other expenses held recoverable by the Trust Company by this court and by the order appointing the Master, to which action by the Master the Trust Company excepts.

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Fourth: The Trust Company excepts to the allowance and finding of the Master, as costs between party and party, in favor of the Trust Company, in the total sum of $11,499.32, as inadequate and insufficient under the evidence, whereas the Master should have allowed as such costs the full amount claimed under the heading of Group L. in said account, to-wit, the sum of $18,670.19.

Fifth: Interest: The Trust Company excepts to the denial by the Master of the Trust Company's prayer that the

Southern Company and Cambria Company be charged with interest at the rate of six per cent. per annum on the moneys paid out by the Trust Company for court costs and other expenses specified in items 1-443, inclusive, of the Trust Company's claim, and that such interest be charged from the date on which each disbursement was made to date, because:

120 (a) Said disbursements were made and became liquidated from the date on which they were made.

(b) Because, as found by this court and by decisions of appellate courts, the Trust Company was wrongfully required to make said disbursements by the wrongful acts of the Cambria Company and Southern Company in instituting and prosecuting the baseless litigation described and characterized in the opinions of the United States Court of Appeals and of this court in its memorandum opinion filed in this cause in June, 1923, and the Cambria Company and Southern Company are therefore in no position to claim that demand for reimbursement should have been made by the Trust Company, such demand being implied by law.

(c) Because principles of equity and good conscience require that such interest be allowed if the Trust Company is to be made whole on account of such costs and expenses yhich it was thus required to pay by the wrongful conduct of its adversaries therein.

(d) Because the Master erred in concluding that merely because of the large amount of costs and expenses wrongfully inflicted on the Trust Company by its said adversaries, and for which, under the decisions of this and appellate courts, the Southern and Cambria companies rendered themselves liable, this in any wise affects the duty and obligation of the Cambria Company and Southern Company to pay such interest, or the duty of the Master to allow same.

(e) Because the Master erred in holding that the Southern Company and Cambria Company were not responsible for the delays of the litigation, said finding being contrary to the findings of this court in its memorandum opinion filed herein June ...., 1923, and the order appointing the Master, as well as the findings of the appellate courts which have passed on this cause.

(f) Because the Master erred in holding that the disallowance of such interest was warranted "by the surrounding circumstances in this portracted litigation," for that by the

decision of this court and of the appellate courts in
121 this cause it has repeatedly been held that this protracted litigation, instituted by the Cambria Company and the Southern Company in their own names or in the names of others, was baseless and unwarranted, and that the costs and expenses herein mentioned were wrongfully inflicted upon the Trust Company, and by the order of reference and the opinion of this court, made part thereof, it was held that all such costs and expenses were justly chargeable against the Southern Company and Cambria Company, and the Master, in holding that the "surrounding circumstances" relieved the said parties from the payment of interest, went beyond his province and contrary to the order of his appointment (see opinion U. S. Circuit Court of Appeals, 210 Federal 696; see also opinion of this court filed in June, 1923, appointing Special Master.)

Sixth: Items 83-107, Inclusive, Totaling $11,149.92, Being Stated Monthly Sums Paid To J. McD. Trimble, Counsel For The Trust Company In This Cause, During The Period October 31, 1902, To October 25, 1904, Inclusive:

The Trust Company excepts to the disallowance by the Master of this group of items separately and as a group. The evidence showed that during said period all of Mr. Trimble's time was engrossed in defending, as counsel on behalf of the Trust Company, against the litigation commenced herein by the Southern Company and the Cambria Company, and that the pendency of said litigation was the sole reason for his employment (see testimony of Jetmore, 601-615; C. A. Braley, Rec. 270-310; S. B. Willey, Rec. 408-488; J. C. Rosenberger, Rec. 519-520; Douglass record, Vols. I. to XV.; and see the docket entries and files in this cause showing the pleadings filed and proceedings participated in by Judge Trimble during said period).

The Master erred in holding that merely because Judge Trimble was paid these items as a regular monthly salary, fixed by the directors of the Trust Company in the interest of the economical conduct of its litigation, and this relieved the Cambria Company and Southern Company from reimbursing the Trust Company for the amount so paid in salary; it appearing from said evidence that the Trust Company
would not have employed Judge Trimble at such
122 salary except on his agreement to give his whole time to said litigation, and that he did give his whole time thereto, and no finding to the contrary is made by the Master. It should have been held by the Master that inasmuch as the

Trust Company would not have employed Judge Trimble on a salary except for his consenting to give his whole time to said litigation, and as he faithfully discharged said obligation, the Trust Company is entitled to reimbursement for the salary items so paid.

Seventh: Item 180, being pro-rata portion of salary paid to S. B. Willey, expert accountant, total $8,093.35, for services for testifying as expert witness before S. C. Douglass, Special Master herein, and for preparing elaborate tabulations and data for use of Receiver and counsel touching state of the account between the Trust Company and various companies involved in the accounting herein, said services extending continuously from December 1, 1900, to December 1, 1904.

The Trust Company except to the disallowance of said item by the Master as a necessary expense of litigation recoverable by the Trust Company, for that the evidence showed that more than half of Mr. Willey's time was engrossed in rendering said services during the period December 1, 1900, to June 1, 1901, during which period one-half of his salary is claimed, and that all of his time was so engrossed in rendering said services from June 1, 1901, to December 1, 1904; that all of said services were necessary to a proper defense by the Trust Company, that they were of an unusually exacting, arduous, and protracted character, that the Trust Company was of necessity compelled to incur said expense, and that the salary paid to said Willey would not have been paid to him except for the rendition of said services (see testimony S. B. Willey, Rec. 408-488; H. A. Jetmore, Rec. 603-615; C. A. Braley, Rec. 270-310; see Vol. 1-15 of the Douglass Record, devoted almost exclusively to said Willey's testimony and tabulations, showing the number of proceedings at which he testified, the intricacy of the accounting conducted by him; and see the vouchers showing payment of said salary, Rec. 153-154-D). The Master erred in holding that because the Trust Company by employing said Willey on a salary to perform said services made itself liable for said salary, this relieved the Southern Company and Cambria Company
123 from making reimbursement therefor. The Master's conclusion should have been just the contrary. The Master, by so holding, disregarded the evidence, which showed that Mr. Willey would not have been employed on such salary except to perform said services in this suit, that his services were vitally necessary to the proper defense of the litigation, as to which necessity for his employment the Master erroneously fails to make any finding one way or the

other, and thereby disregarded the real issue involved in this item.

Eighth: Item 181, being pro-rata portion of salary paid to Jennie L. Gott, Stenographer, total $2,690.00, for stenographic services in preparing tabulations and exhibits for use at hearings before Special Master and for the Receiver, said services extending from December 1, 1900, to December 1, 1904:

The Trust Company excepts to the disallowance of said item by the Master as a necessary expense of litigation, recoverable by the Trust Company, for that the evidence showed that more than half of said Jennie L. Gott's time was engrossed in rendering said services during the period December 1, 1900, to June 1, 1901, during which period one-half of her salary is claimed, and that all of her time was so engrossed in rendering said services from June 1, 1901, to December 1, 1904; that all of said services were necessary to a proper defense by the Trust Company, that the Trust Company was of necessity compelled to incur said expense, and that the salary paid to said Jennie L. Gott would not have been paid to her except for the rendition of said services (see testimony S. B. Willey, Rec. 384-425; C. A. Braley, Rec. 275-381; see Vol. 1-15 of the Douglass Record, devoted exclusively to said tabulations, etc.; and see the vouchers showing payment of said salary, Rec. 153-154-D.) The Master erred in holding that because the Trust Company by employing said Jennie L. Gott on a salary to perform said services made itself liable for said salary, this relieved the Southern Company and Cambria Company for making reimbursement therefor. The Master's conclusion should have been just the contrary. The Master, by so holding, disregarded the evidence, which showed that Miss Gott would not have been employed on such salary except to perform said services in this
suit, that her services were vitally necessary to the
124 proper defense of the litigation, as to which necessity
for her employment the Master erroneously fails to make any finding one way or the other, and thereby disregarded the real issue involved in this item.

Ninth: Items 423-428, Inclusive, being bills of Gates & English rendered to and paid by the Trust Company for the necessary traveling and incidental expenses of said attorneys in attending upon appellate courts in which this cause was pending, to argue this case in behalf of the Trust Company and to perform other necessary duties incident of the defense of this suit.

The Trust Company excepts to the disallowance of these items as costs between solicitor and client separately and as a group, because it was obviously necessary for the Trust Company to be represented by its counsel in the argument of its case and to attend the court at distant cities, and to attend to the proper making up of the record on appeal (see the vouchers supporting these items of expense, viz., Item 423, p. 180; Item 424, p. 181; Items 425, and 426, p. 181; Item 427, p. 135; Item 428, p. 182).

The Trust Company especially excepts to the disallowance by the Master of item 428, covering the expense of Messrs. English and Lehmann, counsel for the Trust Company, and Messrs. Lloyd and Prescott, officers of the Trust Company, in attending hearing of this cause in the U. S. Supreme Court at Washington, D. C., on the ground assigned by the Master that because the voucher includes some expense of J. A. Prescott to New York the entire item should be disallowed, whereas the Master should have found that New York is enroute to Washington and either involved no extra expense, or so small an additional expense as to be easily capable of estimation and deduction.

Tenth: Items 441 and 442, Total $5,000.00, paid to Wollman, Solomon & Cooper, for Attorneys' fees in this suit during the period November 30, 1900, to January 20, 1904, all as more fully specified in said items:

The Trust Company excepts to the disallowance by the Master of each and both of these items as costs between solicitor and client. This expense was directly occasioned by the litigation mentioned in this court's order appointing the Master. Of these attorneys' fees $3500.00 was paid under an order made by Judge Thayer in the Bierce case on October 11, 1902 (page 796, and see voucher 145, p. 732), and the remaining $1500.00 was paid January 24, 1904,
125 for the balance due these attorneys on January 20, 1904, (Leavens, pages 733-735). The evidence showed that the services of these attorneys was made necessary by the attack made by the Southern Company and the Combria Company on the Trust Company's right to retain the collateral pledged with it by the Belt Company (testimony J. C. Rosenberger, 580-585, 801; see intervening petition filed for Trust Company by these attorneys, 803-825; see also paragraph VI. Douglass report). These items should have been allowed by the Master.

Eleventh: Item 443, being for $1777.51 attorneys' fees and expenses paid to H. S. Mecartney by the Trust Company on

January 14, 1905, by its voucher No. 802, and not included by him in any amount recovered by Mecartney from the Trust Company in his State court suit;

The Trust Company excepts to the disallowance of this item by the Master. The services and expenses of Mecartney covered by this item were for investigating the status of this cause and the issues therein, and for making report thereon with his recommendations, were rendered by Mecartney and paid for by the Trust Company in the ordinary course of business as a necessary expense of this litigation, its former counsel, Mr. Trimble, having resigned as such (see Trust Company's minutes, Rec. 740-743; see voucher No. 802, Rec. 738). The Master erred in holding that this expense might have been avoided by the Trust Company, as Mr. Mecartney on prosptctive employment would probably have made the report without charge if demanded," such holding being contrary to all the evidence, and is not based on any evidence. The Master should have held that the Trust Company, having incurred this expense, was bound to pay it, and did pay it only after objection to the charge and after bargaining for and obtaining a reduction thereof (see Trust Co. minutes, 740-743). The Master further erred in disallowing said item "in view of the substantial judgment of the Supreme Court (of Missouri) allowed in full by this Master", for that this item was not included in said judgment of the Missouri Supreme Court in the Mecartney suit vs. the Trust Company, was for a distinct and separate service separately paid for by the Trust Company, and the Master erred in allowing his mind to be influenced by the amount recovered by Mecartney for other services in said State court suit, not related to the items here in question.

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Twelfth: The Trust Company excepts to the action of the Special Master in excluding from evidence the court files in equity cause No. 2483 in the District Court of the United States for the Western Division of the Western District of Missouri, entitled Bierce and others versus the Guardian Trust Company, all as set forth on pages 959-962, inclusive, of the transcript of the testimony before said Master.

Thirteenth: The Trust Company excepts to the action and ruling of the Master in excluding from evidence the record on appeal in Case No. 4859 in the District Court of the United States for the Western Division of the Western District of Missouri, in the cause entitled E. A. Shedd et al. vs. Guardian Trust Co. et al., which said record is in three printed volumes, which were identified as Exhibits 5-A, 5-B,

and 5-C, all of which is shown on page 963 of said transcript of the evidence taken before said Master. Said evidence should have been admitted, because said record contains evidence explanatory of the items contained in the Trust Company's claim filed with the Master, as, for illustration, the minutes of the Trust Company showing authorization of the disbursement, and shows the general situation making the disbursements claimed herein essential to a proper defense against the unwarranted litigation commenced by the Southern Company and the Cambria Company, and other material evidence.

Fourteenth: The Trust Company excepts to the finding of the Master that the total amount allowed and allowable for the items in Group II, of the account charged as expenses between solicitor and client is the sum of $296,520.37, said allowance being inadequate and insufficient, and the Master should have found and allowed, exclusive of interest, the total amount of such expenses to be the items claimed by the
127 Trust Company in said Group II, totaling $326,670.48, exclusive of interest, the difference between the amount last aforesaid and the amount allowed, as aforesaid, being represented by items of expense other than court costs claimed by the Trust Company and disallowed by the Master, as shown by his report.

J. D. BOWERSOCK
J. C. ROSENBERGER

Filed in District Court of United States, September 27, 1924.

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129 Exceptions of The Kansas City Southern Railway Company and the Cambria Steel Company to the report of Honorable Henry D. Ashley, Special Master, filed herein on, to-wit: September 15. 1924.

Come now The Kansas City Southern Railway Company and the Cambria Steel Company and except to the report of the Honorable Henry D. Ashley, Special Master, filed in this court and cause on, to-wit: September 15, 1924.

For convenience, The Kansas City Southern Railway Company is referred to herein as the "Kansas City Southern," the Cambria Steel Company as the "Cambria Company," and the two as the "Exceptants." The Guardian Trust Company and its receiver are referred to herein as the "Trust Company"; the "Claim of Henry C. Flower, Receiver of the Guardian Trust Company for Reimbursement of its costs

and expenses" filed before the Master on, to-wit: October 22, 1923, is referred to herein as the "Trust Company's Statement of Account", and each of the several items of said Statement of Account is referred to by the number given to it therein. Figures herein in parenthesis, unless otherwise designated, refer to the pages of the transcript of the evidence adduced before Honorable Henry D. Ashley, Special Master. The objections of the Exceptants read into the record on Pages 7 to 41-C, inclusive, of said transcript of the evidence, are referred to as the "written objections."

For cause of exceptions, the Exceptants say that they except to said report of the Special Master on the following grounds and for the following reasons amongst others:

1. The Master has erroneously overruled (2) the "Motion of The Kansas City Southern Railway Company to Require the Guardian Trust Company and its Receiver to Re-state Their Present Account and to Eliminate therefrom All
130 Items on Parts of Items not Properly taxable as Costs", which motion was filed before the Master on, to-wit: December 1, 1923.

2. The Master has erroneously overruled (45, 46) the written objections of the Exceptants read into the record upon the offer by the Trust Company of its vouchers, said objections appearing on Pages 7 to 42 inclusive, of the transcript.

Each and all of the items in the Trust Company's Statement of Account, complained of in these exceptions, and the evidence offered in support thereof, are subject to such written objections as specified therein.

3. The Master in his said report has erroneously stated and certified that costs as between solicitor and client may be taxed against the Exceptants; whereas, the Master should have found, under the facts and under the law, and under the principles, rules and practice in equity, and under the decision of the United States Circuit Court of Appeals in this case, and for the reasons set forth in the written objections of the Exceptants, and for other reasons, that costs as between solicitor and client should not be taxed herein.

4. The Master has erroneously refused (348, 491-499, 563 et seq.) to permit the Exceptants to prove that this litigation and the bills and petitions filed herein by the Exceptants and by the Receivers of the Kansas City Suburban Belt Railroad Company were instituted, filed and prosecuted in good faith and on reasonable grounds; and has erroneously refused

(712) to admit the evidence offered by the Exceptants set forth in their "Motion for Leave to Offer Evidence", filed with the Master on, to-wit: February 8, 1924, which evidence was offered by the Exceptants and excluded by the Master; and the Master has erroneously overruled said motion for leave to offer evidence. The proceedings in reference to said offers of evidence, and the rulings of the Master
131 thereon, are set forth on pages 705 to 712, inclusive, of the transcript of the evidence before the Master, and the evidence in said offer of proof is set forth in said "Motion for Leave to Offer Evidence."

5. The Master in the trial of this cause, over Exceptants' objections and exceptions, made and taken at the time, as shown by the record (7 to 47, inclusive, 393 to 397, inclusive, 400, 401, 443 to 446, inclusive, 729, 732), erroneously permitted the admission in evidence of the Trust Company's vouchers, and erroneously ruled that such vouchers were competent evidence not only as to the amounts purporting therein to have been paid, but as to the reasonable value of the service rendered, if any, and expenses, incurred, if any, and that such services and expenses, if any, were applicable to the issues on account of which the Master ruled that costs as between solicitor and client may be taxed.

6. The Master has erroneously ruled that many and large expenses and attorneys fees, which the Trust Company claims to have incurred and paid in this litigation, and other litigation, are taxable as costs as between solicitor and client, including expenses and fees incurred by, and services rendered to the Trust Company in procuring its claim for affirmative relief against the Kansas City Southern, and expenses and fees incurred in other courts, and in other causes; whereas, if costs as between solicitor and client may be taxed on any issues in this case, the Master should have separated the fees and expenses incurred on issues on account of which such costs may be taxable, if any, from the fees and expenses on account of issues for which they may not be taxed.

Exceptants' objections, in addition to their written objections, are set forth on pages 564 to 567, inclusive of the transcript.

132 7. The Master has erroneously failed to separately state the costs incurred and accrued up to and including the date of the final decree, from the costs incurred and accrued after that date, as prayed for by the Exceptants in their motion, referred to in Exceptants in their motion, re-

ferred to in Exception No. 1 hereof, and as directed by the Court of Appeals in this cause.

The Exceptants, in each of Exceptions 12 to 31, inclusive, adopt and make a part thereof each and all of the foregoing exceptions, together with exceptions 38 and 39. They adopt and make a part of Exceptions 8, 9 and 10, Exceptions 1, 2, 5 and 7.

8. The Master in his said report has erroneously stated and certified that he finds there should be taxed as costs as between party and party $170.80, on account of Item 57, the amount which the Trust Company claims to have paid to W. B. Lightburne, Shorthand Reporter, for services in reporting oral argument; whereas the Master should have found that said item should have been disallowed for the following reasons:

(a) There is no statute, law or rule providing for the taxing of such item as costs.

(b) There was no competent evidence that Special Master Douglass ordered Lightburne to report oral arguments for his own use; and there was no evidence that such expenditure was incurred with the understanding and agreement, between the parties or on the part of the Master, that such expenditure should be taxed as costs in the case.

(c) There was no proof of the reasonable value of the services rendered.

(b) The voucher offered in evidence (90-91) shows that a large part of this item was in payment for carbon copies of the argument in question. If any part of this item is taxable as costs, no allowance should be made for the carbon copies included in said item.

133 9. The Master in his said report has erroneously stated and certified that there should be taxed as costs as between party and party, $35.00 on account of Item 74, and $3.10 on account of Item 75, covering amounts claimed to have been paid for certified copies of records in the Cambria case; whereas, the Master should have found that said items, and each of them, should have been disallowed for the reasons stated in clauses (a), (b) and (c) of Exception No. 8 hereof, and for the additional reason that there was no identification of the records so copied; or any proof of the purpose in procuring such copies; or that there was any reasonable necessity therefor; or as to the reasonable value of

such copies, and because there is no statute or rule of court providing for the taxing of such items as costs.

10. The Master in his said report has erroneously stated and certified that there should be taxed as costs as between party and party, $5.00 on account of Item 76 and $5.00 on account of Item 78, covering amounts claimed to have been paid for opinions in cases in the United States Circuit Court of Appeals for the Eighth Circuit; whereas, the Master should have found that said items, and each of them, should have been disallowed for the reasons stated in clauses (a) and (c) of Exception No. 8; for the reasons stated in Exception No. 9; and for the further reason that this court has no right or authority to tax as costs as between party and party (or as between solicitor and client) any amount, or amounts, paid to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit for copies of opinions in that court.

11. The Master in his said report has erroneously stated and certified that amounts which the Trust Company claims to have paid to its attorneys are taxable as costs herein; whereas, the Master should have found that the same are not taxable as costs for the following reasons, amongst others:

134 (a) Under the facts and under the law applicable to this cause, attorneys' fees, other than the $20.00 fee fixed by the statutes of the United States, are not taxable herein.

(b) No competent evidence was offered as to the reasonableness of any of said attorneys' fees.

(c) As to most of the items of attorneys' fee, no competent evidence was offered that the services, for which the Trust Company claimed to have paid such fees, were devoted to this litigation.

(d) No competent evidence was offered that the services, for which the Trust Company claimed to have paid such attorneys' fees, were devoted entirely to this litigation.

(e) No competent evidence was offered that the services rendered were devoted to issues upon which costs as between solicitor and client might be taxed, if any such costs might be taxed in these proceedings.

(f) No competent evidence was offered that the services rendered were devoted entirely to issues upon which costs

as between solicitor and client might be taxed, if any such costs might be taxed in these proceedings.

(g) The amounts which the Trust Company claims to have paid on account of such attorneys' fees included compensation for services for which costs as between solicitor and client may not be taxed herein, if any such costs may be taxed herein.

(h) The amounts which the Trust Company claims to have paid in some instances included compensation on issues and in proceedings for and in which attorneys' fees have been taxed by the United States Circuit Court of Appeals for the Eighth Circuit and by the Supreme Court of the United States; and this court has no right to tax attorneys' fees on account of such issues, nor in said courts.

135 (i) The amounts which the Trust Company claims to have paid on account of attorneys' fees included compensation for services for which costs as between solicitor and client may not be taxed herein, if any such costs may be taxed herein. No competent evidence was offered segregating the amount paid for services for which costs as between solicitor and client may be taxed herein, if any, from the amount paid for services for which costs may not be taxed herein.

The Exceptants, in each of Exceptions 12 to 18, inclusive, and 20 to 23, inclusive, adopt and make a part thereof this exception 11, and all of the grounds and reasons herein stated.

12. The Master in his said report has erroneously allowed and taxed as costs as between solicitor and client $1,000.00 on account of Item 81, amount which the Trust Company claims to have paid to Trimble & Braley; whereas, for the reasons stated in Exception 11 and the other exceptions adopted and made a part hereof the Master should have found that no part of the same was taxable.

Exceptants' objections to this item are set forth in its written objection (6 to 41-C).

13. The Master in his said report has erroneously allowed and taxed as costs as between solicitor and client $5343.75 on account of Item 82, being three-fourths of $7,125.00 allowed to Trimble & Braley as attorneys by Judge Thayer in the Bierce case, which Bierce case is not a part of these proceedings; whereas, the Master should have found

that said item, and no part of the same, was taxable as costs herein, for the following reasons:

(a) The Exceptants adopt and make a part hereof Exception 11 the other exceptions hereinbefore adopted, and each and all of the grounds and reasons stated in each and all of said exceptions. They further adopt and make a part hereof paragraphs (b), (c) and (g) of Exception 15, paragraphs (d), (e) and (f) of Exception 21 hereof, and each and all of the grounds and reasons stated in each and all of said exceptions.

(b) As stated in Exceptants' objections (266 to 269, inclusive) there was no competent or credible evidence
136 upon which to base the apportionment, to these proceedings, of any definite proportion of said sum of $7,125.00, allowed by Judge Thayer. The Trust Company's effort to apportion three-fourths of such allowance was based upon the testimony of witnesses who were in no position to give competent or credible evidence on the subject and whose present recollection was of no value as evidence.

Mr. C. A. Braley, a member of the firm of Trimble & Braley, undertook to testify that three-fourths of the time of Mr. Trimble, during the receivership in the present case, was givin to this litigation (269, 277 to 280, inclusive, 312, 315 to 323, inclusive), but his further evidence showed that he could not distinguish between this litigation and other litigation in which the Trust Company was then engaged (272, 310, 313 to 317, inclusive, 320, 321 to 325 inclusive 335), and that he had no recollection of some of the litigation in which the Trust Company was then involved which he himself was handling (328). The testimony of Mr. Braley that the firm of Trimble & Braley, during the time for which this allowance was made, was devoting a large amount of time to this litigation is directly contradicted by the pleading of Trimble & Braley filed in their suit against the Trust Company, in which pleading they made an itemized claim for services rendered, which itemized claim showed that Mr. Braley devoted four days' time to looking up facts in this litigation from October 8 to October 11, 1900 (912), and another days' time in preparation for the defense of this litigation on October 30, 1922 (917). The Trust Company filed its answer to the original bill in this cause in November, 1900 (314), and the taking of testimony in the cause began on January 15, 1903 (277, 314). It further appears from Mr. Braley's testimony (276) that although Mr. Trimble believed that the Cambria bill was subject to demurrer, he took the

accounting was all on the books, and would probably
137 not take any longer than it would to try out the legal point on demurrer.

A letter of Mr. Wash Adams, written at the time when this litigation was fresh in mind (653 et seq.), shows that he considered the services rendered in certain litigation in Texas were equal in value to the services rendered in this litigation. Mr. S. B. Willey, at one time Secretarp of the Trust Company, an accountant, undertook to testify as to the amount of time that Mr. Trimble was giving to this litigation (404-406, 408), but he also was unable to distinguish between this litigation and other litigation then going on (437 to 439, inclusive, 477), and he showed that he was ignorant of the Texas litigation (406 to 408, inclusive, 420) which was taking up a large part of Mr. Trimble's time; and his recollection was shown to be defective (413, 430, 431). It also appears that Mr. Willey was called and testified as witness on behalf of the complainants (441).

Mr. J. C. Rosenberger, counsel for the Trust Company, undertook to testify as to the comparative amount of time that was being given by Mr. Trimble to this litigation, during the time for which this allowance was made. Judge F. M. Black was the receiver of the Guardian Trust Company, appointed by Judge Thayer in the present case. Mr. Rosenberger was not connected with this litigation at that time, but he shared Judge Black's office. His opinion as to the proportion of Judge Trimble's time devoted to this litigation is based upon his observation of interviews between Judge Black and Judge Trimble in Judge Black's office, in which interviews Mr. Rosenberger sometimes participated (514, 519). He admitted that Judge Black spent parts of the day in the Trust Company's office (515). In various matters coming under Mr. Rosenberger's attenion, some of which would be particularly likely to be impressed upon his memory, his recollection was shown to be inaccurate (377, 378; 430; 453, 547; 457, 39, 40, 697, page 646 of printed record in Mecartney case).

138 The Exceptants' objections to said Item 82 are shown on pages 5 to 41-C, 266 to 269, inclusive, 278 to 280, inclusive, 514 to 519.

14. The Master in his said report has erroneously allowed and taxed as costs between solicitor and client $6,000.00 on account of Item 109, which the Trust Company claims to have

paid to its attorney, Mr. Wash Adams; whereas, the Master should have found that no such costs should have been taxed, for the following reasons:

(a) The Exceptants adopt and make a part hereof Exceptions 5 and 11, paragraphs (b), (c) and (g) of Exception 15, paragraphs (d), (e) and (f) of Exception 21, and the other exceptions adopted and made a part hereof, and each and all of the grounds and reasons stated in each and all of said exceptions.

(b) No competent evidence was offered by which it could be ascertained how much of the services of Mr. Adams, if any, were devoted to this litigation and how much thereof was devoted to the Texas litigation and other litigation in which he was acting as counsel, and for which he was recompensed in the amount which the Trust Company claims to have paid to him. The letter and bill of Mr. Adams (653 et seq.) shows that at least half of his services were devoted to the Texas litigation.

Exceptants' objections, in addition to their written objections to this item appear on page 419 of the transcript.

15. The Master in his said report has erroneously stated and certified that there should be taxed as costs as between solicitor and client herein $5,000.00 on account of Item 108; $5,000.00 on account of Item 111; $5,000.00 on account of Item 114; $5,000.00 on account of Item 116; and $7,500.00 on account of Item 117, which the Trust Company claims to have paid to its attorney, Mr. H. S. Mecartney; whereas the Master should have found that such items, and each and every part thereof, should have been disallowed, for the following reasons:

139 (a) The Exceptants adopt and make a part hereof Exceptions 5 and 11, and the other exceptions hereinbefore adopted and made a part hereof, and each and all of the grounds and reasons stated in each and all of said exceptions.

(b) The evidence with reference to these items showed that the amount which the Trust Company claimed to have paid to Mr. Mecartney covered services other than services in this litigation (351 et seq.) and covered issues in the Cambria case for which costs as between solicitor and client may not be taxed (214), if they be taxable on any issues in these proceedings.

(c) The evidence showed that Mr. Mecartney performed services for the Trust Company in litigation in Texas, which litigation was, by agreement between the Trust Company and the Kansas City Southern, settled and disposed of; and in that Texas litigation the court entered a decree wherein it was adjudged that the costs of such litigation were, by agreement, to be divided between the parties (365 to 374, inclusive).

(d) The evidence also showed that Mr. Mecartney performed services in suing the Kansas City Southern on a judgment in favor of the First National Bank of Kansas City, Missouri, and against the Trust Company (29, 691), which judgment was paid by the Trust Company and which the Kansas City Southern was eventually required to pay; but said First National Bank judgment was not involved in any of the issues in these proceedings on account of which costs as between solicitor and client may be taxed, if any such costs may be taxed herein.

(e) Mr. Mecartney also performed services in bringing suits in the state court to enforce claims of the Trust Company against the Kansas City Southern for Affirmative relief (200 et seq., 208, 212).

140 (f) Mr. Mecartney also performed services in injunction proceedings instituted in the Federal Court (210, 202, 209, 210) to enjoin the prosecution of said state court cases, which injunction cases were appealed to the United States Court of Appeals for the Eighth Circuit, and decided by that court, and that court fixed the attorneys' fees to be allowed in such cases in the Court of Appeals, which attorneys' fees were paid by the Kansas City Southern and received by the Trust Company (645 to 649, inclusive).

(g) Other services were rendered by Mr. Mecartney as shown in the amended petition in his suit for services against the Trust Company. (192 et seq.)

The Master has erroneously stated that the District Court has under consideration this Texas litigation, when, as a matter of fact, that litigation and the disposition of it were not presented to the District Court, or considered by it in its opinion.

16. The Master in his said report has erroneously allowed and taxed as costs as between solicitor and client $3,000.00 on account of Item 119; $4,000.00 on account of Item 120; $2,000.00 on account of Item 121; $3,000.00 on account of Item

122; $4,000.00 on account of Item 123; $4,000.00 on account of Item 125; $7,500.00 on account of Item 128; $5,000.00 on account of Item 130; $5,000.00 on account of Item 133, and $5,859.40 on account of Item 137, which the Trust Company claims to have paid to its attorneys, Gates & English; whereas, the Master should have found that no such costs should have been taxed, for the following reasons:

(a) The Exceptants adopt and make a part hereof Exceptions 5, 7, 11 and 19 and paragraph (c) of Exception 18, and the other exceptions heretofore adopted and made a part hereof, and each and all of the grounds and reasons stated in each and all of said exceptions; and that the reasons stated in paragraph (f) of Exception 15, which is adopted as a part hereof, applicable to the claim of Mr. H. S. Mecartney are applicable to the claim of Messrs. Gates & English.

141 (b) The services, if any, rendered by Gates & English were rendered after all of the evidence had been taken in this litigation and after the case had been submitted (716) to Special Master Douglass, before whom the original hearing was had.

(c) The services of Messrs. Gates & English, if any, were devoted entirely, or almost entirely, to the assertion by the Trust Company of its claim for affirmative relief against the Kansas City Southern.

17. The Master in his said report has allowed and taxed as costs as between solicitor and client $1,000.00 on account of Item 124, $1,500.00 on account of Item 126; and $1,000.00 on account of Item 129, which the Trust Company claims to have paid to Mr. D. J. Haff; whereas, the Master should have found that no such costs should have been taxed. The Exceptants adopt and make a part hereof Exception 16 and all of the exceptions therein referred to, and all of the grounds and reasons stated in each and all of said exceptions.

18. The Master in his said report has erroneously allowed and taxed as costs as between solicitor and client $200.00 on account of Item 131, the amount which the Trust Company claims to have paid to Messrs. Clephane & Clephane, attorneys for the Trust Company, for services in the United States Supreme Court; $1,000.00 on account of Item 132, and $15,000.00 on account of Item 134, which the Trust Company claims to have paid to Mr. F. W. Lehmann, an attorney of the Trust Company, for services in the United States Supreme Court; whereas, the Master should have found that no such costs should have been taxed, for the following reasons:

(a) The Exceptants adopt and make a part hereof Exceptions 5, 11 and 19 and the other exceptions hereinbefore adopted as a part hereof, and each and all of the grounds and reasons stated in each and all of said exceptions.

142 (b) That said services, if any, of the attorneys mentioned in this litigation, were performed in this litigation in the Supreme Court of the United States, at which time there was left in this litigation the sole question of whether the Trust Company was entitled to affirmative relief against the Kansas City Southern.

(c) This court has no authority to tax as costs attorneys' fees for services rendered in another court. The attorneys' fees to be taxed for the services of the attorneys for the Trust Company have been taxed by the Supreme Court of the United States, and this court has no authority to re-tax the same, or to readjudicate the same.

Exceptants' objections, in addition to their written objections are set forth on pages 429, 430, 886, et seq., of the transcript.

19. The Master erroneously admitted in evidence, over the written (42 to 41-C) and oral (186 to 192, inclusive, 281 to 283, inclusive, 305 to 309, inclusive, 400 et seq.) objections of the Exceptants, judgments, opinions and orders of the courts in several cases and proceedings involving and fixing the fees (and in at least one case, the expense) of the attorneys of the Trust Company, and erroneously held that said judgment, opinions and orders were conclusive against the Exceptants, and that the Exceptants were liable to the Trust Co. for the full amount of the fees (and expenses) in said judgments, opinions and orders; and erroneously refused (719 et seq.) to grant the Exceptants any hearing or trial of the issues involved in said judgments, opinions and orders, suits or proceedings; and erroneously held that said judgments, opinions and orders were competent evidence as against these Exceptants; when, in fact, and in law and in equity, said judgments, opinions and orders were neither conclusive nor binding as against the Exceptants, or competent evidence against them, for the following reasons:

(a) Neither of the Exceptants was directly, or indirectly, a party to any of such judgments, opinions or orders, or the suits or proceedings in which they were rendered or made, and neither of the Exceptants was ever notified to defend said suits or proceedings, or any of them.

143 (b) No competent evidence was offered as to the reasonable value, if any, of the services rendered by the plaintiff or plaintiffs, or claimant or claimants, in any of such judgments, opinions or orders, and no competent evidence was offered as to what part of the services rendered or expenses incurred was devoted to this litigation, nor as to what part of such service or expenses, if any, was devoted to issues as to which costs as between solicitor and client might be allowed, if any such costs may be allowed on any issues in this proceeding.

(c) The evidence offered before the Master showed that the plaintiffs or claimants in said judgments, opinions, and orders were, in some cases (see Exceptions 13, 14 and 15) being paid for services to the Trust Company in litigation in Texas, and elsewhere, as in one case (see Exception 21) that the plaintiff was being paid for services for which some of his attorneys' fees had been taxed and paid.

Exceptants' objections, in addition to their written objections, are shown on pages 188 to 192, inclusive, 281 to 283, inclusive, 300 to 309, inclusive, and 400 et seq., of the transcript.

The Exceptants, in each of Exceptions 20 to 25a, inclusive, hereof, adopt and make a part hereof this Exception 19, and each and all of the grounds and reasons herein stated.

20. The Master in his said report has erroneously allowed and taxed as costs on account of Item 127 $9,555.74, being the amount which the Trust Company claims to have paid to Messrs. Trimble & Braley by virtue of a judgment in their favor against the Trust Company; whereas, the Trust Company should have found that no part of such item should have been allowed or taxed, for the reasons hereinafter stated.

The Exceptants adopt and make a part hereof exceptions 5, 11 and 19, paragraphs (b), (c) and (g) of exception 15, paragraphs (b), (c), (d), (e) and (f) of exception 21, and
144 the other exceptions adopted and made a part hereof, and each and all of the grounds and reasons stated in each and all of said exceptions.

Exceptants' objections to this item, in addition to their written objections, are set forth on pages 281, 282 and 305 to 310 of the transcript.

21. The Master in his said report has erroneously allowed and taxed as costs $135,013.56 on account of Item 135, which amount the Trust Company claims to have paid to Mr. H. S. Mecartney, its attorney, in payment of a judgment rendered

by the Circuit Court of Jackson County, Missouri, in his favor ($127,268.49 being for services and $7,745.07 being for expenses); whereas, the Master should have found that no allowance should have been made on account of such items, for the following reasons:

(a) The Exceptants adopt and make a part hereof Exceptions 5, 11 and 19, and the other exceptions adopted and made a part hereof, and each and all of the grounds and reasons herein stated.

(b) No proof was ever made of the claim on account of said item other than the judgment with certain pleadings and proceedings in the suit in which such judgment was entered, and the voucher and attachments thereto, purporting to evidence the payment of such judgment, and the opinion of the Supreme Court of Missouri in said action.

(c) Neither of the Exceptants was a party to said proceedings and the said judgment was not binding on them or evidence against them.

(d) No proof was made as to the reasonable value, if any, of the services rendered by Mr. Mecartney, and no proof was made as to what parts of the services rendered were devoted to this litigation.

145 (e) No proof was made as to what part of the services rendered in this litigation were devoted to issues for which costs as between solicitor and client might be allowed, if any such costs might be allowed on any issue in this cause.

(f) The evidence showed the services for which Mr. Mecartney was paid included services performed for the Trust Company in litigation in Texas (202 to 206, 351 et seq., 681, et seq., 548 et seq., 661 et seq.).

(g) The amount paid to Mr. Mecartney included compensation for services in the Federal Court of Appeals, in which court the attorneys' fees had been taxed and adjudged by that court.

Exceptants' objection in addition to their written objection are shown on pages, 188 to 192, 263, 281, 358, 359, 400 et seq., 488, 527-531, 552, 553, 566, 719, et seq.

22. The Master in his said report has erroneously allowed and taxed as costs as between solicitor and client $47,000.00 on account of Item 136, which amount the Trust Com-

pany claims to have paid to Mr. H. S. Mecartney in conformity with a judgment in his favor against the Trust Company rendered by the Federal Court; whereas, the Master should have found that no part of such item should have been allowed or taxed, for the following reasons;

(a) The Exceptions adopt and make a part hereof Exceptions 5, 11 and 19, paragraphs (b) and (c) of Excetpion 16, and paragraph (c) of Exception 18, and the other exceptions adopted and made a part thereof, and each and all of the grounds and reasons stated in each and all of said exceptions.

(b) The services rendered by Mr. Mecartney, for which he recovered said judgment, were devoted entirely to the question of whether or not the Kansas City Southern was liable to the Trust Company for the debts of the Kansas City Suburban Belt Railroad Company, which question was involved in the effort of the Trust Company to procure affirmative relief against the Kansas City Southern.

146 The Exceptants' objections, in addition to their written objections, are set forth on pages 349 of the transcript.

23. The Master in his said report, while stating that he has disallowed Item 110, $10.00, the amount which it is claimed was paid to D. W. Amram, an attorney; Item 112, $250.00, the amount which it is claimed was paid to Mr. C. O. Tichenor, an attorney; Item 113, $150.00, which it is claimed was paid to Messrs. Sullivan & Cromwell, attorneys; Item 115, $350.00, which it is claimed was paid to C. H. Aldrich; and Item 118, $250.00, which it is claimed was paid to Mr. James C. Jones, an attorney, has, in fact, erroneously allowed each and all of said items, and included the same in Item 135 (see Exceptants' Exception 21); whereas, the Master should have disallowed each and all of said items, for the following reasons;

(a) The Exceptants adopt and make a part hereof Exceptions 5, 11, 19 and 21, and each of the other exceptions adopted and made a part hereof, and each and all of the grounds and reasons stated in each and all of said exceptions.

24. The Master in his said report, while stating that he has disallowed Items 33, 25 to 40, inclusive, 42 to 56, inclusive, 58 to 67, inclusive, 110, 112, 113, 115, 118, 138 to 164, inclusive, 182 to 199, inclusive, 201, 211 to 245, inclusive, and 251 to 411, inclusive (amounting to $7,745.07), being for copies of documents, etc., docket fees, printing costs, attor-

neys' fees described in Exception 23 hereof, printing fees, accountants' fees, traveling expenses, etc., has, in fact, erroneously allowed each and all of said items and included the same in Item 135; whereas the Master should have disallowed each and all of said items, for the following reasons:

(a) The Exceptants adopt and make a part hereof Exceptions 5, 19 and 21, and each of the other exceptions
147 adopted and made a part hereof, and each and all of the grounds and reasons stated in each of said exceptions.

(b) The Exceptants have had no hearing, and there has been no determination in any proceeding to which they were parties, as to whether or not said expenditures were, in fact, made by the Trust Company, or its attorneys; nor as to the reasonable value of said items; nor as to whether or not such expenditures, if any, or any of them, were applicable to this case, or were applicable to issues as to which costs as between solictior and client may be taxed, if any such costs may be taxed in this proceeding.

25. The Master in his said report, while stating that he has disallowed Items 36, 54, 251 to 411, inclusive (which items are referred to in Exception 24), has, in fact, erroneously allowed each and all of said items, and included the same in Item 135; whereas the Master should have disallowed said items, and each of them, for the following reasons:

(a) The Exceptants adopt and make a part hereof Exceptions 5, 19, 21 and 24, and each of the exceptions adopted and made a part hereof, and each and all of the grounds and reasons stated in each and all of said exceptions.

(b) Item 36, $3.00, and Item 54, $5.00, are docket fees paid by the Trust Company for filing suits in the Circuit Court of Jackson County, Missouri, at Kansas City, in which the Trust Company was seeking affirmative relief against the Kansas City Southern for both of which reasons they are not taxable as costs herein.

Items 251 to 411, inclusive, consist largely of traveling expenses of the attorneys of the Trust Company to and from Chicago, and expenses incident to the employment, by the Trust Company, of Mr. H. S. Mecartney, a lawyer living in Chicago, to take charge of this litigation pending at Kansas City, Missouri. The traveling expenses, and other expenses incident to such employment, are not a reasonable or proper

charge, and ought not be taxed as costs as between
148 solicitor and client in these proceedings, if any costs as between solicitor and client may be taxed herein.

25a. The Master in his said report, while stating that he has disallowed Item 42, $25.00, paid to J. D. Jordan for docketing appeal from injunction order, and Item 43, $547.00, paid to J. D. Jordan for printing fees for printing record on appeal from order of injunction (which are referred to in Exception 24), has, in fact, erroneously allowed each of said items, and included the same in Item 135; whereas the Master should have disallowed said items, for the following reasons:

(a) In addition to the other exceptions heretofore adopted and made a part hereof, the Exceptants adopt and make a part hereof Exceptions 21 and 24.

(b) Said Items 42 and 43 were included in the costs taxed by the Court of Appeals in the proceeding in which they were paid, and were paid by the Kansas City Southern when that proceeding was decided against it (645, 646).

26. The Master in his said report has erroneously allowed and taxed as costs $5.00 on account of Item 200 and $5.00 on account of Item 202, premium on appeal bonds from orders of injunction; whereas the Master should have found that no such costs should have been taxed, for the following reasons:

(a) No competent evidence was offered showing that the amounts which the Trust Company claims to have paid were reasonable.

(b) No competent evidence was offered tending to show that such expenditures were devoted to issues upon which costs as between solictior and client might be taxed, if any such costs may be taxed in these proceedings.

(c) No competent evidence was offered tending to
149 show how much of such expenditures were devoted to such taxable issues, if any.

(d) The Court of Appeals has taxed the costs to be taxed in the proceedings in which said appeals bonds were given, which costs have been paid, and this court has no right or authority to re-tax the same.

27. The Master in his said report has erroneously allowed and taxed as costs $175.00 on each of Items 203, 204, 205, 206, 207; $112.50 on Item 208; $43.75 on Item 209; and $175.00 on

Item 210, premiums on appeal bonds from the final decree of June 25, 1910, of the Circuit Court in this cause; whereas the Master should have found that none of said items, or any [party] thereof, should have been taxed, for the following reasons:

(a) The Exceptants adopt and make a part hereof Exception 5, and all of the grounds and reasons thereof.

(b) No competent evidence was offered showing that the amounts which the Trust Company claims to have paid were reasonable; or that such expenditures were devoted to issues upon which costs as between solicitor and client might be taxed, if any such costs might be taxed in these proceedings; nor how much of such expenditures, if any, was devoted to such taxable issues, if any.

(c) Said appeal bonds were given after the final decree of June 25, 1910, herein, upon the appeal of the Trust Company, wherein the Trust Company was seeking to enforce its claim for affirmative relief against the Kansas City Southern and after the final determination of the issues upon which the Trust Company claims the right for the taxation of costs as between solicitor and client.

28. The Master in his said report has erroneously allowed and taxed as costs the amounts claimed in Items 412 to 417, inclusive, 418, 420, 421 and 422, being traveling expenses of Messrs. Gates & English, attorneys of the Trust Company; whereas the Master should have found that no allowance should have been made on account of said items, or any of them, for the following reasons:

(a) The Exceptants adopt and make a part hereof Exception 5, and all of the grounds and reasons therein stated.

(b) No competent evidence was offered showing that said payments were made, or for what purpose they were made, or whether the amounts claimed or paid were reasonable.

(c) Such expenses were incurred after the final decree of June 25, 1910, and, for the reasons stated in Exceptions 16 and 27 hereof, such items are not properly chargeable as costs as between solicitor and client, if such costs are taxable on any issues in this proceeding.

29. The Master in his said report, while stating that he his disallowed Items 182 and 183, $450.00 and $50.00, respectively, which it is claimed were paid to F. B. Wilcox, has, in fact, erroneously allowed each and all of said items, and in-

cluded the same in Item 135; whereas the Master should have disallowed each and all of said items, for the following reasons:

(a) The Exceptants adopt and make a part hereof Exceptions 19, 21 and 24, and each and all of the grounds thereof.

(b) The evidence showed that Mr. F. B. Wilcox was called as a witness on behalf of the complainants (441). In the testimony of Mr. H. S. Mecartney it appeared that Mr. Wilcox undertook to give evidence on behalf of the Trust Company which would satisfactorily explain an item amounting to $89,333.33, for one-half of one per cent of such item (461 et seq. 39), which item was saved to the Trust Company largely by his evidence. In the circumstances the Master should not have allowed this item without a full and satisfactory explanation of the payment.

30. The Master in his said report, while stating that he has disallowed Item 284, $25.00, paid to McDonald for a copy of the Knott letter, has, in fact, erroneously allowed each and all of said item, and included the same in Item 135; whereas the Master should have disallowed each and all of said
151 item, for the following reasons:

(a) The Exceptants adopt and make a part hereof exceptions 19, 21 and 24, and each and all of the grounds thereof.

(b) No sufficient showing was made as to why the Trust Company should have paid $25.00 for procuring a copy of the Knott letter (Transcript 569-571).

31. The Master in his said report has erroneously allowed and taxed as costs $55.95 on account of Item 165, amount claimed to have been paid to John C. Bovard for printing briefs filed with special Master; whereas, the Master should have disallowed this item for the reasons stated in the exceptions adopted and made a part hereof.

32. The Master in his said report has erroneously allowed and taxed as costs $24.60 on account of Item 166; $6.00 on account of Item 167; $10.00 on account of Item 168; $71.00 on account of Item 169; $42.45 on account of Item 170; $70.00 on account of Item 171; $9.90 on account of Item 174, and $19.80 on account of Item 178, which the Trust Company claims to have paid for printing briefs; whereas the Master should have disallowed each and all of said items, for the following reasons:

In addition to the exceptions adopted and made a part hereof, the Exceptants adopt and make a part hereof paragraphs (b) and (c) of Exception 16 and (b) and (c) of Exception 18.

33. The Master erroneously excluded the following evidence offered by the Exceptants:

(a) Petition in case of Charles E. Grannis, et al., vs. Kansas City, Pittsburg & Gulf Railroad Company, et al., (827).

(b) Opinion of Judge Thayer in Bierce case filed November 30, 1901 (836).

(c) Opinion of Judge Thayer in Bierce case filed October 1, 1901 (844).

152 (d) Extract of testimony of Mr. Wilcox on original hearing (856).

(e) Letters to Mr. S. B. Willey of March 28, 1917, and from Mr. Justin D. Bowersock of April 5, 1917, and of August 18, 1918 (957, 958).

34. The Master in his said report has erroneously stated and certified that in the entry of the decree to be entered herein, the Trust Company should be allowed 2 per cent interest on the sum of $7,162.40, upon the claim of the Trust Company; that the interest on a note for $7,162.40, dated October 23, 1899, was figured in the final decree at 6 per cent, when, in fact, said note should have borne 8 per cent interest. The Exceptants except to this ruling, for the following reasons:

(a) The amount fixed by the final decree was based upon the answer of the Trust Company in which it asked for interest on said note at the rate of 6% per annum, and said answer has never been amended.

(b) The Trust Company's exceptions to the final decree made no complaint o fthe ruling of the court in regard to said note, or the interest thereon; no appeal was ever taken on that issue; and the judgment of the District Court was affirmed by the Federal Court of Appeals. Neither the Master nor this court has any jurisdiction or authority to make any finding in favor of the Trust Company on account of said note.

(c) If the final decree was erroneous with reference to the amount of interest to be allowed on said note, and can

now be corrected, a new decree should be entered and interest should be computed from the date of the indebtedness, established by said decree, and not compounded as of the date of the final decree of June 25, 1910, and any interest thus compounded should be credited to the Kansas City Southern.

The Exceptants' objections upon this issue are set forth on pages 970 et seq. of the transcript.

153 35. The parties to this proceeding entered into a stipulation providing for the payment of the costs of reporting the evidence in this case and of making the transcript for the Master. It was agreed in that stipulation that the Kansas City Southern should advance the costs of the transcript, and that the Trust Company should reimburse it immediately for the amount thereof, which should be paid by the Trust Company, and that, in case of a dispute as to the amount, the Master should ascertain the same. The Kansas City Southern has paid for all of said transcript; the Trust Company has paid for none. The Master has failed to make any order with reference to such reimbursement. The Trust Company should immediately reimburse the Kansas City Southern to the extent of $327.30.

36. In considering Item 108, the Master states that he finds that the Channel and Dock litigation in Texas was, under the memorandum opinion and order appointing this Master, part and parcel of the plan of The Kansas City Southern Railway Company and its representative, the Provident Life and Trust Company, to despoil the Guardian Trust Company of its property. The Exceptants, denying that either in the proceedings in which these exceptions are filed, or in any other litigation, was there any plan or purpose of The Kansas City Southern Railway Company or the Provident Life and Trust Company to despoil the Guardian Trust Company of its property, further state that there was no competent or credible evidence that the Channel and Dock litigation in Texas was a part and parcel of any such plan.

The Exceptants further state that the Master has failed to give consideration to the fact that all of the issues involved in the Texas litigation, including the question of costs and attorneys' fees, were settled by agreement between the parties, which agreement was confirmed and established by the decree of the Federal Court in Texas, in which
154 such Texas litigation was pending.

37. The Master has erroneously found that the Kansas City Southern is entitled to interest on the sums

$737.02 and $3,874.47 from April 15, 1916, to the date of entering of final decree herein. As the Trust Company has appropriated said sum of $737.02 on October 25, 1902, and said sum of $3,874.47 on March 20, 1905, which appropriations therefore constituted payments on the indebtedness found to be due to the Trust Company from the Kansas City Suburban Belt Railroad Company as of the dates of such appropriations, the Master should have found that the Kansas City Southern is entitled to said sum of $737.02, with interest thereon from October 25, 1902, to June 25, 1910, the date of the original final decree, and to said sum of $3,874.47, with interest thereon from March 20, 1905, to June 25, 1910, and to interest in said sums from June 25, 1910, to the date of the final decree to be entered herein. As such amounts should be considered as payments on said indebtedness, the rate of interest should be proportioned to the interest which the Kansas City Southern was compelled to pay on the debts which the Kansas City Suburban Belt Railroad Company was held to owe to the Trust Company.

38. The allowance and taxation by the Master of costs as between solicitor and client is in effect and in fact as assessment of damages against the Exceptants; and if the Trust Company were entitled to any such damages (which the Exceptants deny) the amount of such damages may not lawfully exceed the penalty of the injunction bond of $10,000.00 given in this proceeding. The Master has erred in ruling that costs as between solicitor and client may be taxed in this proceeding, and if any such costs were taxable he has erred in assessing such costs in excess of $10,000.00.

39. The allowance by the Master of so-called costs as
155 between solicitor and client is in effect, and in fact, an assessment of damages against the Exceptants; and the allowance of such so-called costs without any pleading and without any statement of the issues upon which the claim for such allowance is based, and without any hearing on the issues upon which it is claimed such allowance is made, and without affording to the Exceptants any right to a trial by jury, is unlawful and in violation of the 5th and 7th amendments to the Constitution of the United States.

Wherefore, The Kansas City Southern Railway Company and the Cambria Steel Company do except to the report

of the Special Master, and appeal therefrom to the judgment of this Court.

FRANK H. MOORE
CYRUS CRANE
A. F. SMITH
Attorneys for Exceptant, The Kansas City Southern Ry. Co.

R. E. BALL
Attorney for Exceptant, Cambria Steel Company.

Filed in the District Court of United States, October 4, 1924.

Final Decree.

156 (Filed in U. S. District Court on May 15, 1926.)

In the District Court of the United States, for the Western Division of the Western District of Missouri.

Cambria Steel Company, Complainant,
No. 2468 vs. In Equity.
The Kansas City Suburban Belt Railroad Company, et al, Defendants.

This day this cause came on to be further heard, at this term, for a decree herein, pursuant to the opinion of the United States Circuit Court of Appeals for the Eighth Circuit, filed respectively on October 22, 1912, and December 2, 1913, as modified by order of January 22, 1914, and reported respectively in Vol. 201 of Federal Reports, page 811 and following, and Vol. 210 of Federal Reports, page 696 and following, and the opinion of the Supreme Court of the United States filed February 21, 1916, and reported in Vol. 240 of United States Reports, page 166, and following, and the mandate of the Supreme Court of the United States of April 13, 1916, filed with the Clerk of this court April 18, 1916, all of the parties appearing in person or by their solicitors, and was argued by counsel, and thereupon, upon consideration thereof,

It is ordered, adjudged and decreed that the first five paragraphs of the final decree entered in this court on, to-wit, the 25th day of June, 1910, herein referred to as the "Original Decree", be and the same are hereby ordered again decreed, except as hereinafter modified, and the remainder of said decree is hereby reversed and set aside, except as

hereinafter provided, and it is ordered, adjudged and decreed as follows:

157 1. It was found by the Circuit Court of Appeals for the Eighth Circuit in its opinion in this cause in 210 Federal Reporter 696, that the Kansas City Southern Railway Company on June 25, 1910, was indebted hereunder to the Guardian Trust Company or its Receiver, for the amount of indebtedness of The Kansas City Suburban Belt Railroad Company to the Guardian Trust Company, that is to say, in the sum of $639,658.86 together with interest thereon from June 25, 1910, as follows: Upon $473,723.59 at 6 per cent per annum, upon $46,565.76 at 7 per cent per annum, and on $119,369.51 at 8 per cent per annum, subject to a credit hereafter stated, together with the costs of this suit, the total amount of said indebtedness as computed on the basis as found by the Court of Appeals, on April 15, 1916, being the sum of $878,892.54, and this court now makes the same finding, except that there was included in said indebtedness bearing interest at the rate of 6 per cent per annum a note for $7,162.40 dated October 23, 1899, when said note in fact bore interest at the rate of 8 per cent per annum. This court accordingly finds that said indebtedness of The Kansas City Southern Railway Company to the Guardian Trust Company exceeded the amount as found by the Court of Appeals by the amount of 2 per cent interest on $7,162.40, from October 23, 1899, to the date of this decree, to-wit: $3,804.82. The Court of Appeals in said opinion also found that there should be deducted from said indebtedness the sum of $40,001.25, referred to in paragraph V of the Original Decree herein of June 25, 1910, together with all interest which has accrued and should accrue, has been and should actually be earned on said sum, and it is ordered that such deduction be made accordingly.

II. It has been made to appear to the satisfaction of the Court, that The Kansas City Southern Railway Company on April 15, 1916, paid to the Guardian Trust Company, on account of said indebtedness and interest, the sum of

158 $821,623.28, such sum being then agreed to be an approximation of the amount of said indebtedness and subject to check and correction in order to arrive at the true and correct amount thereof.

The Court further finds that in accounting for the interest collected by the Guardian Trust Company, on said sum of

$40,001.25, the Guardian Trust Company failed to account for $737.02, interest which it collected and converted to its own use on October 25, 1902, and it also failed to account for $3,874.47, interest which it collected and converted to its own use on March 20, 1905; the Court further finds that the Guardian Trust Company is indebted to The Kansas City Southern Railway Company in said sum of $737.02, with interest thereon at 6 per cent per annum from October 25, 1902, to the date of this decree, amounting to $1,778.65; the Court further finds that the Guardian Trust Company is indebted to The Kansas City Southern Railway Company in the sum of $3,874.47, with interest thereon at 6 per cent per annum from March 20, 1905, to the date of this decree, amounting to $8,791.81, the total amount of said indebtedness of the Guardian Trust Company to The Kansas City Southern Railway Company being $10,570.46.

III. The Court further finds that by reason of the overpayment made as aforesaid by The Kansas City Southern Railway Company to the Guardian Trust Company of April 15, 1916, the Guardian Trust Company is now indebted to The Kansas City Southern Railway Company in the sum of $6,765.54.

IV. The Guardian Trust Company shall forthwith deliver to The Kansas City Southern Railway Company all the collateral security described in paragraph V of the Original Decree, and all the proceeds of such security, with all interest earned thereon, which shall not have been disposed of
159 or applied on said judgment. The balance (to-wit: $1,779.02) of the money deposited in the registry of the court by the Receiver of the Central Improvement Company, in accordance with paragraph IX of the Original Decree, shall be forthwith paid over to and retained by The Kansas City Southern Railway Company. The money paid into the registry of the court by the Receiver of the Northern Townsite Company, in accordance with paragraph IX of the Original Decree has been turned over to the officers of the Northern Townsite Company in accordance with the previous order of this Court, which is hereby approved. The Court finds that The Kansas City Southern Railway Company is the owner of 439 of the 1000 shares of the Northern Townsite Company and is entitled to its distributive share of the assets of the Northern Townsite Company. The court further finds that the Officers of the Northern Townsite Company have in the First National Bank of Kansas City, Missouri, $9,436.27 to which fund The Kansas City Southern Railway Company is entitled. The Court hereby orders that such

distributive share of The Kansas City Southern Railway Company shall be paid over to The Kansas City Southern Railway Company subject to the payment of the costs herein taxed against The Kansas City Southern Railway Company. The Court further orders that out of said distributive share and said balance of $6,765.54 due from the Guardian Trust Company to The Kansas City Southern Railway Company said costs taxed against The Kansas City Southern Railway Company shall be paid and the balance thereof shall be paid over to The Kansas City Southern Railway Company.

V. The action of the Central Improvement Company and its Receiver in conveying the real estate and property described in paragraph VI of the Original Decree to The Kansas City Southern Railway Company is hereby approved and confirmed.

VI. Paragraph XI of the Original Decree is again ordered adjudged and decreed, except that the taxation of costs is made in this decree.

160 VII. The Court finds that the costs herein (other than the costs of the hearing before Honorable Henry D. Ashley as Special Master), shall be taxed against The Kansas City Southern Railway Company in the sum of $13,303.22 with interest on the amount paid Hon. Shannon C. Douglass, Special Master, of $3,520.71, making a total sum of $16,823.93. The Court finds that the costs of the hearing before Honorable Henry D. Ashley, Special Master, shall be taxed against the Receiver of the Guardian Trust Company. The stenographers' fees on such hearing, amounting to $486.00, having been advanced by The Kansas City Southern Railway Company, it shall recover the same from the Receiver of the Guardian Trust Company. The allowance of $2,579.30 made by this court to said Special Master, has been paid by the Receiver.

VIII. This decree shall be a complete accord and satisfaction of all claims and demands and a final adjudication of all issues in this proceeding.

IX. This court shall retain full jurisdiction of this cause to render such further decrees and to take such subsequent proceedings in this suit as equity and good conscience may require.

ARBA S. VAN VALKENBURGH
Judge.

May 14, 1926.

Filed in the District Court of the United States, May 15, 1926.

161 Petition for Appeal by Guardian Trust Company.

To the Honorable Judges of the District Court of the United States within and for the Western Division of the Western District of Missouri:

Now comes the Guardian Trust Company, by Henry C. Flower, Receiver, by Justin D. Bowersock, counsel, and respectfully shows to the Court: That said Trust Company by its Receiver feels itself aggrieved by the final decree in the matter of the above proceedings in equity in this Court, entered on the 15th day of May, A. D. 1926, and hence
162 the said Trust Company, by its Receiver, prays that an appeal may be allowed the Trust Company, by its Receiver, from said final decree to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors filed herein, which said Company here presents in connection with said petition.

GUARDIAN TRUST COMPANY,
By Henry C. Flower
Its Receiver.

Justin D. Bowersock
Solicitor.

Order Allowing Appeal.

The foregoing petition for an appeal is allowed, and it is ordered that the amount of the bond to be filed by said Appellant, Guardian Trust Company, be and the same is hereby fixed in the sum of $500.00.

Dated this 18th day of June, 1926.

ARBA S. VAN VALKENBURGH
Judge.

Filed in the District Court of the United States, June 18th, 1926.

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164 Assignment or Errors.

Now comes Guardian Trust Company, Appellant in the above entitled matter, by Henry C. Flower, Receiver, by Justin D. Bowersock, their solicitor, and in connection with its petition for appeal says that in the record, proceedings and final decree rendered by the Court in the above entitled cause on the 15th day of May, 1926, manifest error has intervened to the prejudice of Appellant as follows:

1. The Court erred in not allowing the claims of the Guardian Trust Company set forth in the claim and supplemental claim filed before the Master on October 23, 1922, and each and every item thereof, and in refusing to tax the said items and each of them as costs in said litigation, and in not entering a decree for such items and each of them as costs in favor of Appellant.

2. The Court erred in ruling that the Appellant was not entitled to have its said items of costs and expenses and counsel fees, and each of them, taxed in favor of said Trust Company as costs as between solicitor and client.

3. The Court erred in not following the decree of the United States Circuit Court of Appeals of the Eighth Circuit in * * * the above entitled cause, as affirmed by the United States Supreme Court, that the said litigation filed and prosecuted by the Cambria Steel Company, the Kansas City Belt Railroad Company, and the Kansas City Southern Railway Company and the subsidiary companies acting under and instigated by them, was trivial, malicious and oppressive, and prosecuted each and all in bad faith, and that, by reason thereof, the Guardian Trust Company was entitled to have the costs, outlays and expenses in said cause and liti-
165 gation taxed in its favor as between solicitor and client.

4. For the reason that the Court erroneously failed and refused in said decree to tax against the Cambria Steel Company, the Kansas City Southern Railway Company, the Kansas City Suburban Belt Railroad Company, et al., and in favor of the Guardian Trust Company, each and all of the following items of costs shown in the claim and supplemental claim of H. C. Flower, Receiver, filed before the Master on October 23, 1922, to-wit:

Items 4 to 32 inclusive, partially disallowed in the amount of $3948.93.

Items 35 to 78 inclusive.

5. For the reason that the Court erroneously failed and refused in said decree to tax against the Cambria Steel Company, the Kansas City Southern Railway Company, the Kansas City Suburban Belt Railroad Company, et al., and in favor of the Guardian Trust Company, each and all of the following items of costs shown in the claim and supplemental claim of H. C. Flower, Receiver, filed before the Master on October 23, 1923, to-wit:

Items 81-443 inclusive.

6. The said final decree is as against Appellant inequitable and unjust, insofar as it relates to matters of costs.

7. The Court erred in not sustaining each and all of the exceptions of Appellant filed to the report of the Special Master upon the question of costs and in not overruling each and all of the exceptions of the Kansas City Southern Railway Company to said report.

Wherefore, the Appellant prays that said final decree
166 be reversed and that said District Court be ordered to enter a decree allowing said costs as claimed by Appellant.

JUSTIN D. BOWERSOCK
Solicitor for Appellant.

Filed in the District Court of the United States June 18, 1926.

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167 Order Allowing Appeal

Now comes Guardian Trust Company, by Henry C. Flower, its Receiver, and this day presents to the Court its petition for appeal and assignment of errors, and moves the Court for an allowance of an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from
168 the final decree entered in the above case on the 15th day of May, A. D., 1926.

It Is Ordered By The Court that said appeal be, and the same hereby is, allowed to the said United States Circuit Court of Appeals, upon said Appellant, Guardian Trust Company, filing bond in the sum of $500.00, with surety to be approved by the Court or the Clerk.

ARBA S. VAN VALKENBURGH
Judge.

Entered June 18, 1926.

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170 (Bond on Appeal.)

Know All Men by These Presents:

That we, Henry C. Flower, Receiver of the Guardian Trust Company, as principal, and United States Fidelity & Guaranty Co., as surety, are held and firmly bound unto the Kansas City Southern Railway Company, in the full and just sum of $500.00, to be paid to the said Kansas City Southern

Railway Company, its successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, by these presents.

The condition of the above obligation is as follows: Whereas, lately at the April Term of the United States District Court for the Western Division of the Western District of Missouri, in a conroversy pending in said Court between said Henry C. Flower, Receiver of the Guardian Trust Company, and said Kansas City Southern Railway Company, a decree was rendered against the said Henry C. Flower, as Receiver, and the said Henry C. Flower, as Receiver, has obtained an appeal and filed a copy thereof in the office of the Clerk of said Court, to revise the decree in the aforesaid controversy, and a citation directed to the said Kansas City Southern Railway Company, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, 60 days from and after the date of said citation; now, therefore, if the said Henry C. Flower, as Receiver, shall prosecute said appeal to effect and answer all damages and costs, if he fails
171 to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed with our seals and dated this 19th day of June, 1926.

HENRY C. FLOWER
As Receiver of Guardian Trust Company, Principal.

UNITED STATES FIDELITY & GUARANTY CO.,
By James G. Guinotte,
(Seal) Attorney-in-fact, Surety.

Approved this 29th day of June, 1926. Edwin R. Durham, Clerk.

Filed in the United States District Court June 29, 1926.

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172 (Order, August 16, 1926, extending time to file ranscript.)

For good cause shown, it is ordered that appellant shall have until on or before the 1st day of October, 1926, to file its transcript of the record in the above entitled cause.

WILBUR F. BOOTH,
Judge.

Dated this 13th day of August, 1926.

Filed in the United States District Court August 16, 1926.

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173 (Order, September 22, 1926, further extending time to file Transcript.)

For good cause shown, it is ordered that appellant shall have until on or before the 1st day of December, 1926, to file its transcript of the record in the above entitled cause.

ARBA S. VAN VALKENBURGH
Judge.

Dated this 20th day of September, 1926.

Filed in the United States District Court September 22, 1926.

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174 (Order, November 24, 1926, further extending time to file Transcript.)

For good cause shown, it is ordered that appellant shall have until on or before the 2nd day of January, 1927, to file its transcript of the record in the above entitled cause.

ARBA S. VAN VALKENBURGH
Judge.

Dated this 24th day of November, 1926.

Filed in the United States District Court November 24, 1926.

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175 (Order, December 31, 1926, further extending time to file Transcript.)

For good cause shown, it is ordered that appellant shall have until on or before the 7th day of February, 1927, to file its transcript of the record in the above entitled cause.

ARBA S. VAN VALKENBURGH
Judge.

Dated this 31st day of December, 1926.

Filed in the United States District Court December 31, 1926.

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176 (Notice of presentation of condensed statement of Evidence for approval.)

To the Kansas City Southern Railway Company, Appellee, and its Solicitors:

You are hereby notified that the appellant has on Friday, December 31, 1926, lodged in the office of the Clerk of the above entitled court, a condensed statement of the evidence taken before Hon. Henry D. Ashley, Special Master in the above entitled cause, and that on Saturday, the 15th day of January, 1927, in the United States District Court Room, at Kansas City, Missouri, appellant will ask the Court to approve said statement. Carbon copy of said con-
177 densed statement is handed you herewith for your information.

JUSTIN D. BOWERSOCK
Solicitor for Appellant.

Received copy of the above notice and condensed statement, this 3rd day of January, 1927.

F. H. MOORE,
CYRUS CRANE,
A. F. SMITH
Solicitors for Appellee.

Filed in the United States District Court January 3, 1927.

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178 (Praecipe of Guardian Trust Company for Transcript).

To the Clerk of said Court:

For use in the appeal of the Guardian Trust Company, Henry C. Flower, Receiver, from the order and decree of this Court, entered June 18, 1926, in the above entitled causes, you will please prepare the transcript for the Appellate Court, and include therein the following parts of the record:

179 1. Stipulation between appellant and appellee, filed herein January 3, 1927.

2. All matters set out in the printed record, filed in the Supreme Court of the United States, in cause No. 24092, Kansas City Southern Railway Company, Appellant, vs. Guardian Trust Company, et al., Appellees, such matters to be included only by reference to said printed record in accordance with the stipulation hereinbefore called for.

3. Motion for order on Master as to inspection of books and papers, and further hearings of testimony and petition for order and decree of court as to further accounting and principles and extent of same, filed June 7, 1905.

4. Motion of Henry C. Flower, Receiver, for final decree, filed October 4, 1922.

5. Order appointing Henry D. Ashley, Special Master, filed June 25, 1923.

6. Memorandum opinion of Hon. A. S. Van Valkenburgh, Judge, filed June 20, 1923.

7. Exceptions of Kansas City Southern Railway Company to order appointing Special Master, filed September 22, 1923.

8. Motion of Kansas City Southern Railway Company to set aside order appointing Special Master, filed September 22, 1923.

9. Motion of Kansas City Southern Railway Company to require Guardian Trust Company to file petition, etc., filed September 22, 1923.

10. Order overruling motions, filed November 2, 1923.

11. Report of Henry D. Ashley, Special Master, filed September 15, 1924, except the testimony transmitted by the Special Master.

12. Condensed statement of testimony before Special Master, lodged December 31, 1926, as finally approved by the Court.

13. Exceptions of Guardian Trust Company to report of Special Master, filed September 27, 1924.

14. Exceptions of Kansas City Southern Railway Company to report of Special Master, filed October 4, 1924.

15. Final decree entered May 15, 1926.

16. Memorandum opinion of Hon. A. S. Valkenburgh, Judge, filed March 22, 1926.

17. Petition of Guardian Trust Company for appeal, filed June 18, 1926.

18. Order allowing appeal, entered June 18, 1926.

180 19. Assignment of errors of Guardian Trust Company, filed June 18, 1926.

20. Bond on appeal, filed June 29, 1926.

21. Citation in connection with said appeal and acknowledgment of service thereon.

22. Orders extending time to file transcript of the record entered August 16, 1926, September 20, 1926, November 24, 1926 and December 31, 1926.

23. Praecipe of Guardian Trust Company for record on appeal, filed January 3, 1927.

Respectfully submitted,

JUSTIN D. BOWERSOCK,
Solicitor for Appellant.

Service of above praecipe acknowledged this 3rd day of January, 1927.

F. H. MOORE,
CYRUS CRANE,
A. F. SMITH
Solicitors for Appellee.

Filed in United States District Court January 3, 1927.

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181 (Stipulation as to matters to be included in transcript, etc.)

It is hereby stipulated by and between Henry C. Flower, receiver of the Guardian Trust Company, appellant, and The Kansas City Southern Railway Company, appellee, as follows:

1. In preparing the record on appeal in the above entitled cause, the clerk of the district court shall not copy into said record any pleadings, exhibits, documents, reports, or any other matter which appears in the printed record filed in the United States Supreme Court in the former appeal in this cause, being case bearing file number 24092 in said Supreme Court, (the said case being No. 387, October Term, 1914, and No. 85, October Term, 1915, in said Supreme Court), but shall incorporate the same by reference to said printed record only. In preparing the printed record on this appeal the clerk of the Court of Appeals shall incorporate said pleadings, documents, reports, and other matter contained in said printed record in the same manner, only, that is to say, by reference to the printed record in said former appeal, and such pleadings, exhibits, documents, reports, and other matter contained in said printed record may be considered by the court and counsel in the same manner and with the same force and effect for all purposes as if copied in full into said record on this appeal.

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2. This stipulation is made expressly subject to approval by said Circuit Court of Appeals and shall not be binding

upon the parties hereto until so approved. The appellant shall provide at least three copies of said printed record on said former appeal in said Supreme Court for use of the court upon this appeal.

3. It is expressly understood that this stipulation applies only to the pleadings, exhibits, documents, reports, and other matters contained in said printed record, and shall not prevent either of the parties from including in the record to be considered by the Court of Appeals on this appeal such other pleadings, exhibits, documents, reports, or evidence as were offered in evidence or were properly before the court or the master in this cause on the issues appealed from subsequent to the filing of the mandate of the Supreme Court of the United States in the district court in this cause on or about April 18, 1916.

183 4. The opinions of any appellate courts introduced in evidence before the court or master in this cause, which opinions have been published in the recognized law reports of such courts, may be incorporated in said record by reference to the appropriate book and page of such reports without being copied in said record.

JUSTIN D. BOWERSOCK
Attorney for Appellant.

FRANK H. MOORE
A. F. SMITH
CYRUS CRANE
Attorneys for Appellee.

Filed in the United States District Court January 3, 1927.

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184 All matters set out in the printed record, filed in the Supreme Court of the United States, in cause No. 24092, Kansas City Southern Railway Company, Appellant, vs. Guardian Trust Company, et al., Appellees, such matters are included by reference to said printed record in accordance with the stipulation hereinbefore called for.

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185 (Order, February 4, 1927, further extending time to file transcript.)

For good cause shown, it is ordered that appellant shall have until on or before the 1st day of March, 1927, to file its transcript of the record in the above entitled cause.

ARBA S. VAN VALKENBURGH
Judge.

Dated this 3rd day of February, 1927.

Filed in the United States District Court, February 4, 1927.

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186 (Praecipe of Kansas City Southern Railway Company for additional matters to be included in Transcript.)

To The Clerk of Said District Court:

For use in the appeal of the Guardian Trust Company, Henry C. Flower, Receiver, from the order and decree of this Court entered June 18, 1926, in the above entitled
187 causes, you will please insert in the transcript for the appellate Court, the following parts of the record:

1. Motion by The Kansas City Southern Railway Company and Cambria Steel Company for leave to file herein "petition of The Kansas City Southern Railway Company for leave to introduce testimony proving that this litigation was instituted and conducted on the part of the complainants in entire good faith, and that therefore no costs as between solicitor and client should be taxed against them, or any of them;" filed December 8, 1923, with said petition for leave to introduce testimony accompanying said motion; and the order of this Court denying said motion.

2. The appellee objects to the inclusion of the "motion for order on Master as to inspection of books and papers, and further hearings of testimony, and petition for order and decree of Court as to further accounting and principles, and extent of the same," filed June 7, 1905, called for in the third paragraph of appellant's praecipe, for the reason that the same has no bearing on the issues tried before the Master, or before the District Court, because the same was not offered in evidence before the Master nor before the District Court on the exceptions to the report of the Master, and because no hearing has been had before the Master or the District Court on any issues upon which such motion could have any bearing. If this objection is overruled and said motion is inserted in the record, then include the ruling of the District Court on said motion as the same appears on pages 28269, 28270, 28271, and the first eleven lines of page 28272, Volume 47 of the transcript of the testimony adduced before Honorable Shannon C. Douglass, Special Master. If appellee's objection is overruled and said motion is inserted in the record, then also include the following:

"Saturday, February 4, 1905, ten o'clock a. m. (p. 8416 Douglass Transcript .....)"

188 then insert lines 4 to 25 inclusive on page 8633, Volume 16 of the transcript of the testimony adduced before Honorable Shannon C. Douglass, Special Master.

Respectfully submitted,

F. H. MOORE
CYRUS CRANE
A. F. SMITH
Solicitors for Appellee.

Service of above praecipe acknowledged this .... day of February, 1927.

Solicitors for Appellant.

Filed in the United States District Court February 5, 1927.

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189 Condensed Statement of Testimony before the Master prepared pursuant to Equity Rule No. 75-B.

In the District Court of the United States for the Western Division of the Western District of Missouri.

Cambria Steel Company, Complainant,
vs. In Equity
Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, Kansas City Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill

Edward F. Swinney, as Receiver of The Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,
No. 2468 vs.
Cambria Steel Company, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, its Receiver, Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

The Kansas City Southern Railway Company, Complainant,

vs.

Guardian Trust Company, Kansas City Suburban Belt Railroad Company and Edward F. Swinney, as Receiver of The Kansas City Suburban Belt Railroad Company, Central Improvement Company and T. T. Crittenden, its receiver, Cambria Steel Company, Northern Townsite Company and its receiver, Fairmount Amusement Company, and Missouri Elevator & Terminal Company, Defendants.

Intervening Petition

190 The claim of Henry C. Flower, Receiver of the Guardian Trust Company for reimbursement for costs and expenses paid and incurred in resisting the various claims, charges and demands made against said company in the Cambria Steel Company-Guardian Trust Company-Kansas City Southern Railway Company litigation, having been by the court referred to the Hon. Henry D. Ashley, as a Special Master, for the taking of testimony on said claim, the same came on for hearing before said Special Master on January 31, 1924, at the office of said Master, at 502 Rialto Building, Kansas City, Missouri. The Guardian Trust Company and its Receiver appeared by Jules C. Rosenberger, and Justin D. Bowersock, their counsel. The Kansas City Southern Railway Company appeared by Cyrus Crane, Frank H. Moore and A. F. Smith, its counsel; and the Cambria Steel Company appeared by R. E. Ball, its counsel.

Thereupon, the following proceedings were had:

The Master, at the outset, over-ruled the motion of The Kansas City Southern Railway Company, filed December 1, 1923, to require the Guardian Trust Company and its Receiver to restate their present account and to eliminate therefrom all items, or parts of items, not properly taxable as costs, to which ruling the defendants, The Kansas City Southern Railway Company, and the Cambria Steel Company, by their counsel, at the time duly [accepted].

Thereupon the Guardian Trust Company and its Receiver, to sustain the issues on their part, offered as a witness, Mr. H. B. Leavens, who, being duly sworn and examined, testified in substance as follows:

191 My name is H. B. LEAVENS. I am assistant to Henry C. Flower, Receiver of the Guardian Trust Company,

and have an office at 301 Fidelity Trust Building, Kansas City, Missouri. As assistant to the Receiver, I examined the account or claim, dated October 15, 1923, now on file with the Master, before it was filed and checked it through with the vouchers we have here. The books of account, vouchers and records of the Guardian Trust Company and its successive Receivers, are lodged in a room in the Board of Trade Building to which I have access at all times. I have custody of them for Mr. Flowers, the Receiver, to the extent that nobody else goes near them or sees them or has anything to do with them but me. I got out of the files of the Guardian Trust Company and its Receiver, all of the vouchers which are recited and referred to by number on the account under the caption "Group 1, Costs as between party and party" and checked the whole list through. I have these vouchers here. They are the original vouchers.

Thereupon, Mr. Rosenberger offered in evidence, all of the vouchers enumerated in the account with the heading "Group 1, Costs between party and party".

Mr. Smith: I understand that there are included in Group 1, a large number of items and parts of items which are not properly taxable as costs as between party and party, and it may be that there will be a claim that they are entitled to tax those as between solicitor and client and, therefore, I want to make a formal objection to all of those items. I will read it in evidence with the understanding that if any question arises outside of those objections and we de-
192 sire to make additional objections to, we will do so, and also with the understanding that it is the purpose of these objections to preserve our objections to any items as costs that may not be properly taxed as costs as between party and party. I want to say in addition, that it is impossible in the offer of these vouchers for us to determine just what vouchers are being offered and, therefore, it is not possible for us to make our objections to the items and to the evidence in support of those items as they are being offered inasmuch as they are being offered in bulk.

The following objections of The Kansas City Southern Railway Company, the Cambria Steel Company joining therein, were thereupon read into the record by Mr. Smith, as follows:

"The Kansas City Southern Railway Company, herein sometimes called the Southern Company, preserving and renewing all of its objections and exceptions to the memoran-

dum opinion of Judge Van Valkenburgh of June 20, 1923, and to the order of the District Court of June 25, 1923, herein, referring this matter to the Master, and preserving all of its exceptions to the overruling of the 'Motion of the Kansas City Southern Railway Company to require the Guardian Trust Company to file a petition, and praying the Court to hear evidence on the issues presented' filed herein on to-wit: September 22, 1923, and overruled on to-wit, November 2, 1923, and to the denying of the motion to file verified 'Petition of The Kansas City Southern Railway Company for leave to introduce testimony proving that this litigation was instituted and conducted on the part of each of the complainants in entire good faith, and that therefore no costs as between solicitor and client should be taxed against them or any of them', filed and overruled on to-wit, December 8, 1923, and preserving its exceptions to the overruling by the Master of its 'motion to require the Guardian Trust
193 Company and its Receiver to restate their present account and to eliminate therefrom all items or parts of items not properly taxable as costs,' filed with the Master on to-wit, December 1, 1923, says:

1. Said Southern Company (the Cambria Steel Company joining in all of these objections) objects to the introduction of any and all evidence as to any item in the account which said Guardian Trust Company and its Receiver, herein sometimes called the Trust Company, are seeking to have taxed as costs as between solicitor and client, for all of the reasons stated in said petitions and motions, all of which are hereby adopted as a part of these objections, and for the following reasons:

2. Under the decree and opinion of the Court of Appeals in this case, and under the law, and under the principles, rules and practice in equity, costs as between solicitor and client may not be taxed in this case.

3. There has been no pleading or motion filed in these proceedings setting forth any grounds upon which costs as between solicitor and client are claimed. There has been no evidence offered showing any facts justifying the allowance of any such costs. The Kansas City Southern Railway Company has not been permitted to offer evidence which would show that the facts do not authorize the allowance of any such costs. The allowance of any costs as between solicitor and client would, therefore, constitute the taking of

the property of said Railway Company without due process of law in violation of Article 5 of the amendments to the Constitution of the United States.

4. If it is claimed by the Trust Company that it is entitled to have taxed as costs as between solicitor and client any of said items on the ground that charges of misconduct were made against said Trust Company, and that such
194 charges were made in bad faith and without any foundation or reasonable ground, and if it is claimed that said Trust Company is entitled to have such items taxed because it was defending a fund in its possession as trustee or pledgee, then such contention is without merit for the following reasons:

(1) Under the rules, principles and practice in equity extraordinary costs are not taxable because of the allegations, or any of them, contained in the original or ancillary bills, or the intervening petition, or any of them.

(2) The Trust Company was sued herein in its individual capacity, and not as the trustee of an express trust.

(3) In the prosecution of its claim, and in its defense against the claims of other parties, the Trust Company had an entirely personal interest in the litigation, and it was acting in the interests of no beneficiary or other party than itself.

(4) There was not involved in this litigation any trust fund which was being administered by the Trust Company, nor any other fund, out of which or on account of which, any allowance could be made under the principles, rules and practice in equity.

(5) The real issues involved in this case were whether the Kansas City Suburban Belt Railroad Company, sometimes herein, for convenience, referred to as the Belt Company, was indebted to the Guardian Trust Company, or whether said Trust Company was indebted to the Belt Company; and whether the Southern Company was liable for the debts of the Belt Company. In a litigation of that kind none of the items mentioned in division I hereof is taxable as costs.

(6) As the result of said accounting several substantial credits were allowed to the Belt Company on the Trust Company's claim against it; and the Master and the Circuit Court

found that the Trust Company's claim to a lien on
195 certain property claimed by the Southern Company was not sustained, though such lien was thereafter established on appeal.

5. By reason of the statutes of limitations and because of the laches of the Trust Company and its Receiver, any claim of said Trust Company or of said Receiver to any of said items, or any part thereof, is barred.

6. The Kansas City Southern Railway Company objects to any and all evidence in support of each and every item sought to be proved by voucher, or by any judgment or order of court in any case to which it was not a party, or by the testimony of witnesses not having personal knowledge of the facts upon which such charges were made, on the additional grounds that there has been no competent proof of the merits of the subject matter of the item, or what services were rendered or materials furnished, or as to proof of its payment, or that such amount, or how much of such amount, if any, was expended on account of this litigation or on account of any issue therein as to which such costs are taxable, if they are taxable on any issue; and we pray the right to have an examination as to the facts in reference to such items and the right to examine and cross-examine the witnesses thereto and to offer counter evidence thereon; and we object to the voucher, judgment or order, and to the testimony of any witness in support of the same as being hearsay evidence and not binding upon us.

7. The Kansas City Southern Railway Company objects to any and all evidence in support of any item or any part of any item for fees or services or expenses charged or earned or incurred subsequent to December 1, 1901, for the following additional reasons:

(1) On November 20, 1901, the receivers of the Belt Company filed their ancillary bill of complaint herein, which included all of the charges against the Trust Company
196 contained in the original bill in these proceedings. Said Receivers were officers of this court, and acting under its authority, and such fact constitutes a conclusive bar to any claim that such charges were not made in good faith and on reasonable grounds.

(2) In November, 1901, there was filed herein a stipulation signed by all of the parties, including the Trust Company and its Receiver, providing for an accounting between

the Belt Company and the Trust Company, and the determination of the state of indebtedness of the one to the other, and providing that a judgment should be entered against the one which should be found to be indebted to the other. No testimony was taken herein until after January 1, 1903. All parties in interest construed said stipulation as a mutual consent that such an accounting should be had as did this court, when in March, 1908, this stipulation was under consideration, this court saying thereof:

'The Guardian Trust Company by its stipulation, its appearance and answer in said cause, has consented to the submission to said Master the hearing and finding on all the matters involved in controversy between it and the parties to said litigation. It has consented that the Master take an accounting, finding and report as to the respective rights and claims of the parties to the property, notes, bonds and claims involved.'

8. The Kansas City Southern Railway further objects to any and all evidence in support of any item or any part thereof so far as it covers payment for fees or services or expenses charged or earned or incurred subsequent to June 25, 1910, for the following additional reasons:

(1) On May 21, 1910, the Master before whom said accounting was had filed in the District Court his report wherein he found in favor of the Trust Company, denying the claim of the Belt Company and its Receivers against the Trust Company, and allowing the claim of the Trust Company against the Belt Company (with certain deductions); the Master also found that the Southern
197 Company was not liable to the Trust Company for the debts of the Belt Company to the Trust Company; the Master also found that the Trust Company did not have a lien on certain lands whose title was in the Central Improvement Company but which had been paid for and which were being used by the Belt Company for railroad purposes, but that said property belonged to the Southern Company. This report of the Master was approved by this court, as shown by the final decree of June 25, 1910, and an appeal was prosecuted by the Trust Company from that decree. If costs as between solicitor and client were taxable on account of any charges of improper conduct made against the Trust Company by any party in these proceedings, the litigation with reference to those issues was finally terminated with that final decree. The only questions then remain-

ing were whether the Master and the Circuit Court were right or wrong in their findings that the Southern Company was not responsible for the debts of the Belt Company, and that the Trust Company did not have a lien superior to the claim of the Southern Company to the real estate described in paragraph VI of the final decree of June 25, 1910. The questions involved on the appeals from said final judgment had to do with questions of law entirely independent of any charge that was made against the Trust Company by any party in these proceedings.

(2) The appeal from the decree of June 25, 1910, was taken by the Trust Company. All of the issues involved on that appeal had been found by the Master and the Circuit Court in favor of the Southern Company. The Chief Justice of the United States and an associate justice concurred in the conclusion of the Master and of the District Court. There is, therefore, no room for contending that the contentions of the Southern Company on the questions at issue on such appeal were not made in good faith and on reasonable grounds.

198 9. The Kansas City Southern Railway Company further objects to any and all evidence in support of each and every item for attorneys' fees for the following additional reasons:

(1) The statutes of the United States fix the amount of attorneys' fees that may be taxed as costs, and the District Court and the Master are without jurisdiction to tax any other or additional fees.

(2) The Court of Appeals and the Supreme Court have, in the judgments and mandates of said courts in these proceedings, fixed the amounts of attorneys' fees to be taxed in said courts, and the District Court and the Master are without jurisdiction to change or determine the amount of such fees.

(3) If the claim for costs as between solicitor and client is based on the theory that these proceedings were instituted in bad faith and without reasonable grounds, then there was no need for so many or such expensive lawyers in this litigation, and the services rendered were in large part unnecessary, and the charges made were excessive.

(4) The Southern Company further says that each of said items as contained in the present account is excessive, and

that it is a charge for services not entirely devoted to these proceedings, and not entirely devoted to the issues on account of which claim is made for extraordinary costs.

10. The Kansas City Southern Railway Company objects to any and all evidence in support of each item, or part of an item, purporting to be established by a judgment or order of court, and objects to the judgment or order offered in evidence, for the following additional reasons in addition to those stated in objection 6 hereof.

(1) The Kansas City Southern Railway Company
199 was not a party to such suits, or any of them, in which such judgments were rendered or orders made, and said judgments or orders are not binding against it or competent evidence against it.

(2) The amount stated in such judgment or order is excessive.

The Southern Company reserves the right to make such other and additional objections as may be necessary and proper."

The foregoing is only a portion of the written statement of objections read into the evidence by Mr. Smith. The statement also contained specific objections to the introduction of any testimony on certain numbered items of the Receiver's claim; and it was agreed between the parties that in making up the transcript the objections made should follow each question in its proper arrangement until each item has been objected to, as to all of the objections appearing to that item on all of the grounds applicable to that item, and that as to the other items in such group, it may be considered that the same objection is made to each of those items.

The Master: The Master has the impression—he may not be correct about it—that items 1, 2 and 3 are admitted.

Mr. Smith: There is no denial as to items 1, 2 and 3; that is admitted. As to all of the other items in Group 1 of this account, we object to them for the reasons stated in our written objection and deny further that they are properly taxable as costs as between party and party. There is included in our objections, the general objection that this is hearsay evidence, all of these vouchers are purely hearsay evidence, and we object to them on that ground.

The Master: The Master overrules the objections to the introduction of these vouchers.

To which action and ruling of the Master, the Kansas
200 City Southern Railway Company and the Cambria Steel Company duly excepted.

Thereupon the vouchers enumerated in the account under the heading "Group 1, Costs as between party and party" were received in evidence by the Master.

The vouchers covering Items 4 to 32, inclusive, are receipted statements for stenographer's fees paid from time to time to H. A. Jetmore, shorthand reporter, by Guardian Trust Company, for the taking and transcribing of testimony heard before the Honorable Shannon C. Douglas, Special Master in the case of Cambria Steel Company vs. Kansas City Suburban Belt Railway Company, in the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Said vouchers are in substance, as follows:

Voucher No. 317, covering Item No. 4, is a receipted statement to the Guardian Trust Company, dated July 14, 1903, from H. A. Jetmore, for one-third of the stenographer's bill for taking testimony on a hearing before said Special Master, and is in the sum of $487.73.

Voucher No. 448, covering Item No. 5, is a similar receipted statement, dated December 1, 1903, from H. A. Jetmore, covering one-third of the cost of the transcript of testimony in another hearing before said Special Master and is in the sum of $168.90.

Voucher No. 510, covering Item No. 6, dated Feb. 16, 1904, in the sum of $77.16, is a receipted statement for carbon copy of transcript of testimony taken in a further hearing before said Special Master, in the same proceeding.

Voucher No. 621, covering Item No. 7, is a receipted statement, dated June 30, 1904, in the sum of $296.87, from
201 Mr. Jetmore to the Guardian Trust Company, covering one-third of the cost of transcript of testimony on a hearing before said Special Master, and being for a carbon copy of said transcript.

Voucher No. 650, covering Item No. 8, is a receipted statement, dated August 1, 1904, rendered by Mr. Jetmore to the Guardian Trust Company for a carbon copy of a transcript of the testimony taken before said Special Master in the same proceeding, in the sum of $36.17, being one-third of the cost of said transcript.

Voucher No. 719, covering Item No. 9, is dated Oct. 27, 1904, and is in the sum of $43.16, and is for a carbon copy of the transcript of testimony on a hearing before said Special Master, and represents one-third of the cost of said transcript.

Voucher No. 831, covering Item No. 10, is in the sum of $96.00, and is dated March 1, 1905, and is for one-third of the cost of a transcript of the testimony on a further hearing before said Special Master, and covers a carbon copy of said transcript.

Voucher No. 845, covering Item No. 11, dated March 30, 1905, in the sum of $209.17, is for one-third of the costs of a transcript of testimony taken on a hearing before said Special Master.

Voucher No. 867, covering Item No. 12, in the sum of $132.50, dated April 20, 1905, is for a carbon copy of a transcript of testimony on a hearing before haid Special Master. and represents one-third of the cost of said transcript.

Voucher No. 890, covering Item No. 13, is dated May 15, 1905, and is in the sum of $123.92. It is for a carbon copy of a transcript of the testimony on a hearing before said Special Master.

Voucher No. 914, covering Item No. 14, dated July 1, 1905, is in the sum of $515.50, and is for a carbon copy of a transcript of testimony on a hearing before said Special Master.

202 To each of Vouchers 317, 448, 650, 719, 831 and 867, was attached a bill rendered by Mr. Jetmore in which it was stated that said bill was for a carbon copy of the testimony in this cause. (pp. 46-57.)

Voucher No. 890, covering Item No. 13, is dated May 15, 1905, and is in the sum of $123.92. It is for a carbon copy of a transcript of the testimony on a hearing before said Special Master.

Voucher No. 914, covering Item No. 14, dated July 1, 1905, is in the sum of $515.50, and is for a carbon copy of a transcript of testimony on a hearing before said Special Master.

203 Voucher No. 923, covering Item No. 15, dated July 11, 1905, is in the sum of $137.75, and is for a carbon copy of a transcript of testimony on a hearing before said Special Master.

Voucher No. 940, covering Item No. 16, dated August 14, 1905, is in the sum of $172.08, and covers one carbon copy of

a transcript of testimony on a hearing before said Special Master.

Voucher No. 944, covering Item No. 17, is dated August 25, 1905, and is in the sum of $352.25. It is for the preparation of copies of exhibits introduced in evidence before said Special Master to be inserted in the records of said proceedings.

Voucher No. 953, covering Item No. 18, is dated September 12, 1905, and is in the sum of $54.00. It is for a carbon copy of a transcript of testimony on a hearing before the Special Master.

Voucher No. 968, covering Item No. 19, is dated Oct. 3, 1905, and is in the sum of $594.33. It represents the cost of a transcript of testimony taken on a hearing before said Special Master.

Voucher No. 1,000, covering Item No. 20, is dated Nov. 13, 1905, and is in the sum of $368.58. It represents the cost of a transcript of testimony on a hearing before said Special Master.

Voucher No. 1023, covering Item No. 21, is dated Dec. 18, 1905, and is in the sum of $346.88. It represents the cost of a transcript of testimony on a hearing before said Special Master.

Voucher No. 1031, covering Item No. 22, is dated Jan. 4, 1905, and is in the sum of $212.58. It represents the
204 cost of a transcript of testimony taken on a hearing before said Special Master.

Voucher No. 1035, covering Item No. 23, is dated Jan. 20, 1906, and is in the sum of $342.00. It represents the cost of a transcript of testimony taken on a hearing before said Special Master.

Voucher No. 1040, covering Item No. 24, is dated Feb. 12, 1906, and is in the sum of $193.05. It is for a carbon copy of a transcript of testimony taken on a hearing before said Special Master.

Voucher No. 1048, covering Item No. 25, is in the sum of $159.58, and is dated Feb. 20, 1906. It is for a carbon copy of a transcript of testimony taken in a hearing before said Special Master.

Voucher No. 1075, covering Item No. 26, in the sum of $180.50, is dated March 23, 1906, and represents the costs of

a transcript of testimony taken on a hearing before said Special Master.

Voucher No. 1079, covering Item No. 27, in the sum of $315.58, is dated March 9, 1905, and represents the cost of a transcript of testimony taken on a hearing before said Special Master.

Voucher No. 1080, covering Item No. 28, is dated March 29, 1906, and is in the sum of $208.60. It represents the cost of a transcript of testimony taken on a hearing before said Special Master.

Voucher No. 1097, covering Item No. 29, is dated April 25, 1906, and is in the sum of $614.78. It represents the cost of a transcript of testimony taken on a hearing before said Special Master.

Voucher No. 1171, covering Item No. 30, is dated Sept.
205 5, 1906, and is in the sum of $214.25. It represents the cost of a transcript of testimony taken on a hearing before said Special Master.

Voucher No. 2032, covering Item No. 31, is a receipted statement from John A. Prescott, rendered to the Guardian Trust Company, on April 1, 1907, covering a number of items paid by him for the company, including a bill of $15.83 from Mr. Jetmore, dated Feb. 28, 1907, representing the cost of a transcript of testimony taken on a hearing before said Special Master.

Voucher No. 2236, covering Item No. 32, is dated Sept. 28, 1907, and is in the sum of $5.00. It represents the cost of transcribing certain testimony taken on a hearing before said Special Master.

The Kansas City Southern Railway Company and Cambria Steel Company urged against the competency of the foregoing vouchers covering Items 4 to 32, inclusive, the objections set forth in numbered paragraphs 1 to 7, inclusive, of their written statement of objections. Said parties admitted so much of Items 4 to 32, inclusive, as include the cost of the original evidence furnished to the Master, and that the same is properly taxable as costs as between party and party; but said parties objected to all other items and parts of items which the Receiver is seeking to have taxed as costs as between party and party for the reason that said items are not properly taxable as such.

Mr. Smith: I want to say, with reference to Items 4 to 32, inclusive, covering the amounts paid to Mr. H. A. Jetmore,

that those items cover the amount paid him for the original cost of the transcript furnished by him to Judge Douglas, as Master, and that a very large part of those items, in fact, the majority of them, are for carbon copies of the testimony furnished to the Trust Company. As to so much of these items as constitute payment for the original transcript, we think that those ought to be taxed as costs as between party and party, and we deny the right to tax the balance of them.

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The foregoing objections were, by the Special Master, overruled, to which ruling, The Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

The remaining vouchers so offered and received in evidence by the Master were, in substance, as follows:

Voucher No. 477, covering Item No. 34, is a receipted statement, dated January 2, 1904, from Adelaide Utter, Clerk of the United States Circuit Court, Kansas City, Missouri, to the Guardian Trust Company, for a certified copy of intervening petition of S. R. Knott and E. F. Swinney in the case of Trust Company vs. Kansas City Suburban Belt Railroad Company, and is in the sum of $1.15.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of said voucher in evidence on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of their written statement of objections. The Special Master overruled the objection, to which ruling said parties duly excepted.

Voucher No. 959, covering Item No. 41, is a receipted statement, dated Sept. 23, 1905, from Adelaide Utter, Clerk of the United States Circuit Court, to the Guardian Trust Company, for a transcript of the record in the Kansas City Suburban Belt cases, No. 24645-6-7, and is in the sum of $389.70.

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The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of this voucher in evidence on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of their written statement of objections. Said parties also objected to any and all evidence in support of Item No. 41, the costs of appeals from injunction orders prior to the final decree for the following reasons:

(1) So much of such items as were properly taxable as costs have been duly fixed by the judgment of the Court of Appeals and they have been paid to the Southern Company.

(2) Judgment was rendered by the Circuit Court in favor of the Southern Company in said injunction suits and, therefore, there is no ground for contending that they were instituted or prosecuted in bad faith and without reasonable grounds.

(3) The suits in the said Court and the appeal from the orders of injunction enjoining their prosecution were improvidently instituted and prosecuted, the position taken by the Trust Company in reference to said suits and appeals being directly contrary to the position eventually taken by it on the appeals from the final decree of June 25, 1910, in the Court of Appeals and in the United States Supreme Court.

Mr. Smith: Item No. 41 is for costs that are taxed for making up a record and for printing the record in the appeal from the first injunction case. Those costs have been taxed in that case and have been paid by the Southern Company, with an attorney's fee added thereto, taxed by the Court of Appeals and hence cannot be taxed in this case.

The foregoing objections to the introduction of said voucher were overruled by the Master, to which ruling the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

208 Voucher No. 1998, covering Item No. 57, is a receipted statement, dated January 5, 1907, from B. W. Lightburn, for stenographic services for reporting and transcribing the arguments of J. C. Rosenberger and H. S. McCartney, made before Hon. Shannon C. Douglas, Special Master in the case of Cambria Steel Company vs. Guardian Trust Company, and is in the sum of $170.80.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of the foregoing voucher on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of their written statement of objections. The objection was by the Master overruled, to which ruling, said parties duly excepted.

Voucher No. 2311, covering Item No. 68, is a receipted statement, dated March 31, 1908, from John D. Jordan, Clerk of the United States Circuit Court of Appeals for the 8th Circuit to the Guardian Trust Company for clerk's fees and the cost of printing the record on appeal in the case of Guardian Trust Company vs. Kansas City Southern Railway Company, and is in the sum of $1,070.00.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of said voucher in evidence on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of their written statement of objections, and on the grounds theretofore urged against the introduction of Voucher No. 959 covering Item No. 41, i. e., that so much of said item as was properly taxable as costs was fixed by the judgment of the Court of Appeals, and paid by the Southern Company; that the judgment was rendered by the Circuit Court in favor of the Southern Company, and hence there is no ground for contending that suit was instituted or prosecuted in bad faith, and without reasonable grounds; and that the suits in the State Court and the appeal from orders of injunction enjoining the prosecution were improvidently instituted, and prosecuted, the position taken in reference to said suits and appeals being di-
209 rectly contrary to the position eventually taken by it on the appeals from the final decree of June 25, 1910, in the Court of Appeals and the United States Supreme Court.

The foregoing objections to the introduction of said voucher were, by the Master, overruled, to which ruling said parties duly excepted.

Voucher No. 2319, covering Item No. 69, is a receipted statement, dated April 10, 1908, from Adelaide Utter, Clerk of the United States Circuit Court, to the Guardian Trust Company for a copy of opinions filed March 30, and April 6, 1908, in the case of Cambria Steel Company vs. Kansas City Suburban Belt Railway Company, and is in the sum of $4.20.

Voucher No. 2663, covering Item No. 70, is a receipted statement, dated June 29, 1910, from Adelaide Utter, Clerk of the United States Circuit Court to the Guardian Trust Company, for a certified copy of the decree in the case of Cambria Steel Company vs. Kansas City Suburban Belt Railway Company and is in the sum of $6.65.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of said vouchers, No. 2319 and 2663 on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of their written statement of objections. This objection was, by the Master, overruled, to which ruling said parties duly excepted.

Voucher No. 2692, covering Item No. 71, is a receipted statement, dated Sept. 30, 1910, from Adelaide Utter, Clerk

of the United States Circuit Court, to the Guardian Trust Company, for a transcript of the record in the case of Cambria Steel Company vs. Kansas City Suburban Belt Railway Company, and is in the sum of $764.35.

210 Voucher No. 2698, covering Item No. 72, is a receipted statement, in the sum of $50.00, from Gates & English, to the Guardian Trust Company, dated Oct. 26, 1910, representing a payment made by that firm to John D. Jordan, Clerk of the United States Circuit Court of Appeals for the 8th Circuit, covering a $25.00 deposit for costs in the case of Central Improvement Company, appellant vs. Cambria Steel Company, and a $25.00 deposit for costs in the case of Guardian Trust Company, appellant, vs. Cambria Steel Company.

Voucher No. 2760, covering Item No. 73, is a receipted statement from John D. Jordan, Clerk of the United States Circuit Court of Appeals, to the Guardian Trust Company, dated Oct. 28, 1910, for the printing of the record in the case of Central Improvement Company vs. Cambria Steel Company, and the case of Guardian Trust Company vs. Cambria Steel Company, and is in the sum of $910.00.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of said vouchers, No. 2692 and 2698 and 2700, covering Items No. 71, 72 and 73, respectively, on the grounds set forth in numbered paragraphs 1 to 8, inclusive, of their written statement of objections, and on the further ground that so much of said items as were properly taxable as costs have been duly affixed and have been taxed as costs as between party and party, and the District Court has no authority to retax the same as costs, either as between party and party, or as between solicitor and client. The foregoing objections were by the Master overruled, to which ruling said parties duly excepted.

211 Voucher No. 2743, covering Item No. 74, is a receipted statement from Gates & English, to the Guardian Trust Company, dated Feb. 7, 1911, representing disbursements totaling $35.00 made by that firm, as follows: For two certified copies of final decree and order for appeal in the case of Cambria Steel Company vs. Kansas City Suburban Belt Railway Company, $15.30; recording lis pendens notice, $9.20; recording said final decree and order for appeal, $10.50; total $35.00.

Voucher No. 2762, covering Item No. 75, is a receipted statement from Adelaide Utter, Clerk of the United States

Circuit Court, to the Guardian Trust Company, dated May 9, 1911, for two certificates in the case of Cambria Steel Company vs. Kansas City Suburban Belt Railway Company, and is in the sum of $3.10.

Voucher No. 2998, covering Item No. 76, is a receipted statement from Gates & English, to the Guardian Trust Company, dated Nov. 18, 1912, representing, among other items, a payment made by that firm to John D. Jordan, Clerk of the United States Circuit Court of Appeals, in the sum of $5.00, for a certified copy of the opinion of said court.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction in evidence of the foregoing vouchers, No. 2743, 2762 and 2998, covering Items No. 74, 75 and 76, respectively, on the grounds set forth in numbered paragraphs 1 to 8 inclusive, of their written statement of objections. The objection was, by the Master, overruled, to which ruling, said parties duly excepted.

Voucher No. 3057, covering Item No. 77, is a receipted statement from John D. Jordan, Clerk of the United States Circuit Court of Appeals for the 8th Circuit, in the sum of $40.00, to the Guardian Trust Company, dated May 2, 1913, representing an additional deposit for costs of $10.00, in the case of Central Improvement Company vs. Cambria Steel Company, and an additional deposit for costs of $30.00 in the case of Guardian Trust Company vs. Cambria
212 Steel Company.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of said voucher in evidence on the grounds set forth in numbered paragraphs 1 to 8, inclusive, of their written statement of objections, and on the further ground that so much of said Item No. 77 as was properly taxable as costs, has been duly fixed and taxed as costs between party and party and the District Court has no authority to retax the same as costs, either as between party and party or as between solicitor and client. These objections were, by the Master, overruled, to which ruling, said parties duly excepted.

Voucher No. 3128, covering Item No. 78, is a receipted statement from John D. Jordan, Clerk of the United States Circuit Court of Appeals to the Guardian Trust Company, dated Dec. 15, 1913, representing the costs of the copy of the opinion in the cases of Central Improvement Company vs. Cambria Steel Company and Guardian Trust Company vs. Cambria Steel Company, and is in the sum of $5.00.

Mr. Leavens: I have also brought with me the original vouchers which are referred to by voucher number in the account under the heading "Group 2, Costs and Expenses as between Solicitor and Client".

Mr. Rosenberger thereupon offered in evidence said last mentioned vouchers.

Mr. Smith: These vouchers are subject to the written objections we have made to Items in Group 1 in the account.

The Master: The objections to the vouchers under Group 2, as offered, are overruled.

To which ruling of the Master, the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

213 The vouchers referred to were thereupon received in evidence by the Master and are in substance, as follows:

Voucher No. 146, covering Item No. 82, is a receipted statement from Trimble and Braley, to the Guardian Trust Company, dated Oct. 8, 1902, representing professional services as attorneys, and expenses incurred and expended in connection with the receivership of the Guardian Trust Company, in the aggregate sum of $7,125.00. The voucher recites that this amount was allowed said firm by Judge Thayer in his order of Oct. 4, 1902, discharging the Receiver of the Guardian Trust Company, and that said sum is paid and accepted in full compensation for professional services and expenses to Wash Adams, as Receiver, and to his predecessor in said Receivership, Francis M. Black, and to the Guardian Trust Company during the receivership except for services and expenses rendered to or in the case of W. W. Bierce vs. Guardian Trust Company, but does not include pay for any services or expenses prior to the receivership.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of said voucher in evidence on the grounds set forth in numbered paragraphs 1 to 7, inclusive, and 9 and 10 of their written statement of objections. Said parties further objected to the introduction of said voucher and to any and all evidence in support of Item No. 82, because it is apparent on the face of the charge, that the Guardian Trust Company and its Receiver are attempting to make their own apportionment of the amount of such expenses to be charged in this litigation. Said parties, in support of their objection to such evidence,

asked leave to offer evidence, documentary and oral, for the purpose of showing that the services covered by said Item, included services foreign to this litigation and upon issues on account of which costs as between solicitor and
214 client may not be taxed, if they may be taxed on any issue, and were excessive; and said parties thereupon read into the record, the following statement:

"The Guardian Trust Company filed its answer in this cause on November 5, 1900, and on the same day the Central Improvement Company filed its answer. On November 21st and 22nd, 1900, testimony was taken upon the application for a temporary injunction and the appointment of receivers. No testimony was taken in the accounting case until January, 1903. During the period of time covered by said items 81 to 107 and by item 127, the said J. McD. Trimble, and Trimble & Braley were devoting their time and attention to other business and litigation of the Trust Company as well as to the litigation and issues here under consideration. In support of this objection, we offer in evidence the following extracts from the findings of the referee in the Trimble & Braley case. (See pages 108 et seq. of said record):

1902.
Jan. 13 To cash for expenses on two trips to Jefferson City, Jan. 9 and 12, to argue Jones v. Hamm in Supreme Court.....$34.60
Feb. 18 To cash for expressage on briefs in Chicago Zinc Mining case.. .25
Mar. 4 To expenses C. A. Braley and Wash Adams to Sherman, Texas.. 45.00
Mar. 27 To cash for expenses of C. A. Braley to Joplin, Mo. Mar. 26 to 28, in Zinc case..... 17.55
Apr. 4 To cash for expenses verifying affidavits of service of notice of hearing at Sherman, Texas, of supplemental and intervening petitions in Port Arthur Channel & Dock suit, .25
Apr. 6 To cash for telegram Trimble to D. E. Bryant Mar. 13 .30
To cash for telegram Supreme Court Clerk to Trimble & Braley, Mar. 19 .25
Apr. 11 To cash for certified copy of order in Moore v. Jones 1.00
215
Apr. 18 To cash for telegram Apr. 8 Clerk of Court to Trimble in Port Arthur Channel & Dock case $ .60
To cash for telegram Trimble & Braley to Clerk in Port Arthur Channel & Dock case .35
Apr. 22 To cash for expenses C. A. Braley to Sherman, Texas 25.05
Apr. 29 To cash for telephone C. A. Braley to Scott in Chicago Zinc Mining case .90
Apr. 30 To cash for telegram from Judge Bryant to Trimble & Braley .30
May 4 To cash for telegram J. McD. Trimble to C. A. Braley at Sherman, Texas .95

May 4	To cash for telegram from Trimble & Braley to C. A. Braley at Sherman, Texas	.80
May 22	To half cost copy order Provident Life & Trust Co. v. Port Arthur Channel & Dock Co.	1.10
	To half C. A. Braley's expenses to Beaumont, May 13 to 20, account Port Arthur Channel & Dock Case	32.80
May 27	To cash for telegram Trimble & Braley to Bates in same case	2.06
June 30	To cash for telephone to Wilcox at Chicago in Chicago Zinc Mining case	1.40
	To cash for telegram June 30 to Braley about hearing Port Arthur Channel & Dock case at Sherman, Texas	.37
Sept. 14	To cash for telegram Trimble & Braley to Ivins, Kidder & Melcher, New York	1.01
Oct. 10	To cash for telegram Sept. 3 to Ivins, Kidder & Melcher	.98
Oct. 30	To cash for copy of order appointing receiver of O. K. C. & E. R. R. Co.	1.30"

Said objections to the introduction of said voucher were, by the Master, overruled, and said offer of proof in support of said objections, were by the Master at that time denied; to which rulings of the Master, said parties duly excepted.

216 Voucher No. 30, covering Item No. 83, is a receipted statement from J. McD. Trimble to the Guardian Trust Company, dated Oct. 31, 1902, representing salary of the General Counsel for the last nine days of October, 1902, at the rate of $500.00 per month, and is in the sum of $150.00.

216 Voucher No. 68, covering Item No. 84, is a receipted statement from J. McD. Trimble, to the Guardian Trust Comany, dated Nov. 29, 1902, representing salary as General Counsel for the month of November, 1902, in the sum of $500.00.

The vouchers covering Items No. 85 to 107, inclusive, are in substantially the same form as Vouchers No. 30 and 68, covering Items No. 83 and 84. The only difference between said vouchers No. 30 and 68 and vouchers covering Items No. 85 to 107, inclusive, being the difference in dates and amounts. Vouchers numbered 131, 154, 176, 205, 244, 273, 299, 325, 358, 374, and 401, covering respectively, Items numbered from 85 to 95, inclusive, are each in the sum of $500.00, and are dated respectively, as follows: December 31, 1902, January 31, February 28, March 31, April 30, May 31, June 30, July 30, September 3, September 29 and October 31, 1903. Vouchers No. 439, 473, 492, 513, 537, 564, 592, 618, 638, 665, 686 and 716 covering respectively, Items numbered 96 to 107, inclusive, are each in the sum of $416.66, and are dated respectively, as follows: November 30, December 31, 1903, Jan-

uary 30, February 29, March 31, April 30, May 31, June 30, July 31, August 31, September 30 and October 25, 1904.

It is admitted by The Kansas City Southern Railway Company and the Cambria Steel Company that the amounts stated in said Trimble vouchers were paid to Mr. Trimble at the date of such vouchers.

Said parties objected to the introduction of each and
217 all of said vouchers in evidence on the grounds set forth in numbered paragraphs 1 to 7, inclusive, 9 and 10 of their written statement of objections and in support of their objections, asked leave to offer evidence, documentary and oral, for the purpose of showing that the services covered by said items, included services foreign to this litigation and upon issues on account of which costs as between solicitor and client may not be taxed, if they may be taxed on any issue, and were excessive; and the statement read into the record in connection with the offer in evidence of the voucher covering Item No. 82 applied also to the foregoing vouchers covering Items No. 83 to 107, inclusive. Said objections to the introduction of said vouchers were, by the Master, overruled, and said offer to introduce evidence at this time in support of said objections was, by the Master, denied, to which rulings of the Master, said parties duly excepted.

Voucher No. 769, covering Item No. 108, is a receipted statement from H. S. Mecartney to the Guardian Trust Company, dated Dec. 8, 1904, representing the sum of $5,000.00 advanced by the company as a retainer for services in the Kansas City Suburban Belt Railway Company suit and other litigation of the Trust Company.

Voucher No. 960, covering Item No. 111 is a receipted statement from H. S. Mecartney to the Guardian Trust Company, dated Sept. 27, 1905, representing a payment of $5,000.00 on account of attorneys fees and expenses in connection with the Kansas City Suburban Belt suits. Attached to said voucher are the following letters:

"Sept. 18, 1905.

To the Executive Committee of the Guardian Trust Company, Kansas City, Missouri.

Gentlemen:

218 I expect to present a third formal report on the Belt Company litigation a month hence, or about the time of the annual meeting.

We are now putting in the testimony on behalf of the Guardian Trust Co., and much the greater part of it has been taken.

The record, abnormally long when I took the case, has in spite of our efforts nearly trebled in volume, making, as I believe, by far the longest record ever made in a court of justice.

I am satisfied that, not only the responsibility for this, but the cost of it, including the greater share of our own law fees, will ultimately be placed of record against the opposition.

At the instance of the Southern people, Judge Philips has enjoined our State Court suit, as we expected he would do. We appealed to the December term of the U. S. Court of Appeals; and hope to have decided in this appeal the chief point on which the Southern Company relies to escape ultimate liability for the Belt Company's debts.

While issues have broadened, it is only the dragon rousing itself to its fullest fury, and it cannot be long, in the nature of things, until the final collapse.

I now recognize that the conditions surrounding our fight are such as were outlined by some members of the committee, and far worse than I had reason to believe. Yet there is nothing to do but to stick by the game and rain blows as hard as we can.

I consider that the imposition upon the Trust Company arising from the making of this enormous record, is so gross and rank that it is now not only a duty to the community, but the part of simple business manhood to stay by the fight and place the responsibility for this unnatural
219 abuse of the court as a forum of justice.

However, over $22,000.00 annually runs upon our claim as interest, and it is a fight worth while.

In inviting the continued co-operation of the Committee, I will continue to take and constantly invite the fullest responsibility possible, and give the fullest and most earnest assurances of ultimate recovery. If at any time the Committee, or any of its members, should seriously doubt our ultimate recovery, I will back it up with such earnest testimony of other lawyers as will, I am sure, dispel all doubts.

My prophecies as to an earlier ending of the accounting case have not come true. However, the Texas case was got-

ten out of the way much earlier than I anticipated and in a very profitable manner.

I have, as I hope, adhered fully to the promises I made to give the litigation special preference and unremittent attention. Mr. Rosenberger has, under my direction, given nearly all of his time and physical energy to the work assigned him; and I have given much, the greater part of mine since December 1st last.

In my original suggestions as to retainer for the purpose of paying local and assisting counsel, and in order that the burden should be a "cheerful" one, I said that, if $5,000.00 were paid me "I would hope to make it last until a decree were reached in the Kansas City case. If greatly disappointed as to my expectations as to when this point would be reached, I would not call for any more money unless I could make it clear that I had paid out the greater part of this as expenses, etc., and that the matter was too heavy for me to carry without some other additional payment on account."

In the Executive meeting, I later suggested that it would probably be better to have the ordinary expense account of witness fees, etc., run through me, instead of sending bills from time to time to the Committee, etc., and the account was opened in that way, viz: I to pay all the ordinary expenses and account to the company therefor.

I have been greatly disappointed as to the closing of the main suit, and of course had no idea—not even the faintest idea—that conditions were bad enough to warrant the trebling of the then abnormal volume of evidence.

I have not only paid out the greater part of the $5,000.00 as expenses of assisting counsel, but have also paid out $2,712.65 for travelling expenses, expert fees, etc., as follows:

Travelling expenses of self and assistants and hotel bills, stenographic work, etc.,	$ 758.58
Advance costs, printing, stenographer, copies of pleadings, and miscellaneous items as per statements of Mr. Rosenberger,	735.22
Expert Fees	896.66
Printing	231.50
Miscellaneous	90.69
	$2,712.65

Statements and vouchers to be given on later accounting.

There are also bills payable at once amounting to about $1,000 more for expert work. These expenses will come back to us in ultimate decree.

I think therefore it is but just to myself to request another payment of $5,000.00 on account. With the expenditures to be made in the next few weeks, it will leave me only a couple of thousand dollars, and that of course will be used up shortly. It gives me nothing net for my time so far, and I think you will all appreciate that this is a much of a burden as I ought justly to carry for the present. The greater and heavier the burden of the suit, the more will I expect to carry, in order to back up in this tangible way my convictions and promises as to the ultimate outcome.

The court has lately ordered a payment on account to Judge Douglass to the effect that the Belt Co., and the
221 Southern Co. shall together pay him $4,000.00, and the Guardian Trust Company shall pay him $2,000.00. However, the order provides, of course, that these sums shall await the final outcome and be taxed as costs in the case.

Judging by the abnormal size of the case, I feel that I have so far conducted it as economically as possible.

As there is not apt to be an Executive meeting for some time, and as I need this money now, I would greatly be obliged if the members of the Executive Committee would authorize the Treasurer to give me the payment requested.

Bidding constantly for continued co-operation and backing of the Trust Co., which is all the writer needs and desires in this case, I remain,

Truly,"

"John A. Prescott,
Financial Agent.
Fidelity Trust Company Building.
Kansas City, Mo.

Telegraphic Adress
'Japscott, Kansas City.'

26th of September, 1905.

C. W. Hastings, Treasurer,
City.

Dear Sir:

In reply to your letter of the 21st instant, I beg to say in reference to the further advance of $5,000 to H. S. Mecartney

on account of the expenses of the litigation which he is conducting against the Kansas City Southern road, that inasmuch as we have employed Mr. Mecartney and he has taken the suit up with apparent vigor, I think we ought to supply him with the sinews of war; and I am therefore favorable to advancing him the $5,000 which he asks for.

With regard to his bill of $200 for services in connection with the settlement of the claim of Wash Adams, I
222 will say that I approve its payment.

I also approve the payment of Mr. Mecartney's bill of $150 for services in connection with the Durango Concession matter.

Yours truly,

JAP-GCW JOHN A. PRESCOTT.
Payment approved:
C. W. Hasting."

"Guardian Trust Company,

Kansas City, Mo.
Sept. 21, 1905.

S. W. Willey, Esq.,
Bryant Building,
City.

Dear Sir:

I enclose you herewith copy of communication received today from H. S. Mecartney, the attorney of the company, relative to our paying him another $5000.00 on account of expenses in the litigation he is conducting; also bills for his services in the matter of Wash Adams' bill and the Durango Concession matter.

In connection with the above, wish to state that since Mr. Mecartney has had charge of the litigation, we have paid no expenses in the matter, with the exception of the bills of the court stenographer for transcript of testimony and the $2,000.00 allowed by the Court to Judge Douglass for his services as Special Master, this amount being noted in Mr. Mecartney's communication.

Kindly advise me immediately if as a member of the Executive Committee, you approve the payment of the amounts as stated in Mr. Mecartney's communication, and oblige.

Yours very truly,

C. W. HASTINGS,
Treasurer."

Encl.

I don't see any way but to pay.

S. W. WILLEY, (in lead pencil)
at bottom

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223 Voucher No. 1041, covering Item No. 114, is a receipted statement from H. S. Mecartney to the Guardian Trust Company, dated Feb. 16, 1906, representing the sum of $5,000.00, advanced on account of expenses and attorneys fees in connection with the Kansas City Suburban Belt and Port Arthur Channel & Dock suits.

Voucher No. 1164, covering Item No. 116, is a receipted statement from H. S. Mecartney to the Guardian Trust Company, dated Aug. 15, 1906, representing a payment of $5,000.00 on account of expenses and attorneys fees in connection with the litigation against the Kansas City Southern Railway Company.

Voucher No. 2199, covering Item No. 117, is a receipted statement from H. S. Mecartney to the Guardian Trust Company, dated July 18, 1907, representing a payment of $7,500.00 on account of expenses and attorneys fees in connection with the litigation against the Kansas City Southern Railway Company.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of said vouchers, No. 769, 960, 1041, 1164 and 2199, covering respectively Items No. 108, 111, 114, 116 and 117, on the grounds set forth in numbered paragraphs 1 to 10, inclusive, of their written statement of objections. Said parties further objected to the admission of said vouchers and to any and all evidence in support of said items on the same grounds afterwards urged to the admission of any evidence in support of Item No. 135, being the judgment in the case of H. S. Mecartney vs. Guardian Trust Company, affirmed by the Missouri Supreme Court, 274 Mo. 224, for the following reasons:

(1) The opinion of the Supreme Court affirming the said pudgment is contrary in many particulars, to the actual facts in the case, and was based on a misunderstanding of the law and facts.

(2) Admissions were made in said cause by counsel
224 for the Trust Company and its Receiver in reference to claims made in said case which were not supported by the facts.

(3) So much of the services as were rendered by the plaintiff in said action and pertain to the issues here involved, were rendered under a contract by which the compensation of the plaintiff therein was fixed, which compensation was fully paid to him prior to the filing of said action.

In support of these objections, The Kansas City Southern Railway Company and the Cambria Steel Company asked leave to offer in addition to other evidence showing the statements made in the pleadings or by the courts or by witnesses in said case of H. S. Mecartney vs. Guardian Trust Company; and said parties thereupon read into the record, the following statement purporting, in part, to contain allegations in the first count of the amended petition on which such case was tried. Item No. 135 being the amount of the judgment on said first count (figures in paranthesis in the following paragraphs refer to pages in appellant's abstract of the record in said cause except that part of the paragraphs where reference is made to pages of the decision of the Supreme Court in Mecartney vs. Guardian Trust Company, 274, Mo. 224, in which case, references are to the pages in said report):

12a. After plaintiff had been so retained and employed in said Belt Litigation and during the progress of the professional work which he performed therein as hereinafter shown, there were several other court cases and controversies which grew out of the same, or which cases and controversies in their issues of law or fact grew out of some of the issues involved therein or closely related thereto, in which cases and controversies plaintiff rendered various legal services which became part and parcel of the one retainer and employment of plaintiff known as the 'Belt Litiga-
225 tion'; which said cases and controversies were as follows, viz:

* * * * * * *

(2) Cases No. 23,066, 23408 and 28277 in the Circuit Court of Jackson County, Missouri:

In the first of which cases, commenced March 15, 1905, defendant sought as plaintiff therein to recover of the said Southern Company as an alleged successor by consolidation of the Belt Company, the amount of the notes and open account which said defendant had against said Belt Company, then amounting to about $500,000 and which were involved in said 'Accounting Case;'

In the second of which cases, commenced on or about March 15, 1905, the defendant sought as plaintiff therein to recover of the Southern Company upon the same ground or basis about $38,000 by reason of defendant having paid the same to the First National Bank of Kansas City as indorser or joint maker of a note given for the benefit of said Belt Company;

And in the third of which cases, commenced July 2, 1906, defendant as plaintiff therein asserted claims of about $30,000 against said Southern Company as the successor by consolidation of the Gulf Company on notes and open account.

Said three cases above became known as the three 'State Court Cases' and are so referred to herein.

At the time that plaintiff's employment in said Belt Litigation ended as hereinafter stated, various demurrers and motions in such proceedings had been overruled by the court and answers had been filed therein and the said causes and each of them were then pending on petition and answer and remained undisposed of. (6, 7).

13. At the time of plaintiff's retainer and employment as aforesaid, there was another branch of the controversy known as the 'Belt Litigation' and pending in the
226 United States Circuit Court held at Beaumont, Texas, and covered by said employment as follows:

A consolidated case known as Nos. 10 and 11 in equity, of the December, 1904 Term of the said United States Circuit Court. In one of said cases, the Provident Life & Trust Company as Trustee, was complainant, and the said defendant Guardian Trust Company was defendant, and said complaint as trustee for bondholders of the Port Arthur Channel & Dock Company claimed, among other things, that said Guardian Trust Company as an alleged subscriber to the capital stock of the said Dock Company was laible to the complainant for a deficiency decree against the Channel & Dock Company then amounting, with interest, to upwards of $1,500,000; secondly, that it had dominated the Dock company in reference to the various dealings in reference to the sale of bonds and stock issues, construction contracts and various other transactions, and that defendant was also liable to the Dock Company for said sum upon the said second ground of complaint.

14. In the other of said two causes, the Barnett & Record Company, a judgment creditor of said Dock Company, was complainant and made similar claims to those last stated

against said Guardian Trust Company, which was among the other parties made defendant; and the said Dock Company was a party defendant thereto and made similar claims to those last stated against said Guardian Company. In the aforesaid two causes, the said Guardian Company asserted claims against the Dock Company for the amount of about $27,000. Prior to said December 6, 1904, certain proceedings had been had in said consolidated causes, various pleadings filed therein and about 4,000 pages of evidence had been taken.

That thereupon at the special instance and request of the defendant, plaintiff entered his appearance in said
227 cause and the appearance of one Clifford Histed, Esq., a practicing lawyer of Kansas City, duly licensed to practice law in the said United States Court, as counsel for the defendant, and proceeded to prosecute its defenses and its claims in said cause, and to protect its interests in said Texas case.

15. Thereupon, and between said December 6, 1904, and April 10, 1905, and at various dates and times during said period, which plaintiff cannot more particularly specify than is specified in the following itemized schedule, plaintiff and his said assistant counsel in his behalf, at the special instance and request of defendant, rendered professional legal services to defendant therein, which services so performed and rendered by plaintiff are intemized in the following 'Schedule A.'

'Schedule A.'

Being Schedule of Services of Plaintiff in said Texas Case.

In December 1904.

(1) Plaintiff made a stipulation to pass the case at the December term, and had same continued December 10.

(2) He examined the various pleadings, bills, cross-bills, answers, and intervening petitions in said cause, amounting to over 200 typewritten pages.

(3) About December 10, he retained Clifford Histed, of Kansas City, as assistant counsel in said cause, and had appearance of himself and assistant entered as counsel for defendant on or about December 21.

(4) He looked up the law of the issues therein, and prepared to make a motion to recall certain orders and sustain the demurrers and exceptions filed therein by the defendant.

(5) He looked up a prior decree of foreclosure which had been entered in said cause, and conferred with officers
228 of defendant as to entry of a decree of sale of the Port Arthur and Town Site Company, same being finally entered by consent with agreement as to 'upset price' of $100,000; decree entered December 21.

In the year 1905.

(6) He ordered and received from the clerk, January 21, a full memo, of all orders entered in said cause, and all papers filed therein, and studied up said records, the same consisting of 312 minutes of orders and filings.

(7) He passed upon a form of resignation of said defendant as trustee in certain railroad mortgages involved in said suit, and upon an order of court making substitution of another trustee, in January and February.

(8) He had said assistant, Histed, make an abstract of the record of testimony and exhibits therein, a total of about 4,000 pages, said abstract being about 128 type pages, in January, February and March.

(9) Plaintiff and his said associates prepared for a hearing of said cause at the April, 1905, term, looked up law, and prepared digest, brief of issues, and served notice of the hearing on March 22.

(10) Took up about March 20 negotiations for a compromise with Mr. Moore, counsel for opposition, Mr. Harris, President of defendant, Mr. Histed and others, and had negotiations for same extending over about ten days' time. Drew and re-drew various propositions and settlement papers as negotiations proceeded; met executive committee of defendant in respect to settlement, made report to them, and had papers signed and settlement consummated on April 4, 1905.

In and about the performance of said services in said Texas case, plaintiff incurred a reasonable expense
229 for local and associate counsel therein of upwards of $1,300.

Said settlement as made was an almost completely successful outcome of the litigation for the Guardian Trust Company, having been made upon the following basis, viz:

The said Dock Company and the said Provident Company released the defendant from their said claim of over $1,500,00. The defendant released its claim against the said Dock

Company of above $27,000, and also released other claims of the value of about $2,000, and paid certain costs amounting to $500.

And plaintiff is unable to more particularly specify the services so rendered or to more particularly specify the dates or times when said services were rendered than is set forth hereinabove. (8, 9, 10).

(Schedule B.)

(10) Examined the Reorganization Plan of the Southern Company; looked up law with reference to liability of Southern Company, and, with the aid of plaintiff's office assistants, Brown and Price, prepared preliminary type briefs thereon, made digests of cases, and completed first printed briefs on said issue, January 15 to June 8.

* * * * * * *

(14) Drew petition for filing suit in Jackson County Circuit Court against the Southern Company upon the notes and open accounts originally held by defendant against the Belt Company, amounting to over $500,000, said petition consisting of 33 counts; and commencing suit March 15, 1905 (Case No. 23,066).

(15) Drew similar petitions in case between same parties in same court, 3 counts, upon an original claim of about $38,000 against the Belt Company, known as the '1st National Bank Claim,' commencing suit March 15, 1905 (Case No. 23,408).

* * * * * * *

(34) Made up a supplemental brief upon the consolidation issue, and also letter suggestions to John G. Johnson,
Esq., of Phila., and C. O. Tichenor, Esq., of Kansas
230 City, counselors of law, and obtaining favorable report from latter on said issue.

* * * * * * *

(43) Prepared type brief upon the right of defendant to file cross bill in said case, completed about May 15.

* * * * * * *

(48) Prepared draft of petition for filing suit in Jackson County Circuit Court by defendant against Southern Company upon notes and open account, which defendant originally held against the Gulf Company, amounting to about $30,-

000 (12 counts); commenced suit July 2, 1906, Case No. 28,277.

* * * * * * *

(52) Prepared printed 'Suggestions for Plaintiff' in said three 'State Court Cases.'

(53) April 1 to July 1, prepared to push the three State Court Cases to trial, giving notice to call up demurrers therein, appeared in court several times, having May 18 set for hearing demurrers.

(54) Appearing in court on said day and having demurrers overruled; examining answers filed in each case about three days later; drawing and filing reply to said answers, appearing in court on motion of opposition to stay proceedings, filed May 28; preparing for and resisting said motion; same being overruled.

(55) Preparing motion to strike out pleas; preparing motion to set causes for trial and advance the same; preparing printed suggestions thereof and letter suggestions for the judges in respect thereto; arguing motion to set and advance cases in court, same being overruled.

(56) On or about June 22, prepared and served notice on opposition to file any proposed amendment to answer in said cases within 30 days.

(57) Appeared in court by Rosenberger and had said court cases set for trial December 20, 1907.

(58) Made further memo, brief upon law of damages and attorney's fees in the injunction issue in Provident
231 Life case, and had negotiations with counsel for opposition in respect to settling such claim, and drew and filed suggestion of damages therein.

(59) Prepared and completed final brief on consolidation issue, having same printed—type held some weeks and brief revised and reprinted about June 13.

(Extract from letter of Harry S. Mecartney to the Guardian Trust Company, dated October 23, 1905.)

Gentlemen:

Your acting president has requested me to make a report of matters under my charge in time for the coming annual meeting.

You understand that no regular counsel was elected by the directors or executive committee for the past year, and when

the matter was brought up late in the fall the writer suggested that there was no absolute occasion for such a salaried official; but that matters could be referred from time to time, as they arose, to counsel and he be paid for work as actually done. This suggestion was adopted; and the writer believes it a far better plan than the salary plan and conduces more towards prompt disposition of business and is more economical in the end.

Quite a number of matters, law suits and claims, independently of the Belt & Dock Company litigations, have been investigated and disposed of, and some half dozen legal opinions rendered upon matters of vital import. The total amounts paid the writer thus far, together with bills presented at the end of this fiscal year have been less than $2,100.

I was at first reluctant to attempt to serve the company as to its general matters, fearing that the Belt litigation was enough for me to undertake. But with the help of com-
232 petent assistants, I have been able to take care of them with, as I hope, reasonable promptness.

As to matters pending and disposed of, I report:

(1) The bill of Trimble and Braley for over $22,000 including interest.

Active and almost constant negotiations for a settlement of this bill extending over a period of eight or nine months resulted in an agreement of compromise between the claimants and a majority of the executive committee on the basis of a payment to Messrs. Trimble and Braley of $9,000 in full settlement. The executive committee passed a resolution, adopting these terms, and against this there was lodged a protest by Mr. Prescott which was filed under the provisions of the order discharging the receiver.

This brought the matter up to the court to affirm or reject the compromise, and after argument it was rejected. In the meantime, Messrs. Trimble and Braley had brought suit in the State Court and the matter stands referred to a referee, Mr. Ball, to take evidence.

2. The claims vs. The Northern Connecting Company.

These claims of the Guardian Trust Company, aggregating about $66,000 had been presented in an intervening petition which the trust company had filed in the foreclosure proceedings on said railroad. It was asserted that the same were preferential claims. Testimony had been taken and the mat-

ter was pending on a reference to Judge Douglass. The master, last spring, made an exceedingly long and exhaustive report of about 100 typewritten pages, in which these claims were rejected, except as to the amount of $1,161.50, which he allowed the Trust Company.

Other parties offered objections to his report, but he has never finally disposed of them. After investigating
233 the matter, the writer concluded, and so reported to the then president, that there was no prospect of having the report overruled and we did not prosecute the matter further.

3. The Mo. Railway Construction Co., Debenture Bonds Amount $53,433.17.

The writer went went east in the summer time and retained counsel there to make inquiries and collect data in regard to the assets of the concern. I, in the meantime, pursued my inquiries in Chicago and finally got track of the books and I have been promised that they will be at my disposal for inspection within a very few days. If they do not turn up, I shall at once take proceedings in court and examine under oath the parties who were last in control of the company and who should know of its affairs.

4. The Texas suit at Beaumont: in which the Channel and Dock Company, set up a claim of stock liability for $1,500,000 against the Guardian Trust, and in which the Guardian Trust Company claimed about $30,000 as due from the Dock Company, was compromised about the first of April last, as heretofore reported.

'The Benedict Zinc case' in New York, was, as has likewise been reported, finally decided against the Trust Company and the judgment was satisfied.

The Quincy 'Zinc' Case at Kansas City was compromised.

The First National Bank case at Kansas City was finally decided against the Trust Company, and the judgment was paid. The amount, about $35,000, with interest, is a valid claim against the Kansas City Southern Company and the latter has been sued in the State Court therefor.

5. The Intervention Petitions in the foreclosure case of the Pittsburg and Gulf, involving claims for the services of counsel, rendered such Trust Company, as trustee in
234 the mortgages on the Texas and Louisiana part of the old Gulf System, were investigated and reported upon

adversely by me last spring, and as a part of the items of settlement of the Texas litigation, they were dismissed as to such items.

6. As to the claim of $22,000 of Coupons vs. the Gulf Road; I investigated this claim last spring. My associate, Mr. Histed, made me an exhaustive seven page report thereon, and after considering the matter thoroughly with him, I concluded that there was no prospect of recovery and I orally reported the same to the president and executive committee, expecting later to follow it up with a formal report, for which this report is now tendered.

7. Other claims.

Set up by way of intervention in various proceedings, which are worthy of note are involved in the Belt accounting case and need not be here commented upon; and with the exception of those so involved the 'slate' had been practically cleared.

8. The Bierce Case.

This is the case, as is well known, in which the receiver for the Guardian Trust Company was appointed, * * * (314, 315, 316).

H. S. MECARTNEY.

In his claim made to the Trust Company on March 26, 1908 (460 et seq.) Mr. Mecartney made the following statement of the amount which he claimed to be due him;

Without attempting to divide or itemize the total figure named, I suggest in brief the following figuring:

235	You have paid me on account		$ 27,500.00
	Total cash disbursed in full to date		7,559.36
	To apply on fees		$ 19,940.64
	1. The suits based upon the 'Gulf' notes of about $30,000.00 (including interest) and the First National Bank claim of about $40,000, are not within the scope of the original retainer, and represent an earned fee of about	$ 5,000.00	
	2. The fees in the first ijunction case, which was tacked onto the Belt foreclosure suits, and which are taxable in whole or in part upon a dismissal of the Supplemental Bill therein, represents a minimum fee earned as of two years ago	5,000.00	

3. The Texas Channel & Dock Co. case, which was consummated by an exceptionally favorable settlement three years ago, represents a minimum fee as of that date of	5,000.00	15,000.00
		4,940.64
Add figure above given		55,000.00
Gives		$59,940.64

as representing upon this tentative basis all services in the Belt-Southern cases, and for incidental work (462.-463).

In his cross-examination Mr. Mecartney testified (469):

Q. Now, you further speak of the suits based upon the Gulf notes of about $30,000.00 and the First National Bank claim as not within the scope of your original retainer?

A. Right.

Q. You are suing in this case for the value of services performed in the Gulf note case as being within the scope of the general Belt litigation, are you not? A. I am.

Q. And the First National Bank claim of about $40,000.00 was included in the Cambria suit by amendment, was it not?

A. It was.

Q. And it was also made a basis of the second of the three state court suits? A. Correct.

Judge Frank G. Johnson, judge of the Jackson County Circuit Court, in his opinion, said:

236 Thus far nothing has been said concerning the so-called Dock litigation, in which plaintiff was also employed at the same time and as part of the same retainer. This was a somewhat similar litigation pending in the Federal Court at Beaumont, Texas. The Trust Company had a claim against the Port Arthur Channel and Dock Company of Texas for about $27,000.00. The Southern Company, through the Dock Company and its receivers, and through the trustee of the railroad mortgage issued by the Dock Company was asserting a claim against the Trust Company for about one and one-half millions of dollars, arising out of an alleged unpaid stock subscription claimed to have been made by the Trust Company to the stock of the Dock Company and other claims. The litigation had started in Texas at about the same time that the Belt litigation had started in Kansas City. Before plaintiff's employment the legal sufficiency of this large claim made against the Trust Company by these other parties had been tested by demurrer, which upon full argument by the counsel for the Trust Company had been overruled by

the Federal Court in Texas, the Trust Company had answered, and about 2,000 pages of testimony had been taken in the case on the merits. A few months after his employment, plaintiff with the aid of his assisting counsel, Mr. Clifford Histed of this bar, consummated a settlement of this case by the terms of which the Trust Company was released from said claims of about one and one-half millions of dollars, which were being asserted against it, in consideration of which release the Trust Company released its claim against the Dock Company of about $27,000.00, and released other claims to the value of about $2,000.00 or less and paid certain court costs, thereby relieving the Trust Company of all liability for this large claim and extracting it from a long and burdensome litigation, which had already been a serious drain upon its resources and which was likely to be even a greater burden in the future. (1425, 1426) * * *

237

The Trust Company put into his charge the collection of an additional obligation of about $31,000.00, exclusive of interest, due it from the Belt Company, arising out of the endorsement of a note held by the First National Bank, upon which note the Trust Company's liability as endorser had not been adjudged until some time after plaintiff's employment. The Trust Company also charged plaintiff with the duty of collecting from the Southern Company certain promissory notes and an open account due it from the Kansas City, Pittsburg and Gulf Railroad Company, which were not within the scope of his original retainer. (1428).

The Supreme Court of Missouri in its opinion in Mecartney vs. Guardian Trust Company, 274 Mo. 224, in discussing the services rendered, said:

At the time he was employed there were two cases pending in which defendant here was interested, as heretofore noted, designated as the Suburban Belt case and the Channel & Dock Company case. (246).

Afterwards suit was brought in the state court, but the claim finally was enforced and collected in the federal court in the Suburban Belt case (246).

A few months after his employment judgment was obtained against the Trust Company as surety for the Belt Company in the amount of over $30,000.00, which the Trust Company was obliged to pay. He immediately brought suit against the Southern Company for reimbursement of the amount. This was not in contemplation and should not have been in the

minds of the parties at the time he was employed, because the liability had not accrued. This, with the suit for $400,000.00 against the Southern Company and a suit on account of $30,-
000.00 against the same company, were called 'the State
238 Court cases'). (247).

It is suggested that the plaintiff 'in the first count of the petition sued for compensation for services rendered in the Belt and Channel & Dock litigation, and nothing more' and that 'he is not entitled to anything on account of extra work' because 'he has not sued for it'.

It seems to be conceded in this suggestion that a number of causes which were not in contemplation at the time of plaintiff's employment were undertaken. What has been said in paragraphs I and II settles that point. But it is proper to mention that the first count, after mentioning the employment in the Belt case, distinctly alleges the undertaking of additional work, for it says: 'There were several other court cases and controversies which grew out of the same, or which cases and controversies in their issues of law or fact grew out of some of the issues involved therein or closely related thereto, in which cases and controversies plaintiff rendered various legal services.' It then refers to the original employment for authority to handle those extras. (254, 255).

Throughout Mr. Mecartney's connection with this case, Mr. J. C. Rosenberger had the brunt of the work. Mr. Mecartney testifying on this subject said:

Mr. Rosenberger's services were chiefly in the prosecution or in the taking of the testimony in the Belt accounting case, and in preparing briefs from time to time on the question of practice, reports from time to time on the progress of testimony and upon questions that arose, and also aided in looking up the propositions of law and aiding in the brief work. . . He also appeared with me in court at the most crucial moments in the argument of the most important motions. . . He interogated witnesses in detail, and took nearly all of the evidence that was taken, and attended upon the
taking of the evidence. (201).

239 Mr. Mecartney figured the value of Mr. Rosenberger's services at $15,500.00.

The amount which we finally settled on as a total payment was $15,500.00 and interest on unpaid amounts that ran from the time I was discharged.

The Referee: How was that, $15,000.00 in addition to what he had?

A. No, $15,500.00 including the $4,500.00 and 6 per cent interest from March, 1908. (767, 768).

Judge McCune, the referee before whom said cause was tried, after an exhaustive trial of the case, on a record containing over 1270 pages, found that the plaintiff was entitled to 'a balance of $14,860.57' (150, 154).

Mr. Mecartney having made a report upon the condition of the Trust Company litigation stated to that company on the threshold of his employment, in answer to a request for an estimate as to the amount of his fees in the Belt and Dock cases that 'if the cases should be settled before final decree my guess is that such fees would run from $10,000.00 to $15,000.00. If fought through to a final decree and through the Court of Appeals they might run up to $20,000.00'. He figured the time required to realize upon the claim at from two to two and a half years (142). At the time this estimate was made, he had made to the Trust Company a full report upon the character of the litigation and the difficulties to be encountered. (556 et seq.) Throughout his connection with the litigation, Mr. Mecartney had the idea that he would recover costs as between solicitor and client in the litigation. In his letter to the Trust Company of June 25, 1907, after all the evidence had been taken in the case, he said:

We are entitled, as said several times in my former letters, to $35,000.00 or $40,000.00 costs and damages, stenographers' and law fees, etc. in the federal court case when a
240 decree shall be entered therein. (342).

On May 26, 1906, he stated that he expected to collect 'as costs $2,000.00 advanced the Master, and about $7,000.00 stenographers' fees, and fees of experts and officers and employes of the company working up statements, etc., say $16,000.00. Portion of attorneys' fees incurred—at least $15,000.00' (330).

In his letter of January 26, 1906, after all of the evidence had been taken, he said:

I expect also, if I get the case to a final decree before an impartial judge, to collect the sum of $15,000.00 or $20,000.00 expenses for stenographer's fees, experts and time of officers, etc., and in addition some $20,000.00 or $25,000.00 law fees. (220).

On March 19, 1908, he said:

If we succeed in having a fair and impartial hearing, we will get back $50,000.00 or more on account of law fees and damages in addition to regular court costs. (456).

As the question of taxation of costs as between solicitor and client originated with Mr. Mecartney we offer his following statements in the record in his case for the purpose of showing that the demand in this case was not governed by the rules, principles and practice in equity, but that he recognized the claim for such costs as being a precedent.

Q. In a letter from you to Mr. Prescott of date February 28, 1906, you estimate the Trust Company's claim against the Belt or Southern Company for attorneys' fees, stenographers' fees and other expenses at $40,000.00. Upon what was that estimate made?

A. That estimate was made upon the basis outlined in my preliminary report that the court, notwithstanding it was considerable of a precedent, would allow us an attorney's fee for the frivolous litigation that had been prosecuted on be-
241 half of the accounting cases . . . . I ought to say in this connection that I found out in the prosecution of my inquiry that the Federal Court, and under practically the same status (evidently he said 'statutes'), had allowed attorneys' fees as a matter of course, and had stopped the practice on the ground that it could not tell when litigation was frivolous or not, and for that reason had dropped it, but there was no reason why the court would not take it up again in a case of this kind. (1194-1195).

The matter was new, and more or less a precedent. (344)

Mr. Mecartney further testified:

I never expected the court to allow all of our attorneys' fees in the entire litigation . . . I may several times have claimed that, but I don't think I did, but I did feel that if we got an impartial hearing in that case that the court would allow us a good round share of our attorneys' fees in the accounting matter on the ground that the litigation had been trivial, and the record had been made on false pleadings, and a patent theory, a theory patent on the face of the pleadings, common business rules, etc. I never stopped to consider just how much, but that it was a proper claim to make in negotiations for settlement, and to earnestly make, and that the court would tax a good round sum against them as attorneys'

fees in the accounting issue only; not on the consolidation issue, but on the accounting issue, possibly even on the intervention issue, as it developed. (344).

It only included the accounting issues, and not taking into consideration any other side issues. (1194).

The foregoing objections to the admission of said vouchers, Nos. 769, 960, 1041, 1164 and 2199, covering Items Nos. 108, 111, 114, 116 and 117, were by the Master overruled, and said offer to introduce evidence in support of said objec-
242 tions was by the Master denied, to which rulings of the Master, said parties thereupon duly excepted.

Voucher No. 2309, covering Item No. 119, is a receipted statement from Edward P. Gates to the Guardian Trust Company, dated March 28, 1908, representing a payment of $3,000.00 as a retainer for said Gates and associate counsel in the matter of litigation with The Kansas City Southern Railway Company in accordance with a letter of Gates, Sea & English, dated March 28, 1908 thereto attached. Said attached letter is as follows:

"Law Offices
Gates, Sea & English
Scarritt Bldg.,
Kansas City, Missouri.

Kansas City, Mo. March 28, 1908.

Guardian Trust Company,
Kansas City, Mo.

Gentlemen:

In answer to your inquiry, through your president, as to whether we could arrange to take charge of the controversies between your Company and the Kansas City Southern Railway Company, we beg to inform you that no obstacle exists to our assuming the litigation if we can have assistance of the executive officers of the Trust Company. The record has assumed such enormous proportions that much preliminary work must be done to enable counsel to present and protect the claims of your company and to permit of a reasonable estimate of the work involved, the time probably required and the fees reasonably to be expected. We understand that immediate attention is required in certain matters and we suggest that a retainer of Three Thousand Dollars ($3,000.00) to cover present fees would be reasonable. For this, we and associate counsel will investigate the issues in the controversy and advise you thereon, giving meantime, attention to all essential details of the present court proceedings.

At the filing of this report, should you then determine that our course of action does not commend itself to your
243 executive committee or should you determine that the probable expense would be excessive, there will be at least no further charge for us or our associates and no expense will be incurred without advising you prior to incurring same.

We are, however, unwilling to undertake these controversies unless it is in good faith sought to dispose of them as rapidly as the interests of your company will permit.

It is understood that this employment includes only the litigation covering your disputes with the Kansas City Southern Railway Company, whether originating with your company or the constituent parts of the Southern Company, which we cannot at this time more explicitly state but which will be determined as we become more conversant with the records.

Should this be satisfactory to you, upon advice to that effect work will begin at once.

Yours very truly,

GATES, SEA & ENGLISH
(Signed By Edward P. Gates."

JAS-MH

Voucher No. 2500, covering Item No. 120, is a receipted statement from Edward P. Gates to the Guardian Trust Company, dated June 25, 1909, representing, among other items, a payment of $4,000.00 on account of legal services rendered in connection with the Belt Line litigation.

Voucher No. 2569, covering Item No. 121, is a receipted statement from Edward P. Gates to the Guardian Trust Company, dated Dec. 14, 1909, covering the payment of $2,000.00 on account of services rendered in Cambria Steel Company vs. Guardian Trust Company and Guardian Trust Company vs. The Kansas City Southern Railway Company.

Voucher No. 2673, covering Item No. 122, is a receipted statement from Edward P. Gates to the Guardian
244 Trust Company, dated August 1, 1910, representing the payment of $3,000.00 on account of services rendered in connection with Cambria Steel Company vs. Guardian Trust Company and Guardian Trust Company vs. The Kansas City Southern Railway Company.

Voucher No. 2747, covering Item No. 123, is a receipted statement from Edward P. Gates to the Guardian Trust Company, dated Feb. 15, 1911, covering, among other items, the payment of $4,000.00 on account of legal services in Kansas City Suburban Belt Railway Company vs. Guardian Trust Company.

Voucher No. 2824, covering Item No. 124, is a receipted statement from D. J. Haff, to the Guardian Trust Company, dated Oct. 27, 1911, representing the sum of $1,000.00 paid for retainer and on account of fee for preparing brief and argument in the United States Court of Appeals on the hearing of the application of the Guardian Trust Company for leave to file additional briefs, as per stipulation filed in the Court of Appeals on June 21, 1911.

Attached to said voucher is the following letter:

"Law Offices
Haff, Meservey, Gorman & Michaels
Suite 906 Commerce Building
Kansas City, Mo.

Delbert J. Haff
Edwin O. Meservey
Charles W. Gorman
Willian. C. Michaels

Correspondents in
the City of Mexico.
Lics. Calero & Vera Estanol

Dell Dutton
Samuel D. Newkirk
Charles M. Blackmar
Lloyd T. Chockley
Frank G. Warren

Oct. 26, 1911.

Cambria Steel Co. vs.
K. C. Suburban Belt Co.
Guardian Trust Co. et al., K. C.
Southern Ry. Co. Intervenor.

Mr. J. F. Downing,
President Guardian Trust Co.,
New England National Bank, City.

My dear Sir:

In reply to your request for a statement of the fee to be
245 charged by me as associate counsel with Messrs. Gates and English, in preparing brief and argument in the United States Court of Appeals on the hearing of the application of Guardian Trust Company for leave to file additional briefs as per stipulation filed in United States Court of Appeals on the 21st day of June, 1911, upon the two ques-

tions set forth in said stipulation, I desire to state that the fee which I will stipulate as compensation for my services and those of the firm of Haff, Meservey, German & Michaels, in the above matter, will be Two Thousand Five Hundred Dollars, one thousand dollars of the same to be paid in advance as retainer, and the remainder of the fee after the submission of the said cause to the United States Court of Appeals.

It is understood that I and my associates will make a further study of the record in the above appeal and of the briefs filed therein and to be filed by Messrs. Gates and English, and will prepare and file additional brief or collaborate with Messrs. Gates and English in any briefs to be filed by them, as we may deem necessary, useful or expedient for the proper presentation of the case.

The fee named herein is, of course, exclusive of any expenses that may be incurred in the premises.

Very truly yours,

DJH*B D. J. HAFF"

Voucher No. 2881, covering Item No. 125, is a receipted statement from Gates and English to the Guardian Trust Company, dated Jan. 16, 1912, representing, among other items, the payment of $4,000.00 for services rendered in the Belt and Kansas City Southern litigation.

Voucher No. 2884, covering Item No. 126, is a receipted statement from Haff, Meservey, German & Michaels to the Guardian Trust Company, dated Jan. 18, 1912, repre-
246 senting, among other items, the payment of $1,500.00 for balance of services in the case of Cambria Steel vs. Kansas City Suburban Belt Company, Guardian Trust Company, et al.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of the foregoing vouchers, No. 2309, 2500, 2569, 2673, 2747, 2824, 2881 and 2884 covering respectively Items No. 119 to 126, inclusive, on the grounds set forth in numbered paragraphs 1 to 10, inclusive, of their written statement of objections. Said objections were, by the Master, overruled, to which ruling of the Master, said parties duly excepted.

Voucher No. 2954, covering Item No. 127, is a receipted statement from Trimble & Braley, to the Guardian Trust Company, dated July 31, 1912, representing the payment of

$10,198.13 in full payment of all claims and judgment rendered in favor of Trimble & Braley in case of Trimble & Braley vs. Guardian Trust Company. Attached to said voucher are the following letter and acknowledgment:

"Edward C. Wright, Trimble & Braley case.
Attorney at Law,
First National Bank Building, August 7th, 1912.
Kansas City, Mo.

Mr. John A. Prescott,
Liquidation Agent,
Guardian Trust Company,
Kansas City, Mo.

Dear Sir:

Upon receipt of the notification that the Supreme Court of Missouri had reversed the judgment in the case of Trimble & Braley against the Guardian Trust Company and has remanded the case for further proceedings in the Circuit Court of Jackson County, Missouri, in accordance with the opinion, I ascertained from Mr. Harkless that he did not desire to go further in the case. I then went over the opinion and the record with him and found that he had determined to his own satisfaction that further litigation was inadvisable,
for the reason that the opinion of the Supreme Court
247 left nothing to be decided but had finally disposed of
the matter, except upon the formal entering of a decree and determination of the amounts due.

I then prepared a motion in the Supreme Court to tax the costs of printing the abstract of the record and prepared and attached to the motion an attested copy of the bill from the printer, in the sum of $366.00. I also prepared, served and filed in the Supreme Court a notice to Trimble & Braley and John A. Eaton, their attorney of record, of the filing of our motion which was accepted and delivered to the Clerk of the Supreme Court on the 28th day of June, 1912.

At that time I learned that Mr. John A. Eaton, for Trimble & Braley, had filed in the Supreme Court a motion to tax the cost against us of printing their additional abstract of the record. No notice of this was given to us. Both motions are now pending before the Supreme Court and the Clerk informs me that there will probably be no argument heard upon these motions, but that at its next session the Court, upon its own inspection of the record, will decide the matter of these costs and advise the parties.

Then after consultation with you, I took up with Mr. Eaton and Mr. Braley the question of agreeing upon a record in the

Circuit Court which should finally dispose of this matter. We agreed upon everything except the question of taxing part of the costs against the plaintiffs in this case, and after carefully going over all the authorities and briefing the matter thoroughly, I decided that the chance of our recovering any of the costs in the lower court was so much against us that it would be a waste of the Company's money, and thereupon I entered into a stipulation for judgment in the sum of $12,560.41 which included interest to July 30th, 1912. This stipulation was prepared for signature by the parties and was accompanied by receipts to be signed by Judge J. McD. Trimble and Mr. C. A. Braley.

248 You will remember that Mr. Eaton had filed in this case, a notice of attorney's lien which was accepted by me on behalf of the Company, I, therefore, prepared a stipulation and receipt from Mr. Eaton, covering any claims which he might have, and this matter was then approved by Trimble & Braley and all that was left to be settled between us was the amount of costs which had been advanced by Messrs. Trimble & Braley and not determined in the record.

On the 5th day of August, upon my return, I went with Mr. Eaton to the Assignment Division of the Circuit Court of Jackson County and found that the mandate from the Supreme Court had been received and filed and the case reinstated on the docket under its old number 25346. I had the clerk of the court figure up the amount of unpaid costs, $41.55 and paid these and then with Mr. Eaton went before the court and had judgment entered upon the stipulation for the agreed sum of $12,580.41 and had receipt of satisfaction of the judgment acknowledged in open court and noted upon the record.

There remains, therefore, upon the records of the court in Jackson County, Missouri, nothing of the controversy between us but the cause is finally disposed of and stricken from the docket as a disposed of case.

The costs for which we asked judgment in the Supreme Court, namely: $366.00, as you know, retained in your hands to await the final determination by that court of our right to recover from Trimble and Braley these costs. I have requested the Clerk of the Supreme Court to advise me as soon as the motions which have been filed to assess these costs, have been disposed of and at that time we can decide, under the rulings of the court, where this sum of $366.00 will be paid, and when this is done the matter will be entirely cleared from our books.

In clearing the matter upon the records of the Circuit
249 Court I found that while we had paid to the Hon. R. E. Ball the sums taxed under the proceedings below in favor of him as Master, no receipt had ever been made in the Clerk's office and in order that no question could ever hereafter arise upon this matter, although the Clerk had, upon my producing Judge Ball's receipt, satisfied the judgment and given us a note of the satisfaction, I secured from Judge Ball an acknowledgment of the payment of the allowance to him in full, filed it with the court and had it pasted upon the margin of the record so that there is now upon the records of the Circuit Court of Jackson County, Missouri, the full and complete evidence that all liability against the Guardian Trust Company upon the claims of Trimble & Braley have been paid and satisfied in full.

The Surety Company upon our appeal bond have had the records inspected and have acknowledged themselves to be fully satisfied upon this question and our liability upon application for this bond has been satisfied and nothing now remains to be done except to await the action of the Supreme Court upon the sum retained in your hands.

I have felt, and now state to you, that I believe this was in all respects for the best interest of the Guardian Trust Company and that we should have been derelict in our duty to the company had we litigated further over the question of possibly recovering part of the costs expended by us, as in determining this we would, beyond question, have paid out in court costs, attorneys' fees and interest, sums considerably in excess of any sums we might have hoped to recover.

Yours very truly,

ECW/MW EDWARD C. WRIGHT."

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250 "In the Circuit Court of Jackson County, Missouri, To the June Term, 1912, at Kansas City.

J. McD. Trimble, and C. A. Braley, Plaintiffs,
No. ..... vs.
Guardian Trust Company, Defendant.

Acknowledgment of Satisfaction.

Know All Men By These Presents, that we, J. McD Trimble and C. A. Braley, formerly partners under the firm name and style of Trimble and Braley, have received and do hereby acknowledge to have received of Guardian Trust Company

defendant in the above entitled cause, full satisfaction, payment and accord for judgment rendered in the above entitled cause and of all causes of action connected therewith, and we and each of us do hereby ratify and confirm the action of the defendant in the above entitled cause, Guardian Trust Company, in paying the amount of said judgment to John A. Eaton, attorney for the plaintiff in said cause, and we, and each of us hereby specifically authorize the said John A. Eaton to enter up satisfaction of said judgment upon the margin of the record in the office of the Clerk of the Circuit Court of Jackson County, Missouri, for us and for himself as attorney, in said cause.

Dated this 31 day of July, A. D. 1912.

J. McD TRIMBLE,
C. A. BRALEY."

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of said voucher on the grounds set forth in numbered paragraphs 1 to 7, inclusive, and nine and ten of their written satement of objections, and in support of said objections, said parties asked leave to offer evidence, documentary and oral, for the purpose of showing that the services covered by said voucher included services foreign to this litigation, and upon issues
on account of which costs as between solicitor
251 and client may not be taxed, if they may be taxed on
any issue, and were excessive. The written statement read into the record in connection with the objections to the voucher No. 146, covering Item No. 82, and as to the offer of proof in support of said objections referred also to said voucher No. 2954, covering Item No. 127. Said objections were by the Master overruled, and said offer of proof in support thereof was denied, to which rulings of the Master, said parties duly excepted.

Voucher No. 3035, covering Item No. 129, is a receipted statement from Gates & English to the Guardian Trust Company, dated Feb. 21, 1913, representing the payment of $7,500.00 on account for professional services rendered in the Cambria Steel Company vs. Guardian Trust Company cases.

Voucher No. 3035, covering Item No. 129, as a receipted statement from Haff, Meservey, German & Michaels to the Guardian Trust Company, dated Feb. 24, 1913, representing

a payment of $1,000.00 in full to date for additional services in attendance upon United States Court of Appeals at St. Louis, and in preparation of reply to the Guardian Trust Company to argument and brief on reargument of The Kansas City Southern Railway Company.

Voucher No. 3154, covering Item No. 130, is a receipted statement from Gates & English to the Guardian Trust Company, dated January 13, 1914, representing, among other items, the payment of $5,000.00 on account of professional services in the Belt litigation.

Voucher No. 3155, covering Item No. 131, is a receipted statement from Clephane & Clephane, Washington, D. C. to the Guardian Trust Company, dated April 9, 1914, representing the payment of $200.00 as a retainer fee and on account of filing motion in the United States Supreme Court in the case of Kansas City Southern Railway Company vs. Guardian Trust Company.

252 Voucher No. 3189, covering Item No. 132, is a receipted statement from Frederick W. Lehmann, St. Louis, Missouri, to the Guardian Trust Company, dated Nov. 10, 1914, representing a payment of $1,00.00 as a retainer fee in the case of Guardian Trust Company vs. Kansas City Southern Railway Company.

Voucher No. 3238, covering Item No. 133, is a receipted statement from Gates & English to the Guardian Trust Company, dated Nov. 9, 1915, representing, among other items, the payment of $5,000.00 on acocunt of services in the Cambria Steel Company case.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of the foregoing vouchers, No. 3034, 3035, 3154, 3155, 3189 and 3238, covering respectively, Items No. 128 to 133, inclusive, on the grounds set forth in numbered paragraphs 1 to 9, inclusive, in their written statement of objections. Said objections were by the Master overruled, to which ruling, said parties duly excepted.

Voucher No. 896, covering Item No. 134, is a receipted statement from F. W. Lehmann to the Guardian Trust Company, Henry C. Flower, Receiver, dated Dec. 2, 1917, representing the payment of $15,000.00 for balance in full settlement for legal services rendered to date paid under order of court made Nov. 24, 1917.

The Kansas City Southern Railway Company and Cambria Steel Company objected to the introduction in evidence of said voucher No. 896 on the grounds set forth in numbered paragraphs 1 to 10, inclusive, of their written statement of objections. Said objections were, by the Master, overruled, to which ruling said parties duly excepted.

Voucher No. 1203, covering Item No. 135, is a receipted statement from H. S. Mecartney to the Guardian Trust Company, Henry C. Flower, Receiver, dated May 6, 1918, representing, among other items, the payment of $135,013.56 in settlement of a judgment awarded H. S. Mecartney against the Guardian Trust Company in the Circuit Court of
253 Jackson County, Missouri.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction in evidence of said voucher No. 1203 on the grounds set forth in numbered paragraphs 1 to 10, inclusive, of their written statement of objections. Said parties further objected to the introduction of said voucher and to any and all evidence in support of Item No. 135, being the Mecartney judgment for the further reasons:

1. The opinion of the Supreme Court in affirming said judgment is contrary in many particulars to the actual facts in the case and is based on a misunderstanding of the law and facts.

2. Admissions were made in said cause by Counsel for the Trust Company and its receiver in reference to claims made in said case which were not supported by the facts.

3. So much of the services as were rendered by the plaintiff in said action as pertain to the issues here involved were rendered under a contract by which the compensation of the plaintiff therein was fixed, which compensation was fully paid to him prior to the filing of said action.

In support of said objections, said parties asked leave to offer, in addition to other evidence, evidence showing the statements made in the pleadings or by the courts or by witnesses in said case of H. S. Mecarntey vs. Guardian Trust Company; and said parties read into the record, the written statement hereinbefore set forth in connection with the objections to the introduction of Voucher No. 769 covering Item No. 108 and the offer of proof in support of said objections, said written statement appearing at pages 4 to 11 hereof. Said objections were by the Master overruled, and said offer of

proof denied, to which rulings of the Master, said parties duly excepted.

254 Voucher No. 3371, covering Item No. 136, is a receipted statement from H. S. Mecartney to Henry C. Flower, Receiver of the Guardian Trust Company, dated Sept. 15, 1922, representing the payment of $47,000.00 as an allowance of attorneys' fees and advancements by the United States Circuit Court of Appeals. Attached to said voucher, is the following order:

Order.

"In the District Court of the United States for the Western Division of the Western District of Missouri.

Edward A. Shedd and Charles B. Shedd, et al., Complainants, No. 110. vs. In Equity.
Guardian Trust Company, Board of Trade Office Building Company, State Realty Company and John A. Prescott, et al., Defendants.

Harry S. Mecartney, Claimant.

Now this cause coming on to be heard upon the mandate of the Circuit Court of Appeals, 8th Circuit, filed herein Sept. 11, 1922, the claimant, Harry S. Mecartney, appearing by James A. Reed and J. G. L. Harvey, his attorneys, and the Receiver, Henry C. Flower, by Justin D. Bowersock, his attorney, and the Court having considered said mandate, and being fully advised in the premises.

It Is Now Ordered that said Receiver shall forthwith pay to said claimant, taking the usual receipt therefor, the sum of $37,500.00 allowed to him by said Circuit Court of Appeals for services rendered by him to the defendant Guardian Trust Company, as specified by him in his printed claim filed herein, with interest thereon at 6% per annum from May 12, 1919, to this date, and also the sum of $1,725.92 for disbursements and advances made by him in and about the rendition of said services, with interest thereon at 6% per annum from March 26, 1920, to this date, amounting in the aggregate to $47,000.00.

Sept. 15, 1922.

(Signed) ARBA S. VAN VALKENBURGH,
District Judge."

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of said Voucher No. 3371, on the grounds set forth in numbered paragraphs 1 to 10, inclusive of their written statement of objections and further objected to the introduction of said voucher and to any and all evidence in support of said item No. 136, being the judgment in favor of H. S. Mecartney in the Federal Court for the following additional reasons:

(1) The services rendered by him in this litigation
255 after the final decree of June 25, 1910, were voluntary services. In support of this objection, we offer in evidence the following statement contained in 'Suggestions in Support of Petition for Leave', etc., purporting to be signed by Messrs. Newell H. Clapp and Enoch J. Price, but which statement was in fact the statement of H. S. Mecartney.

It is apparent from the volume of the record here that due diligence has been used to prepare this application. In fact, without Mr. Mecartney's aid—volunteered without compensation, it would scarcely have been possible to present it thus early. (Page 966 printed record in the United States Supreme Court in this cause.)

In this testimony on this subject Mr. Mecartney testified:

Q. I find that in the transcript that on January 20th, 1913, the following order was made: 'These cases came on to be heard and on motion of Edward S. Shedd, et al., petitioners for leave to file suggestions, etc. (reading same). Are those suggestions that are there referred to the same as Exhibit 117 which you have identified. A. They are.

Q. Pursuant to that order did you file these suggestions with the court?

A. I did. I did it pursuant to both these orders. (Pages 1415, 16 record in Mecartney case in state court).

(2) If it was Mr. Mecartney who presented in the Court of Appeals the contention that The Kansas City Southern Railway Company was liable for the debts of the Kansas City Suburban Belt Railroad Company, and that judgment should be entered against the Southern Company, the fact that such contention was not made by other counsel for the Trust Company in that case was because of the conduct of Mr. Mecartney as counsel for the Trust Company prior to that time in putting the issues in this case in such shape that his successors as counsel for the Trust Company in charge of the

litigation were led to believe that that issue could not
256 be presented in the Court of Appeals. In his argument before Judge McPherson against the application for the second injunction against the prosecution of the state court cases Mr. Mecartney, in speaking of the Trust Company's pleading with reference to the liability of the Southern Company said:

It is not an affirmative claim on our part to a personal judgment—we could not get judgment on it. But, as the pleadings stand, we are not seeking personal judgment against the Southern Company. In that case the Southern Company is a mere intervener (page 57 of the argument before Judge McPherson).

Said parties also asked leave to offer other evidence in support of said objections. Said objections were by the Master overruled, and said offer of proof denied, to which rulings of the Master, said parties duly excepted.

Voucher No. 3385, covering Item No. 137, is a receipted statement from George H. English, surviving partner of the firm of Gates & English, to Henry C. Flower, Receiver of the Guardian Trust Company, dated Oct. 27, 1922, representing an aggregate payment of $5,859.40, including the claim of Gates & English for attorneys' fees as finally allowed, of $4,609.59 and interest on the same to date, of $1,249.81. Attached to said voucher is the following order:

"Order.

In the District Court of the United States for the Western Division of the Western District of Missouri.

Shedd, et al., Complainants,
No. 110. vs.
Guardian Trust Company, et al., Defendants.

Now on this 23rd day of October, 1922, the above entitled
257 cause coming on to be heard upon the claim of Gates & English heretofore filed herein, and upon the report of Hon. Henry D. Ashley, Special Master, filed herein on October 15, 1918, and upon the exceptions filed thereto by the plaintiff and certain intervening petitioners, and upon the exceptions filed thereto by the claimants, Gates & English, George H. English, the surviving partner of said firm of Gates & English, appearing in person, the plaintiff and intervening petitioners by Jules C. Rosenberger, their solicitor, and the Receiver herein by Justin D. Bowersock, his solicitor,

and the Court having considered said report and heard the argument of counsel, and being fully advised in the premises,

It Is Now By The Court Considered, Adjudged And Decreed that said report be and it is hereby in all things confirmed; that said claim be allowed in the sum of $4,609.59, with interest at 6% per annum from April 20, 1918, and that the Receiver do forthwith pay out of the funds of the Guardian Trust Company in his hands to said George H. English, surviving partner, the sum of $5,859.40, taking proper receipt in full therefor.

(Signed) ARBA S. VAN VALKENBURGH,
District Judge."

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction in evidence of said voucher No. 3385 on the grounds set forth in numbered paragraphs 1 to 10, inclusive, of their written statement of objections. Said objections were, by the Master, overruled, to which ruling said parties duly excepted.

Voucher No. 2405, covering Item No. 165, is a receipted statement from John C. Bovard, to the Guardian Trust Company, dated Nov. 9, 1908, for $55.95, representing the cost of printing the brief filed with Judge Douglas in the Kansas City Southern Railway Company case and also the bried filed in the United States Circuit Court of Appeals.

The Kansas City Southern Railway Company and the
258 Cambria Steel Company objected to the introduction in evidence of the foregoing voucher on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of their written statement of objections. Said objections were, by the Master, overruled, to which ruling, said parties duly excepted.

Vouchers No. 2755, 2763, 2774, 2846, 2867, 2868, 2997, 3037, 3039, 3061, 3083 and 3130, covering respectively Items No. 166 to 177, inclusive, and Voucher No. 3160 covering Items No. 178 and 179 are receipted statements from various printing firms in Kansas City, Missouri, to the Guardian Trust Company, representing the cost of printing briefs and opinions in the Guardian Trust Company, Cambria Steel Company, Kansas City Southern Railway Company litigation. Said vouchers are dated, respectively, April 25, 1911, May 8, 1911, May 31, 1911, Nov. 9, 1911, Dec. 22, 1911, Dec. 22, 1911, Nov. 19, 1912, Feb. 24, 1913, Feb. 24, 1913, May 8

1913, August 21, 1913, December 20, 1913 and May 14, 1914. The vouchers covering Items No. 166 to 171, inclusive, 173, 174 and 179 represent the cost of printing briefs and are in the following amounts, respectively: $24.60, $3.00, $10.00, $71.00, $42.45, $77.00, $77.40, $9.90, $9.00. The voucher covering Item No. 172, in the sum of $21.00, represents the cost of printing 100 copies of the opinion in the United States Circuit Court of Appeals in the cases of Central Improvement Company vs. Cambria Steel Company, and the Guardian Trust Company vs. Cambria Steel Company. Voucher covering Item No. 175, in the sum of $18.75, represents the cost of printing the opinion of the United States Supreme Court in the case of Northern Pacific Railway Company vs. Joseph H. Boyd. The voucher covering Item No. 177, in the sum of $35.00, represents the cost of printing 150 copies of the opinion in the cases of Central Improvement Company vs. Cambria Steel Company and Guardian Trust Company vs. Cambria Steel Company. The vouchers covering Items
259 No. 176 and 178, in the amounts of $6.30 and $19.80, respectively, represent the cost of printing pleadings filed in the cases of Guardian Trust Company vs. Cambria Steel Company and Kansas City Southern Railway Company vs. Guardian Trust Company.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction in evidence of the foregoing vouchers covering Items No. 166 to 179, inclusive, on the grounds set forth in numbered paragraphs 1 to 8, inclusive, of their written statement of objections. Said objections were, by the Master, overruled, to which ruling said parties duly excepted.

Voucher No. 46, covering Item No. 180, is a receipted statement from S. B. Willey to F. M. Black, Receiver of the Guardian Trust Company, dated Dec. 31, 1900, for salary for the month of December, 1900, in the sum of $250.00.

The following numbered vouchers also represent salary paid by the Guardian Trust Company and its Receivers to S. B. Willey during the period from January 1, 1901 to December 1, 1904: 105, 133½, 147, 176, 190, 222, 240, 283, 294, 329, 331, 341, 365, 377, 416, 433, 458, 472, 499, 516, 545, 556, 586, 617, 643, 658, 693, 710, 744, 757, 791, 802, 828, 1, 23, 28, 55, 61, 80, 84, 106, 113, 179, 31, 51, 70, 101, 129, 143, 156, 169, 175, 192, 206, 229, 242, 262, 272, 293, 298, 315, 324, 342, 348, 365, 376, 390, 403, 430, 441, 458, 472, 488, 491, 509, 511, 528, 535, 554, 565, 582, 593, 612, 620, 632, 640, 655, 663, 682, 688,

713, 717 and 750. All of said vouchers are in substantially the same form as voucher No. 46, except as to dates and amounts. All of said vouchers, including Voucher No. 46, show in the aggregate, payments of $1,500.00 of salary to S. B. Willey by the Guardian Trust Company and its Receivers, from Dec. 1, 1900 to June 1, 1901, and total payments from June 1, 1901 to December 1, 1904, of $7,343.35, on the dates and for the respective periods shown in the account filed with the Master. It is admitted by the Kansas City South-
260 ern Railway Company and the Cambria Steel Company that the amounts stated in said Willey vouchers were paid to Mr. Willey at the date of said vouchers.

Voucher No. 20, covering Item No. 181, is a pay-roll of Missouri, Kansas and Texas Trust Company for the half month ending December 15, 1900, showing, among other items, the payment of $30.00 to Jennie L. Gott, stenographer, said pay-roll being approved by F. M. Black, Receiver. Attached to said voucher is a receipt, dated Dec. 15, 1900, from Jennie L. Gott, acknowledging receipt of $30.00 from F. M. Black, Receiver, in full for salary to date.

Vouchers No. 43, 94, 106, 745 and 749 also show payments of salary to Jennie L. Gott, by the Guardian Trust Company and its Receivers during the period from December 15, 1900 to December 1, 1904. Said vouchers, including Voucher No. 20, show, in the aggregate, a payment for salary by said company and its Receivers to said Jennie L. Gott of $360.00 from Dec. 1, 1900 to June 1, 1901, and of $2510.00 from June 1, 1901 to Dec. 1, 1904. Said vouchers numbered 43, 94, 106, 745 and 749 are in substantially the same form as voucher No. 20 insofar as they cover the salary paid to said Jennie L. Gott, except as to dates and amounts.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction in evidence of the foregoing vouchers covering Items No. 180 and 181 on the grounds set forth in numbered paragraphs 1 to 5, inclusive, and 7 of their written statement of objections. Said objections were, by the Master, overruled, to which ruling said parties duly excepted.

Vouchers No. 958, 2479, 2686, 2807, 2951, 2958, 3076, 3084, 3173, 3196, 3227 and 3236 covering Items No. 200 and 202 to 210, inclusive, in the respective amounts of $5.00, $5.00, $175.00, $175.00, $175.00, $175.00, $112.50, $43.75 and $175.00, dated respectively Sept. 23, 1905, March 27,
261 1909, Sept. 1, 1910, Aug. 4, 1911, July 31, 1912, August 8, 1912, July 31, 1913, August 30, 1913, Aug. 27,

1914, Nov. 20, 1914, Aug. 31, 1915 and Nov. 5, 1915, are receipted statements to the Guardian Trust Company from various Surety Companies and their agents representing premiums paid on appeal bonds in the Cambria Steel Company-Kansas City Suburban Belt Railway Company-Kansas City Southern Railway Company-Guardian Trust Company litigation.

The vouchers covering Items No. 200 and 202 are premiums on bond for $500.00 for two years given on appeal from Judge Phillips' decision restraining the Guardian Trust Company from prosecuting its suit in the State Court against the Kansas City Southern Railway Company.

Vouchers covering Items No. 203 to 207, inclusive, and Item No. 210, represent the premiums for six years on the appeal bonds in the Central Improvement Company case and in the case of Guardian Trust Company vs. Cambria Steel Company.

The voucher covering Item No. 208, in the sum of $112.50, represents the premium for three years on the appeal bond in the case of Cambria Steel Company vs. The Kansas City Suburban Belt Railway Company. Attached to voucher No. 3196 covering said item, is the following letter:

"John R. Bland, President. Cash Capital $2,000,000 Geo. R. Callis, Secretary-Treasurer.

We will Bond You
Contract
Judicial
Fidelity
Casualty
United States Fidelity and Guaranty Company
Baltimore, Md.

Kansas City, Mo. Oct. 15, 1914.

Midland Valley Department
Lucas & Debout
Managers
104-5-6 R. A. Long Bldg.,
Phones: Bell 5555 Main
Home 4800 Main
Robert E. Ball & I. P. Ryland
Attorneys.

Re: Central Improvement Company.

Mr. Geo. H. English,
930 Scarritt Bldg., City.

Dear Sir:

As suggested by you I have taken up with Judge Ball
262 the matter of the Central Improvement Company in the case of the Cambria Steel Company vs. K. C. Su-

burban Railway Company, et al, and am advised by Judge Ball that bonds given in the U. S. Circuit Court of Appeals are still in force when the case is removed to the Supreme Court of the United States, and that it is impossible for us to terminate our liability until the case is finally settled.

I am enclosing herewith our bill covering three annual premiums of $37.50, two of which have been fully earned, and the third due since August 10th, 1914, which when paid will continue the bond in force until August 10, 1915. Should we be able to terminate our liability at any time before this date, there will be a return premium due covering the unexpired term of the last year.

I will thank you to present this bill to the proper parties and secure a check covering same.

Yours very truly,

MWL*MMM M. W. LUCAS, Mgr.

Voucher No. 3227, covering Item No. 209, represents a premium of $43.75 paid as premium on the bond in Cambria Steel Company vs. Kansas City Southern Railway Company.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of such of said vouchers as covered Items No. 200 and 202 on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of their written statement of objections, and further objected to any and all evidence in support of Items 200 and 202, premiums on appeal bonds on appeals taken by the Trust Company from orders prior to the final decree of June 25, 1910, for the following additional reasons:

(1) Said appeals were taken by the Trust Company, which fact is conclusive evidence that there were reasonable grounds for the contentions made by the Southern Company on those issues.

(2) Said appeals were improvidently taken by the Trust Company.

263 (3) The costs of said appeals were taxed by the Court of Appeals and the District Court has no authority to retax the same or to tax other costs in addition to those taxed by the Court of Appeals.

Said parties objected to such of said vouchers as cover Items No. 208 to 210, inclusive, on the grounds set forth in

numbered paragraphs No. 1 to 8, inclusive, of their written statement of objections and further objected to any and all evidence in support of Items 203 to 210, inclusive, premiums on appeal bonds on appeals taken by the Trust Company and the Central Improvement Company from the final decree of June 25, 1910, for the following additional reasons:

(1) Said appeals were taken by the Trust Company and the Central Improvement Company, which fact is conclusive evidence that there were reasonable grounds for the contentions made by the Southern Company on the issues appealed from.

(2) The costs on said appeals were taxed by the Court of Appeals and by the Supreme Court and the District Court has no authority to retax the same or to tax other costs in addition to those costs taxed by the Court of Appeals and by the Supreme Court.

All of said objections were by the Master overruled, to which ruling said parties duly excepted.

Voucher No. 2327, covering Item No. 246, is a receipted statement from Gates, Sea & English to the Guardian Trust Company, dated March 6, 1908 for three copies of attorneys' arguments in the Cambria Steel Company vs. Guardian Trust Company, and is in the sum of $25.00.

Voucher No. 2329, covering Item No. 247, is a receipted statement from Lillian Rawson, to the Guardian Trust Company, dated May 6, 1908, representing the sum of $31.50, paid for services in making three copies of the arguments in the Belt suit.

264 Voucher No. 2786, covering Item No. 248, is a receipted statement from John I. Levin, to the Guardian Trust Company, dated June 29, 1911, representing the payment of $18.50, for reporting oral arguments in Central Improvement Company vs. Cambria Steel Company and Guardian Trust Company vs. Cambria Steel Company in the United States Circuit Court of Appeals.

Voucher No. 2821, covering Item No. 249, is a receipted statement from John I. Levin, to the Guardian Trust Company, dated Oct. 6, 1911, representing a payment of $36.70 for reporting services in the United States Circuit Court of Appeals in the cases of Central Improvement Company vs. Cambria Steel Company, and Guardian Trust Company vs. Cambria Steel Company.

Voucher No. 3038, covering Item No. 250, is a receipted statement from the Watson Law Reporting & Process Serving Company to the Guardian Trust Company, dated Feb. 24, 1913, representing the payment of $72.50 for stenographic services from Jan. 20, to Jan. 22, 1913, in the case of Guardian Trust Company vs. Cambria Steel Company.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of the foregoing vouchers covering Items No. 246 to 250, inclusive, on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of their written statement of objections. Said objections were by the Master overruled, to which ruling, said parties duly excepted.

Voucher No. 2500, dated June 25, 1909, being a receipted statement from Edward P. Gates to the Guardian Trust Company, heretofore referred to as covering Item No. 120, also covered Items No. 412, 413 and 414. Item No. 412 represents a payment to said Edward P. Gates of $28.00, for the expense of a trip to St. Paul, Minnesota, and return, for attendance upon the United States Circuit Court of Appeals
in the case of Guardian Trust Company vs. Kansas
265 City Southern Railway Company.

Item No. 413 represents a payment of $60.00 covering the expense of a trip by Edward P. Gates and George H. English, Jr., to St. Louis, Missouri, on the first setting in the United States Circuit Court of Appeals in Guardian Trust Company vs. Kansas City Southern Railway Company.

Item No. 414 represents a payment of $65.00 covering the expense of a trip by Edward P. Gates and George H. English, Jr., to St. Louis, Missouri, to attend the hearing of Guardian Trust Company vs. Kansas City Southern Railway Company in the United States Circuit Court of Appeals.

Voucher No. 2773, covering Item No. 415, is a receipted statement from Gates & English to Guardian Trust Company, dated May 31, 1911, representing a payment of $105.50 for railroad fare and expense on the argument of the appeal from the final decree in Guardian Trust Company vs. Cambria Steel Company.

Voucher No. 2787, covering Item No. 416, is a receipted statement from Gates & English to the Guardian Trust Company, dated June 29, 1911, representing, among other items, the payment of $74.00 as expenses of Edward P. Gates and George H. English, Jr., to St. Paul and return to attend the

hearing in the motion of Shedd et al in the case of Guardian Trust Company vs. Cambria Steel Company.

Voucher No. 2881, being a receipted statement from Gates & English, to Guardian Trust Company, dated Jan. 16, 1912, heretofore referred to as covering Item No. 125, also covers Item No. 417, and as to such item, it represents the payment of $25.00 for expenses to St. Louis and return in attending the United States Circuit Court of Appeals for the oral argument in the Belt and Kansas City Southern cases.

Voucher No. 2884, being a receipted statement from
266 Haff, Meservey, German & Michaels, to the Guardian Trust Company, dated Jan. 18, 1912, heretofore referred to as covering Item No. 126, also covers Item No. 418 and as to such item, represents the payment of $1.87 for two telegrams in connection with the Cambria case and the payment of 50c as express on briefs to the Clerk of the Supreme Court.

Voucher No. 2998, being a receipted statement from Gates & English to the Guardian Trust Company, dated Nov. 19, 1912, heretofore referred to as covering Item No. 76, also covers Item No. 419, and as to such item, represents a payment of $50.00 for expenses of a trip to St. Louis and return, to inspect the opinion of the United States Circuit Court of Appeals.

Voucher No. 3007, covering Item No. 420, is a receipted statement from Haff, Meservey, German & Michaels to the Guardian Trust Company, dated Dec. 16, 1912, representing, among other items, the payment of 75c for telegrams in connection with the Cambria case.

Voucher No. 3025, covering Item No. 421, is a receipted statement from John A. Prescott & Company to the Guardian Trust Company, dated Jan. 31, 1913, representing, among other items, an advance payment of $146.05 for the expense of a trip to St. Louis by J. A. Prescott, E. P. Gates, George H. English, Jr., and D. J. Haff, to attend the hearing of the Belt case in the United States Circuit Court of Appeals.

Voucher No. 3036, covering Item No. 422, is a receipted statement from Gates & English to the Guardian Trust Company, dated Feb. 24, 1913, representing a payment of $18.00 for railroad fare and berths of Edward P. Gates and George H. English, Jr., to St. Louis.

Voucher No. 3131, covering Item No. 423, is a receipted statement from Gates & English to Guardian Trust Company,

dated Dec. 20, 1913, representing a payment of $50.00 for the expense of a trip to St. Louis and return to examine and make synopsis of opinion of United States Circuit of
267 Appeals in Guardian Trust Company vs. Kansas City Southern Railway Company.

Voucher No. 3162, covering Items No. 424, 425 and 426 is a receipted statement from Gates & English to the Guardian Trust Company, dated May 14, 1914. As regards Item No. 424, it represents the payment of $58.00 for expenses of a trip to St. Louis and return, made in January, 1914, in respect to perfecting the record and allowing appeal. As regards Item No. 425, said voucher represents a payment of $260.40 for expenses of a trip to Washington and return made in March, 1914, to examine the record in the Supreme Court and to engage local counsel. As regards Item No. 426, said voucher represents a payment of $252.00 for the expense of a trip to Washington in April, 1914, to submit motion to dismiss and resist application for certiorari and interventions.

Voucher No. 3238, being a receipted statement from Gates & English to the Guardian Trust Company, dated Nov. 9, 1915, heretofore referred to as covering Item No. 133, also covers Item No. 427. As to such item, it represents a payment of $54.00 on account of expenses incurred on a trip to St. Louis to consult with F. W. Lehmann with regard to preparing briefs in the Belt case.

Voucher No. 3249, covering Item No. 428, is a receipted statement from Prescott & Snider, to the Guardian Trust Company, dated Dec. 31, 1915, and represents, among other items, a payment of $9.58 for two berths and one fare to St. Louis for Messrs. Prescott & English and the payment of $2.10 for telegrams and the payment of $278.49 for expenses of J. A. Prescott to Washington and New York, in connection with the Belt case, and other matters; expenses of George H. English, Jr. to Washington and return for trial of Belt case; also part expenses of H. A. Lloyd and Frederick W. Lehmann to Washington on account of the Belt case.

Voucher No. 3250 also covering Item No. 428, is a receipted statement from George H. English, Jr., to the Guardian Trust Company, dated Jan. 11, 1916, representing a further payment of $10.00 for balance of expenses of trip to Washington, D. C. and return on account of the Belt cae.

268 The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction

in evidence of such of the foregoing vouchers as covered Items 412, to 414, inclusive, on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of their written statement of objections, and objected to such of said vouchers as covered Items No. 415 to 428, inclusive, on the grounds set forth in numbered paragraphs 1 to 8, inclusive, of their written statement of objections. In support of their objections to said vouchers covering items 412 to 428, inclusive, said parties called attention of the Master to Item No. 428, expenses of Gates & English and others, to Washington, as showing that expenses foreign ot the issues here involved are included in said items. Said objections to the introduction of said vouchers were, by the Master, overruled, to which ruling said parties duly excepted.

Mr. Rosenberger: Mr. Leavens, I direct your attention to the following part of an order made by the Special Master in this case on Nov. 7, 1923, reading as follows:

"Ordered further that in the meantime the vouchers referred to and enumerated in said claim or demand, shall be lodged in the office of the Receiver of the Guardian Trust Company in the Fidelity Trust Building, Kansas City, Missouri, and shall, during the usual office hours of the Receiver, be open to the inspection of the Cambria Steel Company and of the Kansas City Southern Railway Company, by and through their solicitors and accountants."

You may state whether at all times since the date of that order, these vouchers have been lodged in the Receiver's office.

Mr. Leavens: They have been in my custody, in fact, they were lodged in the safety deposit vaults down in the Fidelity National Bank and Trust Company; they have been segregated from the general vouchers relating to other transactions of the Trust Company, and put together and
269 in their numerical order for convenient reference and have been inspected by Mr. Smith here and also by Mr. Jetmore and have been produced every time they have been called for.

On cross examination by Mr. Smith, Mr. Leavens testified in substance as follows:

"I do not know of my own knowledge, anything about the transactions represented by these vouchers prior to the time of my connection with the Receiver's office. That connection began Oct. 1, 1918. I now devote my time very largely to

the business of the Guardian Trust Company and have a lady in the office with me that does the same, and have had a lady assistant ever since I have been acting as assistant to the Receiver."

On redirect examination by Mr. Rosenberger, Mr. Leavens testified in substance, as follows:

"Since I have been in the Receiver's office, all the vouchers which have been issued and which I have identified and which have been introduced in evidence here, have been issued and kept in the regular course of business of the Receiver; and the vouchers introduced in evidence here show disbursements made by the Trust Company as shown by its books."

On recross examination by Mr. Smith, Mr. Leavens testified in substance as follows:

"Except possibly in one or two instances where I may have personal knowledge, I have no knowledge of any of the transactions represented by these vouchers except that I know that the money was paid out. I know nothing of what services were rendered in return for the payment except by hearsay."

Mr. Rosenberger thereupon offered in evidence, the title page of the appellant's abstract of the record in the Supreme Court of Missouri in the case of Mecartney vs. Guardian Trust Company, also the opening recitals of said ab-
270 stract of record appearing on page 1 thereof as follows:

"This action was begun in the Circuit Court of Jackson County, Missouri, at Kansas City, by the filing of a petition and issuing of summons on the 28th day of March, 1908. The petition was several times amended and the proceedings of the court in respect to said amendments, were preserved of record by a term bill of exceptions presented by the defendant to the court on the 99th day of the April, 1909, term of said court, the same being the 2nd day of Oct, 1909, which said term bill of exceptions was by the judge of said court signed, sealed, allowed and by the court ordered filed, and said bill of exceptions was on the said 2nd day of October, 1909, at said April, 1909 term of said court filed and made a part of the record in said cause, all as appears by record [and made a part of the record in said cause, all as appears by record] entry made at the time.

Said term bill of exceptions has been incorporated in and made a part of the final bill of exceptions filed in said court, as appears hereafter, to which reference is hereby made.

Further proceedings were had in said cause, which proceedings were preserved and made a part of the record in this cause by a bill of exceptions tendered by the defendant on the 75th day of the October, 1910 term of said court, the same being January 7th, 1911, and said bill of exceptions was by the judge of said court signed, sealed and allowed and was by the court ordered to be filed and made a part of the record of said cause, and said term bill of exceptions was on said 75th day of the said October, 1910 term duly filed and made a part of the record in said cause, all as appears by record entry made at the time."

Mr. Rosenberger also offered in evidence the amended petition and all exhibits referred to therein appearing on
271 pages 2 to 53, inclusive, of said abstract, also the amended answer in said suit appearing on pages 54 and 55, the reply at page 55 of said abstract, the order appointing the Referee appearing at page 56, the judgment of the Circuit Court appearing at page 57, and recitals appearing on pages 56 to 57, the modified judgment appearing in pages 58 and 59, and the proceedings appearing on page 59, and ending with the affidavit of appeal on page 61.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of any evidence in support of the Mecartney judgment on the grounds of their written statement of objections and for the following further reasons:

(1) The opinion of the Supreme Court permitting said judgment is contrary, in many particulars, to the actual facts of the case, and we was based on a misunderstanding of the law and the facts.

(2) Admissions were made in said cause by counsel for the Trust Company and its Receivers, in reference to claims made in said case which were not supported by the facts.

(3) So much of the services as were rendered by the plaintiff in said action as pertain to the issues here involved, were rendered under a contract by which compensation of the plaintiff therein was fixed, which compensation was fully paid to him prior to the filing of said action.

In support of these objections, said parties ask leave to offer in addition to other evidence, evidence showing the

statements made in the pleadings or by the courts or by witnesses in said case of Mecartney vs. Guardian Trust Company. The written statement read into the record in support of the objections to the introduction of Voucher 769 covering Item No. 108 apply also to this evidence.

Mr. Smith: If the Master, please, our written objection objects to this judgment as being rendered in a suit in which we were not parties and, therefore, it is not binding on us, and there is also included in that objection, the objection that the judgment covers services for which costs as between solicitor and client could not be taxed on any theory against us; it not only covers this suit but covers other litigations that is not a part of this litigation, and in addition to that we want to offer as part of our objection, certain extracts from the transcript of this record as showing that that judgment included issues on account of which costs are not properly taxable here.

The foregoing objections were, by the Master, overruled, and said offer of proof denied, to which ruling said parties duly excepted.

The Master: The Master had already formerly indicated he is not going to try the Mecartney cases. On the other hand, I think that if you could show to the satisfaction of the Master that specific amounts that were included in the Mecartney judgment were not matters referred to in the memorandum opinion, I think the burden is on you to show it, show the amount of it.

Mr. Smith: This judgment was recovered for services in gross and the amount that was allowed for services in any other litigation is not shown by any figure or statement in the record and the only way that we could show what those services were would be to retry those issues in which we have no interest, for the purpose of substracting that amount from the issue in which we have an interest, and I think that is not a proper way, or legal way, to put this evidence in.

Mr. Crane: Your Honor understands we object to the offer as not binding on the Southern Railway Company and the Cambria Steel Company, because neither of them were parties to that suit, nor were notified to appear and defend the suit; nor could any judgment rendered in the suit be considered as binding on or an obligation of the Southern
273 and Cambria Companies; and for those reasons, in addition to the other reasons stated in the formal writ-

ten objections, judgment rendered in that case cannot be binding on either [one] the Southern or Cambria Companies. And further upon the showing that we make that other items were sued for and included in that judgment we contend that the obligation is on the Receiver here to establish by evidence what charges of Mecartney's against the Guardian Trust Company were rendered that will apply to this case and what those services are.

Mr. Smith: And what part of them would apply to the issues in this case in which it is claimed costs may be taxed against these clients. Now, as Mr. Crane says, that is not taken as part of the written objections.

Mr. Crane: Do you want us now to point out in the record where Mecartney, himself, shows—

Mr. Rosenberger: (Interrupting) Oh no, I expect to show that myself when I get to it.

Mr. Crane: I was going to say, where Mecartney shows by his testimony he was suing for other items than those which apply in the matter which we have under consideration here.

The Master: In reference to what company, the Dock Company?

Mr. Crane: The Port Arthur Channel & Dock Company.

The Master: Weren't they parties to the reorganization of the Kansas City Southern?

Mr. Moore: I should say that they were; that is, when the reorganization was completed the Port Arthur Canal & Dock Company purchased the property of the old Port Arthur Channel & Dock Company and the Kansas City Southern Railway Company owns the stock of the Port Arthur Canal and Dock Company.

Mr. Smith: Now in addition to that there was litiga-
274 tion—

Mr. Rosenberger: (Interrupting) Well now, if the Master please, all these statements going into the record here are all part of their case. I expect to deal with this question and I would like to be able to put in my proof in some sort of uninterrupted way.

Mr. Smith: We want to make, in addition to our other objections, the objection to the introduction of so much of this record as an unnecessary encumbering of the record and should offer limited parts.

The Master: He is.

Mr. Smith: He is offering the whole petition in evidence.

Mr. Rosenberger. The whole petition, yes.

Mr. Smith: We object to all of it for the additional reason it is unnecessarily encumbering the record.

The Master: The objection is overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and the Cambria Steel Company at the time duly excepted.

Mr. Smith: Now it may be understood this objection may be included in our objection taken before the Master?

The Master: Yes.

Mr. Rosenberger: Now I wasn't listening very attentively. Mr. Bowersock calls my attention to the fact you are offering some evidence in support of your objection. I object to that as not an orderly method of proceeding.

Mr. Smith: Why, certainly. Here you are offering the judgment in the case and the judgment is not admissible; the facts don't permit the judgment to be offered in this case and the only way I can make our objection is to point out in the evidence the reason why the judgment is not competent. You can't admit it and say it is competent and then have this evidence come in and take it out again.

275 The Master: What is the evidence?

Mr. Smith: It is from the same record as Mr. Rosenberger offered.

Mr. Rosenberger: We object to the introduction of any evidence by the Southern Company and the Cambria Company at this time.

Mr. Crane: Let us not get confused. He offers the petition. Now we call attention to the thing that is in his offer which shows it is not admissible here.

Mr. Rosenberger: That is argument. I offer the petition. The petition is all here for the consideration of the Master. If it is competent the Master will consider it.

Mr. Crane: We have to point out why it isn't competent.

Mr. Rosenberger: Point it out in the argument.

Mr. Crane: We object for the reason the petition in there shows certain things that make it not competent.

Mr. Bowersock: That objection is all right, but you don't need to offer any evidence on that, because the petition is already offered.

Mr. Crane: We have got to designate those portions of the petition that are not competent.

The Master: I think that is in the nature of argument and the objection should be sustained.

To which last action and ruling of the Master in sustaining the objection of the Guardian Trust Company, the Kansas City Southern Railway Company and Cambria Steel Company, at the time, by their counsel, duly excepted.

Thereupon, the Master overruled the objection to the introduction of the documents offered in evidence from the abstract of the record in the case of Harry S. Mecartney vs. Guardian Trust Company; to which action the said Southern Railway and Cambria Steel Companies at the time duly excepted.

276 Said documents, last above admitted in evidence by the Master, are in words and figures as follows, to-wit:

"Amended Petition.

Now comes the plaintiff, Harry S. Mecartney, who was named in said original petition as Henry S. Mecartney, a resident of Illinois, and by leave of court first had and obtained, files herein this, his amended petition, and for his several causes of action against the defendant states and alleges as hereinafter set forth in three several counts and in numbered paragraphs thereof as follows:

First Count

1. That plaintiff at the times hereinafter mentioned was and for over twenty years prior thereto had been, and still is, an attorney at law in good standing, duly licensed in Illinois and duly licensed to practice law in the federal courts, and engaged in active practice of the profession of law with headquarters in Chicago and resident in Illinois, and at times performing professional legal services at various other places in the United States.

2. That defendant, Guardian Trust Company, is, and at the times hereinafter mentioned, was, and for a long time prior thereto had been, a corporation organized and existing under the laws of the State of Missouri, as a Trust Company, having its principal office at Kansas City in said County of Jackson, empowered to execute trusts of various kinds, including railroad bond and other trusts, and to act as financial agent and trustee of various other individual and corporate enterprises, and as to all manner of real estate and personal property; and had for many years been engaged in the financing and furthering among others railroad enterprises and other enterprises closely allied thereto, and many other enterprises of large dimensions and of intricate and complex financial interests.

277 3. That on or about December 6, 1904, plaintiff was called to Kansas City from his office in Chicago by the defendant and requested, retained and employed by defendant to undertake to appear for and protect the interests and claims of defendant in a certain litigation then pending and known as the 'Belt Litigation', a cause or controversy of great and abnormal dimensions and complexity and involving very large financial interests. Said controversy had grown out of a series of transactions between said Trust Company on the one hand and a number of railroad companies on the other; that is to say, the Kansas City Suburban Belt Railroad Company (hereinafter called the 'Belt' Company), the Kansas City, Pittsburg & Gulf Railroad Company (hereinafter called the 'Gulf' Company), and the Port Arthur Channel & Dock Company (hereinafter called the Dock Company).

4. The said Belt Company owned and controlled what was known as the 'Belt System' at Kansas City, which was the terminal among others for the system of railroads owned and controlled by the 'Gulf' Company, extending from Kansas City to Port Arthur, Texas, at which latter point it connected with deep sea shipping by means of a dock terminal owned by said Dock Company.

The said Belt 'System' had been built in sections by various railroad companies, to-wit: The said Belt Company, The Consolidated Terminal Railroad Company, The Kansas City & Independence Air Line Company, and the Union Terminal Railroad Company; and the said Belt Company, some time prior to 1897, had consolidated with all said other companies and owned their stock and bonds, said other companies being herein called 'Constituent' companies of the Belt Company.

5. From the time the building of the Belt System was commenced in 1889, and from the time that the 'Gulf' 278 System was commenced in 1891, and from the time the Dock Company's enterprise was commenced about 1895, down to about April 1, 1900, the defendant had been the financial agent of such companies, and of all such "Constituent' Companies, selling their bonds and stock on commission, advancing them various moneys, taking from them various collateral, and paying out on their account various sums for construction purposes; looking after their construction contracts, collecting and disbursing interest and dividends upon their order and making all manner of disbursements for them.

6. As these various railroads, and particularly the 'Belt System', had been in process of construction, certain closely allied enterprises had come into being at various times, which had been furthered and financially backed by the Belt Company for the purpose of increasing its traffic, namely, The Missouri Elevator & Terminal Company, which had constructed and operated certain grain elevators; the Fairmount Amusement Company, which constructed and conducted a pleasure park; a certain land company, known as the Central Improvement Company (hereinafter called the Central Company), promoting land purchases and sales along the lines of the said Belt Railroad and the 'Gulf' Railroad principally in or near Kansas City; also the Second Street Improvement Company, a land company which had acquired title to certain lands along the line of the Belt Railroad in Kansas City.

7. In 1895, the Belt Company, with a view to acquiring a new terminal customer, had contracted with the Kansas City & Northern Connecting Railroad Company to build for the latter its ninety mile road, then in prospect, from Kansas City to Pattonsburg, the consideration therefor being the stock and bonds of the said Connecting Company. Defendant had been trustee under the mortgage securing the bonds of said Connecting Company, and had acted as the 279 agent for the sale of some of its bonds and also stock, and for the disbursement of the moneys thereby raised for the construction of said road. And a land company, known as the Northern Townsite Company, had been organized to further land purchases and sales along the line of said Northern Connecting Railroad and had so operated for several years prior to 1900, in which said Trust Company, by means of its relations to the Belt and Connecting

Companies, had acquired a large amount of stock. The said Elevator, Amusement, Central, Second Street, Northern Connecting and Townsite Companies were known in said cause and litigation as 'Subsidiary' companies.

8. On September 6, 1900, the Cambria Steel Company had filed a creditor's bill in the United States Circuit Court at Kansas City against the said Belt Company, seeking to have receivers appointed for said Belt Company, and to wind up its affairs, in which were recited the above facts in reference to the organization of said various railroad 'Subsidiary' companies, all of which were alleged to be insolvent, and their various operations and the transactions and dealings so had by them with defendant.

The Guardian Trust Company was made a party to said cause upon the ground as alleged that in the various dealings it had had with the Belt Company and with said 'Constituent' and 'Subsidiary' Companies the defendant had controlled and dominated said companies to its own advantage and profit, and had not truly accounted for moneys which it had collected and realized on through the various bonds and stock sales and from various other sources, and that it was liable to account to the Belt Company for all such moneys and transactions. It was also alleged that the defendant held about $350,000 of notes and an open account of about $43,000 against said Belt Company, which upon a true accounting would be wiped out and canceled. It was prayed that
280 defendant should be restrained and enjoined from disposing of said notes and account, and also from disposing of the various collateral which it held as security for said note and open account, stocks in the said subsidiary companies, and an assigned account of the Belt Company against the Gulf Company, also other stocks and bonds so held as collateral, which collateral securities were then worth from $250,000 to $400,000. It was also prayed that Receivers should be appointed for said 'Subsidiary' companies. Said bill also prayed that the receivers to be appointed for the Belt Company should be ordered and empowered to bring a bill for accounting against the Trust Company as to all of said various transactions.

A restraining order against the defendant as prayed for in said bill was at once issued. Receivers were at once appointed in said cause for the Belt Company and later and within the year next following the filing of said bill, receivers for said 'Subsidiary' companies were also appointed—with the exception of the Second Street Company—and the court

in said cause from time to time proceeded to administer the affairs of said companies through said receivers.

Said Cambria case was No. 2,468 of said United States Court.

9. On or about November 6, 1901, the said receivers of the Belt filed an ancillary bill against defendant and others seeking from defendant the accounting alleged in said Cambria cause to be due from it to said Belt Company. The bill of complaint was exceedingly long and covered many transactions of great magnitude, the bond issues of the Belt Company of $1,000,000 and others of $300,000, $500,000 and $2,000,000, respectively, issued by the various companies, which had consolidated with the Belt Company as above stated; and an accounting was sought as to all these and as to various stock issues of said companies, and as to all the proceeds realised thereon from time to time and dis-
281 bursed by the defendant on account of these various companies, and as to all the transactions ever had between said defendant and said Belt Company, and with each and all of said 'Constituent' and 'Subsidiary' companies.

Defendant was also charged with having appropiated to its own use from time to time upwards of $500,000 of other moneys of the Belt Company for which it had not truly accounted.

Said ancillary bill was No. 2,616 of said United States Court, and was an adjunct to the said Cambria cause, and the said joint or double cause thereafter proceeded as one cause and became known as the 'Belt Accounting Case', and is referred to herein as such.

10. It was also claimed in said ancillary cause that the notes and account held by defendants against the Belt Company, then amounting with interest to upwards of $400,000, should be canceled, that all of the collateral held as security to said claims should be surrendered, and that the lands held by the Central Improvement Company of a value of upwards of $200,000 (and nearly all of the stock of which company defendant held as collateral security as aforesaid), should be held to be the property of the Belt Company; and it was prayed that a full accounting be had between said Belt Company and defendant as to all of the transactions with said Belt Company for about eleven years, and with all said 'Constitutent' companies and said 'Subsidiary' companies covering the greater portion of said time.

Said bill demanded a full accounting as to transactions of upwards of $8,000,000 and claimed that defendant owed the Belt Company more than enough to wipe out the entire assets of said Trust Company, then amounting to upwards of $2,000,000.

11. A full answer to said ancillary bill had been filed about December 9, 1901, and later on April 1, 1902, by said stipulation an order had been entered in said cause
282 referring the issues of said Cambria and ancillary bills to Hon. Shannon C. Douglas as special master, to take the evidence therein and to make a report of his conclusions of fact and law thereupon. Testimony had been taken in said cause from time to time, so that by the time plaintiff was employed to take charge of the case as hereinafter stated, there had been 8,260 pages of evidence taken or thereabouts.

12. Thereupon, and on or about December 6, 1904, plaintiff was employed and retained by defendant in the place of the former counsel for defendant to undertake said cause in its behalf and to protect its interests therein and to prosecute its claims and defenses therein and thereto. Plaintiff immediately and on or about December 12, 1904, and at the special instance and request of defendant, entered his appearance in said cause along with that of one Jules C. Rosenberger, a practicing attorney at Kansas City, duly licensed to practice law in the state and federal courts there held whom he chose as his assistant, as attorneys for the defendant in said litigation; and from said time until the 27th day of March, 1908, he and his said assistant counsel on his behalf continued to act for and prosecute the claims of and defend against the claims made against said defendant Trust Company therein, and did at various times perform and render to the said defendant the professional services as hereinafter detailed.

Shortly after said retainer of plaintiff the said ancillary bill of complaint was amended so as to specifically challenge some eighty-five different transactions between said defendant and said various companies aggregating about $8,000,000 of transactions and making specific claims as to net balances against said defendant of over $1,400,000.00.

Shortly after said retainer of plaintiff the said accounting case proceeded in the way of taking evidence from
283 time to time and an enormous amount of testimony was taken therein as to said various and complex

transactions, so that by the time the evidence was closed therein on or about December 31, 1905, the [complaints] in said cause and the Southern Company as intervener therein had taken about 30,000 pages of evidence, and there were about 5,000 pages of the same which had been taken on behalf of defendant. The said cause was argued before said master in July, 1906, and the issues were then submitted to him and taken under advisement, and the same remained undisposed of at the time the employment of plaintiff in said 'Belt Litigation' ended as hereinafter shown.

12a. After plaintiff had been so retained and employed in said Belt Litigation and during the progress of the professional work which he performed therein as hereinafter shown, there were several other court cases and controversies in their issues of law or fact grew out of some of the issues involved therein or closely related thereto, in which cases and controversies plaintiff rendered various legal services, which became part and parcel of the one retainer and employment of plaintiff known as the 'Belt Litigation,' which said cases and controversies were as follows: viz:

(1) An Intervening Petition which was filed February 28, 1905, by the Southern Company in said 'Accounting Case' in which the intervener claimed as a purchaser of the Belt Company's assets and under what is known as the 'after acquired property clause' in the foreclosed mortgages of the Belt System, the right to and ownership of all the securities which the defendant then held as collateral to its said notes and open account against the Belt Company; and in which by an amendment the intervener as a holder of a deficiency decree against the Union Terminal Railroad Company made a personal or money claim against defendant on account of an alleged breach of trust as trustee in the mortgage of said Union Company, which said claim amounted to about $1,000,000.

28d After the filing of said intervening petition the issues therein were also referred to said Douglass as master and the same were heard together with the issues in said 'Accounting Case' and became a part of the same and were submitted to said master at the same time, and at the time that plaintiff's employment in said Belt Litigation ended as hereinafter stated, the same were undisposed of.

(2) Cases No. 23,066, 23,408 and 28,277 in the Circuit Court of Jackson County, Missouri.

In the first of which cases, commenced March 15, 1905, defendant sought as plaintiff therein to recover of the said Southern Company as an alleged successor by consolidation of the Belt Company the amount of the notes and open account which defendant had against said Belt Company, then amounting to about $500,000 and which were involved in said 'Accounting Case';

In the second of which cases, commenced on or about March 15, 1905, the defendant sought as plaintiff therein to recover of the Southern Company upon the same ground or basis about $38,000 by reason of defendant having paid the same to the First National Bank of Kansas City as endorser or joint maker of a note given for the benefit of said Belt Company;

And in the third of which cases, commenced July 2, 1906, defendant as plaintiff therein asserted claims of about $30,000 against said Southern Company as the successor by consolidation of the Gulf Company on notes and open account.

Said three cases above became known as the three 'State Court Cases' and are so referred to herein.

At the time that plaintiff's employment in said Belt Litigation ended as hereinafter stated, various demurrers and motions in such proceedings had been overruled by the court and answers had been filed therein and the said causes and
285 each of them were then pending on petition and answer and remained undisposed of.

(3) A supplemental bill filed by the Southern Company on July 3, 1905, in the consolidated case of the Provident Life and Trust Company against said Belt Company and said 'Constituent' companies, case No. 2464 in said United States Circuit Court, in which supplemental bill the Southern Company as a purchaser under the mortgages of the 'Belt System' sought to enjoin the prosecution by defendant of the first two of said three 'State Court Cases.'

A temporary injunction having issued therein on or about August 30, 1905, said issue was appealed by defendant to the United States Circuit Court of Appeals for the Eighth Circuit, which on or about May 31, 1906, reversed the said order and the injunction was thereupon dissolved. At the time plaintiff's employment in said 'Belt Litigation' ended as hereinafter stated, the said supplmental bill was pending upon demurrer and a motion to assess damages on behalf of de-

fendant for wrongful issuance of the said injunction, which remained undisposed of.

(4) A supplemental bill filed on or about November 16, 1907, jointly by the Belt Company and the Southern Company in said 'Accounting Case' and against defendant, to restrain defendant from prosecuting said three State Court cases, in which a temporary injunction was granted on or about February 22, 1908. An appeal was perfected from said order to said United States Court of Appeals on behalf of the defendant, and the record forthwith fully made up and filed in said Court of Appeals on or about March 26, 1908, and the said matter thus remained undisposed of when said employment of plaintiff ended as hereinafter stated.

13. At the time of plaintiff's retainer and employment as aforesaid, there was another branch of the controversy known as the 'Belt Litigation' and pending in the United States Circuit Court held at Beaumont, Texas, and covered by said employment as follows:

286 A consolidated case known as Nos. 10 and 11 in equity, of the December, 1904, Term of the said United States Circuit Court. In one of said cases the Provident Life & Trust Company as trustee was complainant, and the said defendant Guardian Trust Company was defendant, and said complainant as trustee for bondholders of the Port Arthur Channel & Dock Company claimed among other things that said Guardian Trust Company as an alleged subscriber to the capital stock of the said Dock Company was liable to the complainant for a deficiency decree against the Channel & Dock Company then amounting with interest to upwards of $1,500,000; secondly that it had dominated the Dock Company in reference to the various dealings in reference to the sale of bonds and stock issues, construction contracts and various other transactions, and that defendant was also liable to the Dock Company for said sum upon the said second ground of complaint.

14. In the other of said two causes the Barnett & Record Company, a judgment creditor of said Dock Company, was complainant and made similar claims to those last stated against said Guardian Trust Company, which was among the other parties made defendant; and the said Dock Company was a party defendant thereto and made similar claims to those last stated against said Guardian Company. In the aforesaid two causes the said Guardian Company asserted claims against the said Dock Company for the

amount of about $27,000. Prior to said December 6, 1904, certain proceedings had been had in said consolidated cause, various pleadings filed therein and about 4,000 pages of evidence had been taken.

That thereupon at the special instance and request of the defendant, plaintiff entered his appearance in said cause and the appearance of one Clifford Histed, Esq., a practicing lawyer of Kansas City, duly licensed to practice law in the said United States Court, as counsel for the defendant, and proceeded to prosecute its defenses and its claims in said cause and to protect its interests in said Texas case.

287 15. Thereupon, and between said December 6, 1904, and April 10, 1905, and at various dates and times during said period which plaintiff cannot more particularly specify than is specified in the following itemized schedule, plaintiff and his said assistant counsel in his behalf at the special instance and request of defendant rendered professional legal services to defendant therein, which services so performed and rendered by plaintiff are itemized in the following 'Schedule A'.

'Schedule A'

Being a Schedule of Services of Plaintiff in said Texas Case.

In December, 1904.

(1) Plaintiff made a stipulation to pass the case at the December term, and had same continued December 10.

(2) He examined the various pleadings, bills, cross-bills, answers, and intervening petitions in said cause, amounting to over 200 typewritten pages.

(3) About December 10, he retained Clifford Histed, of Kansas City, as assistant counsel in said cause, and had appearance of himself and assistant entered as counsel for defendant on or about December 21.

(4) He looked up the law of the issues therein, and prepared to make a motion to recall certain orders and sustain the demurrers and exceptions filed therein by the defendant.

(5) He looked up a prior decree of foreclosure which had been entered in said cause, and conferred with officers of defendant as to entry of a decree of sale of the Port Arthur and Town Site Company, same being finally entered by consent

with agreement as to 'upset price' of $100,000; decree entered December 21.

In the year 1905.

(60) He ordered and received from the clerk, January 21, a full memo, of all orders entered in said cause, and all
288 papers filed therein, and studied up said records, the same consisting of 312 minutes of orders and filings.

(7) He passed upon a form of resignation of said defendant as trustee in certain railroad mortgages involved in said suit, and upon an order of court making substitution of another trustee, in January and February.

(8) He had said assistant, Histed, make an abstract of the record of testimony and exhibits therein, a total of about 4,000 pages, said abstract being about 128 type pages, in January, February and March.

(9) Plaintiff and his said associates, prepared for a hearing of said cause at the April, 1905 term, looked up law, and prepared digest, brief of issues, and served notice of the hearing on March 22.

(10) Took up about March 20 negotiations for a compromise with Mr. Moore, counsel for opposition, Mr. Harris, president of defendant, Mr. Histed and others, and had negotiations for same extending over about ten days' time. Drew and re-new various propositions and settlement papers as negotiations proceeded; met Executive Committee of defendant in respect to settlement, made report to them, and had papers signed and settlement consummated on April 4, 1905.

In and about the performance of said services in said Texas case plaintiff incurred a reasonable expense for local and associate counsel therein of upwards of $1,300.

Said settlement as made was an almost completely successful outcome of the litigation for the Guardian Trust Company, having been made upon the following basis, viz:

The said Dock Company and the said Provident Company released the defendant from their said claim of over $1,500,000. The defendant released its claim against the said Dock Company of above $27,000, and also released other
289 claims of the value of about $2,000 and paid certain costs amounting to $500.

And plaintiff is unable to more particularly specify the services so rendered or to more particularly specify the dates or

times when said services were rendered than is set forth hereinabove.

16. Between said December 6, 1904, and March 27, 1908, and at various dates and times during said period which plaintiff cannot more particularly specify than is specified in the following itemized schedule, plaintiff and his said assistant counsel and other assistant counsel employed by him on his behalf and acting in conjunction with plaintiff under his direction and supervision, at the special instance and request of defendant rendered professional legal services to defendant in and about said cause or cotroversy, known as the said 'Accounting Case', and in and about said injunction suits and said 'State Court Cases' which schedule of services so rendered by plaintiff with the dates upon or the periods within which the same were respectively performed or when completed, are itemized in the following 'Schedule B':

In the following schedule the year in which the said servivces were respectively performed is shown in chronological order; where a month is referred to without the year being given, said months fall within and is referrable to the year next preceding the item and shown in italics:

'Schedule B'

Being a Schedule of Services of Plaintiff in said 'Accounting Case,' in said Injunction Suits, and in said 'State Court Cases.

In December, 1904.

(1) Plaintiff examined the evidence heretofore taken in said 'Accounting Case' and the files and records therein and made a short skeleton abstract of said bill.

(2) He consulted from time to time with the officers of defendant and with Messrs. Hagerman, Lucas and Moore, counsel for the opposition, in reference to procedure and
290 having testimony closed, and consulted with former counsel of defendant in the cause, in reference to the history of the case and its then status.

(3) Made inquires as to suitable local counsel, and then retained J. C. Rosenberger about December 12 as assistant local counsel.

(4) He prepared motion for closing the proofs in the case, served same on opposing counsel, appeared at three different sittings before Master, and argued for entry of rule,

and on December 30 obtained rule on complainants to close proofs by March 15.

In the year 1905.

(5) He prepared a trial brief in reference to practice, completed January 14.

(6) Prepared motions in reference to abbreviating the taking of testimony, and appeared before Master and argued said motions on February 2, which motions were overruled, and a rule was entered on complainant to file specifications of items of account objected to, February 3.

(7) Obtained order for defendant to be allowed examination of books and papers of Belt and Southern Companies, February 4.

(8) Drew and signed stipulation to use in this case the testimony taken in the Dock Company case pending at Beaumont, Texas, February 4.

(9) Made efforts to bring about arbitration or possible compromise of the case with counsel for opposition, in January and February.

(10) Examined the Reorganization Plan of the Southern Company; looked up law with reference to liability of Southern Company, and, with the aid of plaintiff's office assistants, Brown and Price, prepared preliminary type briefs thereon, made digests of cases, and completed first printed briefs on said issue, January 15 to June 8.

(11) Examined interevening petition of Southern Company filed February 27, and drew answer thereto.

291 (12) Drew first printed cross-bill against Southern Company and argued before Judge Phillips in chambers for leave to file the same.

(13) Had assistant Brown at Kansas City for about fifteen days, March 12 to March 29, examining books and records of the Belt Railroad mortgages, and foreclosure decrees, making abstracts thereof and aiding assistant Rosenberger upon the hearing.

(14) Drew petition for filing suit in Jackson County Circuit Court against the Southern Company upon the notes and open accounts originally held by defendant against the Belt Company, amounting to over $500,000, said petition consisting of 33 counts; and commencing suit March 15, 1905 (Case No. 23,066.)

(15) Drew similar petitions in case between same parties in same court, 3 counts, upon an original claim of about $38,000 against the Belt Company, known as the '1st National Bank Claim' commencing suit March 15, 1905 (Case No. 23,408).

In said 'Accounting Case'.

(16) Examination of Amended Printed Intervening Petition served on plaintiff about April 1; drew printed answer thereto, completed about May 15.

(17) Examining printed amended and supplemental ancillary bill filed March 22, containing 85 specific items of complaint as to various transactions, claiming a net balance thereon from defendant of over $1,400,000; and making abstract thereof, May 1, to 20.

(18) Drew, revised and completed printed answer to ancillary bill and to each item therein (118 pp), answer filed June 1.

(19) Examined exceptions of Southern Company to defendant's answer to intervening petition, filed June 5, and making preparation to argue them in court on notice received therefor.

(20) Negotiations for compromise of the said controversy, from January to June 13, and making complete proffer of compromise on said date, same being rejected.

(21) From time to time from January 1 to August 1, made four different 'digest briefs' (type), and com-
292 pleted on or about said date for the first printed brief upon the merits of the ancillary bill.

(22) Made up type brief on question of having attorney's fees taxed as costs in said case; same completed in November.

(23) From February 1 to July 1, at various times, argued against motions of opposition made before Master for inspection of books, and opposed motions for extension of time for complainant to close proofs; made requests of and motions before Master to order complainants' proofs closed.

(24) Prepared for appeal to court from rulings of Master thereon; gave notice of the same, and appeared in court and argued the same, and made cross-motion to have proofs declared closed June 7 (no order entered).

(25) Appeared before master upon taking of testimony by complainants from about February 1 to July 10, when complainants rested their case, testimony taken during said period amounting to about 20,000 pages.

(26) Looked up supplemental bill filed in Provident Life cases on July 3, 1905—same being consolidated cause No. 2,464 of U. S. Circuit Court, and prepared to resist application for injunction against the said two 'State Court Cases', and appeared in court and argued said issue on or about June 10.

(27) Examined brief of opposition on injunction issue, prepared printed brief in reply, same completed about July 26.

(28) A temporary injunction having been issued in said cause on or about August 29—gave notice of appeal by defendant therein, prepared assignments of error, and made up praecipe of record for the clerk; prepared and had filed appeal bond, and completed make-up of record, same being about 1,000 pages.

(29) Filed record in the U. S. Court of Appeals for Eighth Circuit, September 29 (Case No. 2,329) and prepared, revised and completed briefs in said cause, and filed same on or about December 1.

293 In said Accounting Case.

(30) Prepared for taking evidence on the part of defendants therein, and commenced the same on or about July 12, and continued the same until on or about November 28, when defendant rested his case.

(31) Took rebuttal evidence, and took depositions in Detroit and New York, evidence in the whole case being closed on or about December 31, 1905, the record then amounting to 34,614 pages.

(32) Prepared printed brief on the 85 'Item Complaints' of ancillary bill—Completed in December.

(33) Examined voting trust agreement in reorganization plan of Southern Company; examined marked reports and stock exchange list, and the foreclosure cases of the railroads of the Gulf, Belt and the said 'Constituent' companies, and collecting other evidence bearing upon the consolidation issue.

(34) Made up a supplemental brief upon the consolidation issue and also letter suggestions to John G. Johnson, Esq., of Phila., and C. O. Tichenor, Esq., of Kansas City, counselor, of law, and obtaining favorable report from letter on said issue.

In the year 1906.

(35) Examined brief of opposition on injunction issue in Court of Appeals and prepared reply brief therein; prepared for oral argument at St. Louis in said cause, spent five days there in preparation and argument of same—argument completed January 12.

(36) Said Court of Appeals, on or about May 13, reversed said order of injunction; and plaintiff thereafter prepared and filed demurrer to supplemental bill in cause, and motion to set aside order in said Circuit Court, gave notice and prepared memo brief on right to recover attorney's fees therein—completed about September 18.

In said Accounting Case.

(37) Collected reports and data, with a view of mak-
294 ing requests for change of venue from Judge Phillips—same completed about February 15—(the said work having commenced on or about November 1, 1905.)

(38) Abstracting thirty-four volumes of testimony in said cause and about 20,000 pages thereof taken before the Master by complainants,—same being completed about March 1 (said work having been commenced about December 15, 1904, and continued at various times to said last named date).

(39) Abstracting testimony of defendant in said cause, made up 'statistics of record', completed about July 1.

(40) Examined draft of new and second amended and supplemental ancillary bill; drew printed answer and plea thereof and filed same on July 2.

(41) Prepared second draft of printed cross-bill after evidence had been closed, same completed about April 15.

(42) Prepared 38 page typewritten affidavit in respect to the issues and facts as basis for motion to recall the reference, completed about April 17.

(43) Prepared type brief upon the right of defendant to file cross-bill in said case, completed about May 15.

(44) Prepared printed brief upon the issues of the intervening petition of Southern Company, completed about June 1.

(45) Made efforts from time to time, from January 1st to July 5th, to have the case set for argument before Master, and appeared before him at various times, arguing against motions of opposition to have cause set over, same being finally set peremptorily for argument on July 5th.

(46) Conferred with Executive Committee on May 17 and 18, in regular meeting assembled and with sub-committee appointed to negotiate a settlement of said cause, and prepared at various times data for use of said sub-committee; attended conference of the same in New York and prepared final printed letter in respect to said negotiations; such work
295 causing an almost continuous service of plaintiff from May 9 to June 21.

(47) July 1st to 18th prepared for and attended hearing, and made argument before Master, the hearing lasting about 11½ days.

(48) Prepared draft of petition for filing suit in Jackson County Circuit Court by defendant against Southern Company upon notes and open account, which defendant originally held against the Gulf Company, amounting to about $30,000.00 (12 counts); commenced suit July 2, 1906, Case No. 28,277.

In said Accounting Case.

(49) Examined full notes of oral argument (438 pages) and corrected notes of argument made on behalf of defendants from September 18 to December 1.

(50) Made up by assistant Rosenberger memorandum brief in ancillary cause, labeled 'Points and Authorities,' completed about December 1.

In the year 1907.

(51) Plaintiff prepared printed 'Supplemental Brief' in said 'Accounting Case' completed about March 10.

(52) Prepared printed 'Suggestions for Plaintiff' in said three 'State Court Cases.'

(53) April 1 to July 1, prepared to push the three State Court Cases to trial, giving notice to call up demurrers therein, appeared in court several times, having May 18 set for hearing demurrers.

(54) Appearing in court on said day and having demurrers overruled; examining answers filed in each case about three days later; drawing and filing reply to said answers; appearing in court on motion of opposition to stay proceedings, filed May 28, preparing for and resisting said motion; same being overruled.

(55) Preparing motion to strike out pleas; preparing motion to set causes for trial and advance the same; preparing printed suggestions thereof and letter suggestions for the judges in respect hereto; arguing motion to set and ad-
296 vance cases in court, same being overruled.

(56) On or about June 22, prepared and served notice on opposition to file any proposed amendment to answer in said cases within 30 days.

(57) Appeared in court by Rosenberger and had said Court Cases set for trial December 20, 1907.

(58) Made further memo, brief upon law of damages and attorney's fees in the injunction issue in Provident Life Case, and had negotiations with counsel for opposition in respect settling such claim, and drew and filed suggestion of damages therein.

In said Accounting Case.

(59) Prepared and completed final brief on consolidation issue, having same printed—type held some weeks and brief revised and reprinted about June 13.

(60) Conference with Charles H. Aldrich, Esq., counsellor at law, in Chicago submitting briefs of the case to him and obtaining verbal opinion from him on same for use in said 'State Court Cases', and also for Executive Committee of defendant.

(61) Examining brief of opposition in 'Accounting Case' (over 500 pages); also their brief on Intervention Issues (10 pages); and their further brief on Consolidation Issue, received July 27.

(62) Resisting Motion of opposition made before Master to change the record and to file additional books and minutes in June.

(63) Made schedule of portions of record after certain items for use of Master and as called for by him; completed before September 1, 1907.

(64) Prepared by assistant Rosenberger, second printed brief on intervention issues, completed about September 3d.

(65) Prepared data for James C. Jones, Esq., counsel at law, at St. Louis, in reference to appeal to United States Circuit Judges for special appointment of Judge to hear 'Accounting Case', and one day's conference with him and assistant Rosenberger at St. Louis, about November 26.

297 (66) Received notice of restraining order issued by Judge McPherson on November 16, 1907, based upon Supplemental Bill filed in said cause by Belt and Southern Companies jointly, restraining prosecution of the three 'State Court Cases'.

(67) Looked up orders in the case, received and examined copy of supplemental bill, drew demurrer to the same, and filed same November 27.

(68) Drew, revised and printed answer to rule to show cause why injunction should not issue therein, filed same December 16; drew and printed suggestions in support of said answer and in opposition to said rule; drew and presented affidavits in opposition to said rule.

(69) Prepared for oral argument to show cause therein and made arguments December 16 and 17 on same; attended later before Judge with reference to settling form of order as to answers and affidavits.

(70) Examined notes of oral argument and cases cited therein and examined brief of opposition on same.

(71) An injunction having been issued by said Judge about February 17, 1908, drew and filed motion on or about Feb. 29 to increase bonds on same for $10,000 to $1,000,000; investigated value of defendant's collateral security and the market values of stocks and bonds of Southern Company and drew affidavits in respect thereto for use on said motion.

(72) Made arguments upon motion to increase bonds in open court; motion denied, and petition therein stricken from files Feb. 29; redrew petition and suggestions in support thereof, gave notice and presented motion in open court, court refused to hear same, March 14.

(73) Prepared notice of and prayer for appeal from the said injunction and assignment of error therefor; prepared and filed special bonds and had appeal allowed and bond approved about March 10; prepared praecipe of record for clerk

(65 items), and furnished copy of records to clerk, obtained certified record (about 1,000 pages) and filed same in
298 United States Court of Appeals on or about March 26th.

In the year 1908.

(74) Had completed minutes of records made in Provident Life case and in said 'Accounting Case'—the former being 217 minutes of orders and filing and the latter 340 minutes of same, brought down to about December 17, 1907; and examined same in February and March.

(75) January 1st to March 25; Looked up testimony taken on original restraining order in 'Accounting Case', prepared motion to dissolve said order, and alternative motion for hearing on temporary injunction issue, and motion to increase bond; prepared notice thereof, served the same on opposition counsel and conferred with judge with reference to having same heard in court.

(76) Looked up various orders made in the cause as to Central improvement property which had been made without notice to plaintiff as counsel in the case; made further search of records and files and investigated further the values of said Central Company's lands covered by said orders; made minutes in detail of said orders and petitions on which same were based, and investigated facts with reference thereto; from February 15 to March 20.

(77) Prepared two printed affidavits as to the history of 'Accounting Case', (the first embodying former typewritten affidavit of 38 pages), changing and revising the same from time to time to correspond with developments in the case, completing same about March 13, 1908, first affidavit being 50 pages and second affidavit 25 pages.

(78) From time to time prepared personal messages to various parties concerned in said cause, including Messrs. Prescott, the defendant, and Samuel W. Moore, Esq., counsel for the opposition, Judge John F. Phillips, Judge of United States District Court at Kansas City, Master Shannon C. Douglas, Samuel Untermeyer, General Counsel of Southern Company, and the Executive Committee and Directors
299 of said Southern Company, with reference to bringing the case to an end; said work commenced about November 1st, 1907, and was completed about March 21st, 1908 (about 100 type pages).

(79) Took up criticism and protests of Prescott, Secretary of defendant, of date March 4, 1908, in reference to proceedings theretofore had in the said litigation, and as to the future policy therein; prepared reply thereto and transmitted copy thereof to Executive Committee; prepared for special meeting of Executive Committee on March 26, upon request of the President; attended open Committee meeting at Kansas City, and received notice of plaintiff's discharge as counsel for said defendants' case, on March 27, 1908.

(80) During the progress of said 'Belt Litigation' plaintiff rendered various reports to the President and Executive Committee of defendant, reporting the progress of the same, said reports being made on December 21, 1904, February 3 and 17, May 5 and October 25, 1905; January 26, May 17, and October 24, 1906; January 12, March 11, April 28, June 25, October 22, and December 14, 1907, and March 16, 1908.

From time to time during the said period from December 6, 1904, to March 27, 1908, and at various times, and on various dates which plaintiff is unable to particularly specify, the plaintiff in connection with the various services in said 'Belt Litigation' as specified above, rendered to defendant various legal services in said cause or controversy, and in the protection and prosecution of defendant's interests involved therein in the way of consultation with his said assistant counsel, various witnesses and parties cognizant of facts, expert bookkeepers, officers and employes of defendant; having correspondence with said assistant counsel and said witnesses, parties, bookkeepers, officers and employes; examined great masses of books that had been kept by said Belt, Southern and other companies involved in said cause and volumes of correspondence and other data had between them and bearing upon the said controversy.

During said period made various schedules of things
300 to be done and covering all manner of questions of law, future policy and procedure to be considered and performed in and about said litigation; made certain stipulations and agreements in respect to the conduct of the cause and taking testimony therein; investigated from time to time the various items of collateral security held by defendants and involved in said cause; made various demands upon the various receivers of said subsidiary companies, involving the conservation of said collateral; had made by assistants various reports upon special features of said controversy, as the same were required from time to time; looked after the serv-

ing of notices, and gave directions for the service of subpoenas and other processes.

All of which said services plaintiff is unable more particularly to specify or to give the dates upon which, or the periods within which the same were done or performed.

The total evidence taken in said 'Accounting Case', amounted to 34,614 pages, contained in fifty-six volumes.

All of said services, so rendered by plaintiff and his said local and assistant counsel, were necessary for the due and proper protection of the interests of defendant, the conducting of its defenses and the prosecution of its claims in said litigation and controversy of which defendant had notice.

The correspondence between plaintiff and his said assistant counsel and others, in respect to said litigation and its due prosecution, amounted to about 1,100 letters and telegrams.

The said pleadings and other files, exclusive of the said record of testimony in said cause, amounted to upwards of 3,000 pages; the printed briefs prepared by him as above amounted to 794 pages and the type briefs to about 300 pages.

The said services hereinabove itemized, and shown in said schedule 'A' and 'B' necessarily involved and consumed about 550 days' time of the services of his said several assistant counsel, besides much time of other office as-
301 sistants and clerks and stenographers, which plaintiff is unable to specify or to give the dates or periods upon or within which said services were performed more particularly than as shown hereinabove. In and about said services plaintiff was necessarily required to make, and did make thirty-nine trips from Chicago to Kansas City and return; three trips from Chicago to St. Louis and return, and two trips from Chicago to New York and return; and his said assistant, Rosenberger, was necessarily required to make, and did make, four trips from Kansas City to Chicago and return, and one trip to New York and return; the dates of which various trips of plaintiff and his assistant are shown in the exhibits and statements hereto annexed and hereinafter referred to and which plaintiff is unable more particularly to specify.

In and about the performance of said services in said 'Belt Litigation,' plaintiff incurred a reasonable and necessary

total expense for local and assistant counsel of about $20,000, and which plaintiff cannot more particularly specify.

And plaintiff is unable to more particularly specify which of the above mentioned services were performed by himself personally, and which of said services were performed by his said local or assistant counsel or others, than as shown hereinabove; and is unable to specify the various dates upon which, or the various periods within which the said services were performed, more particularly than as shown hereinabove; and is unable to make a more specific statement as to said services; and is unable to value the said items of service or any of them separately from all the services performed in said litigation.

From the time that plaintiff and his said assistant counsel, Histed, entered their appearance for defendant in said Texas case, in the said United States court, he and said Histed were duly recognized by said court in the various proceedings there had as the sole and regular counsel of record, for defendant in said case; and from the time that the ap-
302 pearance of himself and said Rosenberger was entered in said 'Accounting Case', in said three 'State Court Cases', and in the said Provident Life cases, and in said United States Circuit Court of Appeals, plaintiff and said Rosenberger were duly recognized by said courts, respectively, as the sole and regular counsel for defendant in said case or cases respectively pending therein.

17. Plaintiff, from time to time during the said employment made frequent and specific reports to the President and Executive Committee of defendant; and defendant was, therefore, duly apprised in full from time to time of the scope and course of said litigation and of all the services and the character thereof, performed by plaintiff and his assistants, and as the same are fully set forth above.

All of the services so performed, as set forth hereinabove, including those performed in the said injunction suits and the said 'State Court Cases', were recognized and treated by plaintiff and defendant in the accounts and reports rendered and received from time to time, and in the payments and received on account of the said services and disbursements made in connection therewith, and in all their mutual dealings in reference thereto, as within the scope of such retainer, and as parts of the said 'Belt Litigation' and as all being part and parcel of one employment and retainer, such services to be paid for as an entirety and not as separate items.

18. On or about March 27, 1908, while plaintiff was duly and diligently proceeding with his said services and employment and plaintiff having prior to that time, with all due and proper care, diligence and skill, protected the interests, conducted the defenses and prosecuted the claims of defendant in said 'Belt Litigation', and while plaintiff was then continuing to so protect said interests, conduct said defenses and prosecute said claims, the defendant—without any just or reasonable cause therefor whatsoever—discharged plaintiff from said retainer and employment and substituted other and new counsel therein.

303 19. The said services, so performed by plaintiff and his said assistant counsel, and so rendered by plaintiff to defendant in the said employment and retainer known as the 'Belt Litigation' were of the reasonable value of one hundred thousand dollars ($100,000).

20. That in and about and in connection with said services so performed in said 'Belt Litigation' and from time to time during the period in which said services were performed, as aforesaid, plaintiff, at the special instance and request of defendant, did expend and pay out certain moneys, and did make certain and various disbursements, all for the benefit of defendant and in the due prosecution and protection of defendant's claims and interests in said litigation. Such disbursements, made from December 6, 1904, to January 25, 1906, are shown in detail in a statement hereto annexed and marked 'Exhibit 1', which is hereby made a part hereof as if the same were herein set out at large, the same showing a balance in plaintiff's favor of $5,733.15, and a copy of which statement was delivered to defendant by plaintiff in the due course of his employment as aforesaid on or about January 26, 1906.

That such disbursements, made by plaintiff between January 25, 1906, and June 25, 1907, with the said balance of $5,733.15 carried forward as the first item thereof, are shown in detail in a statement hereto annexed and marked 'Exhibit 2', which is hereby made a part hereof, as if the same were herein set forth at large, the same showing a balance in plaintiff's favor of $8,830.44, and a copy of which statement was delivered to defendant by plaintiff in the due course of his employment as aforesaid on or about June 25, 1907.

Such disbursements made by plaintiff subsequent to June 25, 1907, with said balance of $6,830.44, carried forward as the first item thereof, are shown in detail in a statement

hereto annexed and marked 'Exhibit 3', which is hereby made a part hereof, as if the same were herein set
304 forth at large, which statement shows a balance due plaintiff on said account as of March 27, 1908, of $7,745.07, and a copy of which statement was delivered to defendant by plaintiff in the due course of his employment as aforesaid on or about March 26, 1908.

Annexed to said exhibits and following said 'Exhibit 3' are 'Statement A', 'Statement B', 'Statement C', 'Statement D', 'Statement E', 'Statement F', 'Statement G', 'Statement H', 'Statement I', 'Statement J', 'Statement K', 'Statement L', 'Statement M', which statements are referred to in said exhibits, in which certain amounts shown therein are more particularly set out and which statements and each of them are hereby expressly made a part of the respective exhibits in which the same are referred to, and by that means are also hereby expressly made a part of this petition, as if the same were therein and herein set forth at large.

That there was, on March 27, 1908, thus due and owing to plaintiff on account of said disbursements, a total or aggregate sum of $7,745.07. That the said several sums set out in said Exhibits 1, 2 and 3, were paid out, expended and disbursed by the plaintiff and on his behalf and all for defendant from time to time as the same are shown by said exhibits and by said statements 'A' to 'M' annexed thereto.

(21) That defendant has paid plaintiff on account of said services and disbursements in said 'Belt Litigation' the following sums and them only, namely:

On December 9, 1904	$5,000.00
On September 28, 1905	5,000.00
On February 20, 1906	5,000.00
On August 16, 1906	5,000.00
On July 22, 1907	7,500.00

Making a total of $27,500.00 paid plaintiff on such account.

(22) And plaintiff has applied the sums so paid him on account in total discharge of said sum of $7,754.07, and
305 the remainder of said sum so paid, namely, $19,754.83, plaintiff has applied on account of the said sum of $100,000 due for services as above, thus leaving a net amount due plaintiff, after allowing to defendant all just credits, deductions and set-offs, on account of said 'Belt Litigation' of $80,245.07, as of March 27, 1908, and also interest thereon from said date according to the legal rate therefor.

(23) And in consideration of the premises and of the services so rendered by plaintiff and the disbursements so made by him for and on behalf of the defendant the defendant on, to-wit, the said 27th day of March, 1908, and at, to-wit, Kansas City, aforesaid, promised to pay to plaintiff the said moneys so due.

And thereafter plaintiff, on, to-wit, said 27th day of March, 1908, at, to-wit: Kansas City, aforesaid, demanded of defendant the payment of the said moneys so due as aforesaid, but defendant then and there neglected and refused and does still neglect and refuse to pay to plaintiff the said moneys so due, or any part thereof.

(24) Wherefore plaintiff claims judgment against the defendant for the said sum of eighty thousand two hundred and forty-five and 7/100 dollars ($80,245.07), together with interest thereon from March 27, 1908, at six per cent per annum and his costs in this behalf sustained.

REED, ATWOOD, YATES, MASTIN
& HARVEY,
DANA, COWHERD & INGRAHAM,
Attorneys for Plaintiff.

Second Count.

1. That plaintiff, at the times hereinafter mentioned, was and for over twenty years prior thereto had been and still is an attorney at law in good standing, duly licensed in Illinois, and duly licensed to practice law in the Federal Courts, and engaged in active practice of the profession of law, with headquarters in Chicago, and resident of Illinois, and at times performing professional legal services at various other places in the United States.

2. That defendant, Guardian Trust Company, is and at the times hereinafter mentioned was, and for a long
306 time prior thereto had been a corporation organized, exisiting and operating under the laws of the State of Missouri, as a trust company, having its principal office at Kansas City in said county of Jackson.

3. That on or about December 10, 1904, there [were] pending an unsettled controversy between defendant and the Messrs. Trimble and Braley, practicing lawyers of Kansas City, Missouri, who claimed from said defendant large sums of money, namely, about $22,000, for various legal s rvices rendered to defendant at various times between November 2, 1898 and February 29, 1904, and for disbursements made

during said period, which claim defendant disputed, and which claims involved many different kinds of legal services and the many items therefor and the very long account of said disbursements as shown hereinafter.

4. Thereupon and on or about said December 10 plaintiff was requested, retained and employed by defendant to investigate said claim or claims and to seek to bring about and effectuate a settlement thereof, and to defend defendant in any suit or suits that might be brought against defendant on said claim or claims, and to assert certain counter-claims and offsets which defendant claimed to have against said Trimble and Braley; and in the conduct of said negotiations for settlement and in the investigation of the merits of said claim or claims, counter-claims and offsets and for the due and proper protection of the interests, conducting the defenses and prosecuting the counter-claims and offsets of defendant in the suit that was brought upon such claim, as hereinafter stated, it became and was necessary for plaintiff to employ assistant and local counsel on his behalf, of which fact the defendant had notice and which employment was approved, acquiesced in and consented to by defendant.

5. Plaintiff immediately and on or about December 12, 1904, retained and employed Messrs. Harkless, Crysler and Histed, practicing lawyers at Kansas City, Missouri,
307 duly licensed to practice law in the state and federal courts there held, whom he chose as his assistant and local counsel to assist him on his behalf in said investigation and negotiations and in the litigation subsequently commenced upon said claims, as hereinafter stated. Plaintiff, thereupon and on or about said December 10th, entered into negotations with said Trimble and Braley for a settlement of said controversy, which extended over a number of months' time, namely, until about August 30, 1905, when said negotiations failing, said Trimble and Braley commenced suit against defendant upon the said claims in the Circuit Court of Jackson County, Missouri, Case No. 25,346. Immediately thereafter and on or about September 10, 1905, plaintiff entered his appearance in said cause, along with that of Messrs. Harkless, Crysler and Histed, as counsel for defendant, plaintiff and said assistant counsel being thereafter recognized by said court as the sole and regular counsel for defendant therein, and proceeded thereafter to protect defendant's interest, conduct its defenses and prosecute its counter-claims in said cause. Said counter-claim consisted in (1) a claim against said Trimble and Braley for

negligence in managing the defense of defendant to the bill of complaint in what was known as the Bierce Case No. 2,463, of the United States Circuit Court held at Kansas City; (2) a similar counterclaim for negligence in managing the defense of defendant in what was known as the Cambria Steel Company Case, No. 2,468, and the case ancillary thereto, No. 2,616, in the said United States Circuit Court, each of said counter-claims being for the amount of $100,000; (3) a counter-claim of about $2,000 arising out of what was known as the 'Lombard Matter'; (4) a counter-claim of $6,000, arising by virtue of the fact of a payment of that amount having been made by defendant to one Wash Adams, Esq., on account of an alleged failure of Trimble and Braley to pay him the sum, they being liable therefor.

After the issues had been made up in said cause, the same were referred to a referee to take evidence and report his conclusions of law and fact therein; said report was in
307 due course filed in court on or before August 10, 1907, and the cause was later heard by the court upon the exceptions to said report, and was taken under advisement and was so held, and was pending at the time plaintiff's employment in said matter was ended, as hereinafter stated.

6. In the due prosecution of said negotiations for settlement of said controversy and in the investigation of said claims, and in the due prosecution of said cause and the counter-claim and defenses of defendant therein between said December 10, 1904 and March 27, 1908, and at various dates and times during said period, which plaintiff cannot more particularly specify than as specified in the following itemized schedule, plaintiff and his said assistant counsel in his behalf, and acting in conjunction with plaintiff and under his direction and supervision at the special instance and request of defendant rendered professional legal services to defendant, which said services, so performed and so rendered by plaintiff, are itemized in the following 'Schedule C'.

In the following schedule the year in which the said services were respectively performed, is shown in the margin in chronological order. Where a month is referred to without the year being given, said month falls within and is referrable to the year next preceding the item and set in the margin.

'Schedule C'

Being Schedule of Service of Plaintiff in said 'Trimble and Braley Matter'.

1904. (1) Examination of Bill rendered by Trimble and Braley, 149 items of cash disbursed and 60 items of services rendered in 16 different controversies and suits, the said bill covering a period from November 2, 1898, to February 29, 1904, and consultations from time to time with claimants in respect thereto, and the various items therein, in order to be advised of the merits of said items.

1905. (2) Having assistant, Histed, examine into the merits of the $6,000 item for services in the foreclosure
309 cases of Texarkana and Shreveport railroad mortgages, and to the claims as set forth in foreclosure case against the Kansas City, Pittsburg and Gulf R. R. Company, pending in the Federal Court at Kansas City, in which state Trust Company was complainant, and having report by assistant made thereon.

(3) Acting with and advising with two Messrs. Prescott and Heyneker, two members of Executive Committee of defendant, appointed by said Committee, together with plaintiff as sub-committee to negotiate a settlement of said claims.

(4) Making a report upon said claims and as to negotiations for settlement to said Executive Committee under date of February 4, 1905, and as to merits of said controversy and as to cross-claims for negligence.

(5) Making similar report on June 1, 1905.

(6) Drawing notice, application and affidavits, and making and arguing application to court in the Bierce case for permission to defendant to consummate settlement at $9,000 agreed on by five members of the Executive Committee, application denied by Court on October 12, 1905.

(7) Received notice of suit commenced by Trimble and Braley, August 20, 1905, examined petition, and appeared by Assistant Counsel in court on motion to order case to a referee.

(8) Made further negotiations for settlement of cause after suit was commenced.

(9) Looked into question of whether U. S. Court, by proceeding in the Bierce case, had power to enjoin Trimble and Braley suit, and correspondence with assistant counsel and members of Executive Committee in reference thereto.

(10) Drawing first draft of answer by assistant, and completing same and drawing cross claims for negligence in con-

ducting defense of defendant in the Bierce and Cambria cases.

310 (11) Drawing second amended answer to petition, nineteen items (32 pp).

1906. (12) Attending upon the taking of evidence by plaintiff therein, from February 1, to March 22.

(13) Making examination through assistant of old books and papers of defendant and of various pleadings in the case in which Trimble and Braley had performed services for defendant, consultations with witnesses and preparing to put in defendant's evidence therein.

(14) Taking testimony for defendant in said cause from March 22, 1905, to August 31, 1905.

(15) Preparing for hearing and attendance thereupon, lasting five days, and making oral argument in said cause on behalf of defendant, argument completed about September.

(16) Examining various briefs of opposition submitted at various times during the reference, amounting to four in number and over 80 pp. Preparing for defendant typewritten brief (79 pp) for defendant, also printed brief (66 pp) and printed propositions of law and special findings of fact (34 in number).

(17) Amending answer increasing ad damnum clause of two negligence cross-claims to $200,000 in each case or $200,000 in both, and appearing in court and obtaining leave therefor, and making report to defendant Sept. 6, 1907.

(18) Appearing in court from time to time on orders extending time for filing report of referee.

(19) Examining Master's report (10 pp) filed August 10, 1907, and drawing and filing exceptions thereto (23 pp and 68 objections).

(20) Preparing for hearing before Judge Slover of exceptions to Master's Report, and making argument thereon two days, Sept. 26, and 27, 1907.

(21) Making full abstract of the record of testimony and exhibits in said cause, completed October 25, 1907, (Abstract 325 pp).

(22) Having minutes of record brought down and
311 having certain exhibits corrected, and record tested for possible appeal.

(23) 'Further Argument on Defense of Estoppel' prepared and printed, completed December 13, 1907 (34 pp).

(24) Examining new argument of Trimble and Braley in answer to 'Estoppel' brief of defendant (27 pp).

(25) Making up new brief on question of estoppel not being pleaded, and drawing motion to amend in accordance with proof and letter of suggestions to Judge Slover and filing same, court taking whole case under advisement, about January 8, 1908.

(26) From time to time between December 10, 1904, and March 27, 1908, on various dates which plaintiff is unable to particularly specify, the plaintiff in connection with the services so specified above, rendered to defendant various legal services in said cause, and controversy, and in and about protection and prosecution of defendant's interest involved therein, in the way of consultations with his said assistant counsel, with various witnesses and parties cognizant of facts, had correspondence with his said assistant counsel and said witnesses and parties, and examined various books, records, court files and other data bearing upon said matter, which services plaintiff is unable more particularly to specify.

All of said services so rendered by plaintiff and his said local assistant counsel were necessary for the due and proper protection of the interests of the defendant, the conduct of its defenses and the prosecution of its claims in said litigation and controversy, of which defendant had notice.

The said services hereinabove itemized and shown in said 'Schedule C' necessarily involved and consumed about 73 days' time of the personal services of the plaintiff, and about 50 days' time of his said assistant counsel, besides much time of other office assistants and clerks and stenographers which plaintiff is unable to specify or to give the dates or periods upon which or within which said services were performed more particularly than as shown hereinabove.

In and about the performance of said services in said
312 'Trimble and Braley Matter' plaintiff incurred a reasonable and necessary expense for local and assistant counsel of about $1,300, and which plaintiff cannot more particularly specify.

Plaintiff is unable to more particularly specify which of the above mentioned services were performed by himself personally, and which of said services were performed by his local or assistant counsel or others than as shown hereinabove; and is unable to specify the various dates upon which or the various periods within which the said services were performed, more particularly than as shown hereinabove; or to make a more specific statement in respect to said services; and is unable to value the said items of service or any of them separately from all the services performed in said litigation and controversy,

7. Plaintiff from time to time during his said employment as shown above and also on October 25, 1906, February 7, and October 22, 1907, and March 16, 1908, made specific reports to the president and executive committee of defendant; and defendant was, therefore, duly apprised in full, from time to time, of the scope and course of said litigation and controversy, and of all the services and the character thereof performed by plaintiff and his said assistants and as the same are fully set forth above.

All of the services so performed as set forth hereinabove were recognized and treated by plaintiff and defendant in the accounts and reports rendered and received from time to time, and in all their mutual dealings in reference thereto as within the scope of said retainer, and as parts of said 'Trimble and Braley Matter' and as all being part and parcel of one employment and retainer, such services to be paid for as an entirety and not as separate items.

8. On or about March 27, 1908, while plaintiff was duly and diligently proceeding with his said service and employment, plaintiff having prior to that time with all due and proper care and skill, protected the interests, conducted the defenses and prosecuted the claims of defendant in said 'Trimble and Braley Matter' and while plaintiff was
313 then continuing to so protect said interests, conduct said defenses and prosecute said claims, the defendant—without any just or reasonable cause therefor whatsoever—discharged plaintiff from said retainer and employment and substituted other and new counsel therein.

9. The said services so performed by plaintiff and his said assistant counsel, and so rendered by plaintiff to defendant in the said employement and retainer known as the 'Trimble and Braley Matter' were of the reasonable value of ten thousand dollars ($10,000).

10. That in and about and in connection with said services so performed in said 'Trimble and Braley Matter' and from time to time during the period in which said services were performed as aforesaid, plaintiff at the special instance and request of defendant did expend and pay out certain moneys and did make certain and various disbursements, all for the benefit of defendant and in the due prosecution and protection of defendant's claim and interest in said litigation, and controversy. Such disbursements are shown in detail in a statement hereto annexed and marked 'Exhibit 4' which is hereby made a part hereof as if the same were herein set out at large, the same showing a balance in plaintiff's favor as of March 27, 1908, of $433.07. and a copy of which statement was delivered to defendant by plaintiff on or about March 27, 1908.

That there was on March 27, 1908, thus due and owing to plaintiff on account of said disbursements a total or aggregate sum of $433.07. That the said several sums set out in said 'Exhibit 4' were paid out, expended and disbursed by the plaintiff and all for the defendant from time to time as the same are shown by said exhibit.

11. That defendant has paid plaintiff on account of said services and disbursements in said in said 'Trimble and Braley Matter' the following sums and them only, viz:

On December 5, 1905	$ 300.00
On July 12, 1906	500.00
On October 31, 1906	700.00
On January 24, 1908	1000.00
Making a total of	$2500.00

314 paid plaintiff on said account. And plaintiff has applied the sums so paid to him on account in total discharge of said sum of $433.07, and the remainder of said sums so paid, namely, $2066.93, plaintiff has applied on account of the said sum of $10,000.00 due for services as above, thus leaving a net amount due plaintiff after allowing on account of said 'Trimble and Braley matter' of $7,933.07 of March 27, 1908, and also interest thereon from said date according to the legal rate therefor.

12. And in consideration of the premises and of the services so rendered by plaintiff and the disbursement so made by him for and on behalf of the defendant the defendant on, to-wit: the said 27th day of March, 1908, and at, to-wit:

Kansas City aforesaid, promised to pay to plaintiff the said moneys so due.

And thereafter plaintiff, on to-wit: the said 27th day of March, 1906, at, to-wit: Kansas City aforesaid demanded of defendant the payment of the said money so due as aforesaid, but defendant then and there neglected and refused and does still neglect and refuse to pay to plaintiff the said moneys so due, or any part thereof.

Wherefore, plaintiff claims judgment against the defendant for the said sum of seven thousand nine hundred thirty-three dollars and seven cents ($7,933.07), together with interest thereon from March 27, 1906 at six per cent per annum together with his costs in this behalf sustained.

REED, ATWOOD, YATES, MASTIN & HARVEY,
DANA, COWHERD & INGRHAM,
Attorneys for Plaintiff.

Plaintiff's Exhibit I.

In the circuit Court of Jackson County, Missouri, at Kansas City Harry S. Mecartney, Plaintiff, vs. The Guardian Trust Company, Defendant, Case No. 28412.

'Exhibit 1'

Referred to in the First Count of and Annexed to the Petition in said case.

January 25, 1906.

Guardian Trust Company,
To Harry S. Mecartney, Dr.
Attorney and Counselor,
1 45 La Salle Street.

313			Cash Disbursements 'Belt Litigation' Dec. 5, 1905, to Jan. 25, 1906.		
Item No.	1906				
1	Dec.	6-6	To expenses to Kansas City, two days:		
			Railway fare and berths	$20.00	
			Meals, hotels, telegrams, incidentals	11.90	$61.9
2	Dec.	21	To expenses Kansas City, Dec. 14-21:		
			Mileage ticket	27.00	
			Berth, both ways	6.00	
			Meals and incidentals in transit	7.35	
			Coates House	18.75	
			Stenographer, telegrams, messenger	4.25	94.3

3	Dec.	21	To express on two packages to Kansas City		1.30
	1905				
4	Jan.	6	To clerk U. S. Circuit Court, Beaumont, Texas, for lists of orders in 10th and 11th in equity		2.00
5	Jan.	7	To express on package to and from Kansas City		1.10
6	Jan.	19	To cash advanced by J. C. Rosenberger, as per his statement of January 17, 1906, a and marked as 'Statement A'		44.20
7	Jan.	23	To expense to and from Kansas City		31.00
8	Jan.	24	To sundry telegrams for December		2.35
9	Jan.	25-27	To expense to Kansas on said dates:		
			Railway fare and berths		13.00
			Meals and Hotel		4.50
11	Jan.	31	To express on trunk to Kansas City		2.30
12	Feb.	2	To expenses to Kansas City February 2:		
			Mileage	$60.00	
			Hotel	9.50	69.50
13	Feb.	6	To telephone consultation with Mr. Harris at Champaign, Illinois		3.00
14	Feb.	9	To express on trunk to Kansas City		2.32
15	Feb.	13	To express two packages, different dates		1.30
16	Feb.	15	To January telegrams, seven in all		3.04
			Amount forwarded,		$ 223.12
			Brought forward		$ 223.12
17	Feb.	17-18	To express on trunk from Kansas City and package to same		2.60
18	Mar.	1	To Frank B. Wilcox, expert and accountant		450.00
19	Mar.	9	To two telegrams from Kansas City and postage on package legal papers		1.46
20	Mar.	10	To telegrams in Feb. bill of Western Union		2.55
21	Mar.	10	To expenses to and from Kansas City, including railway fares, berths, hotel bill, telegrams and stenographer		23.85
22	Mar.	17	To expense to Kansas City 13th-17th inc.		
			Mileage	$60.00	
			Hotel	14.30	
			Stenographer	3.75	
			Berths, meals, incidentals, telegrams	11.70	89.75
23	Mar.	31	To expense of Mr. Brown, assistant to		
24			Kansas City, Mar. 12-29, inclusive:		
			Railway fare and berths	$30.00	
			Hotel Expense	43.25	$ 73.25
25	Mar.	31	To expense of self to Kansas City:		
			Berths	5.00	
			Hotel	19.10	
			Telegrams	3.50	

			Meals in transit	4.95	
			Incidentals	1.75	34.80
25	Apr.	1	To cash in payment of bill rendered by J. C. Rosenberger for sundry advances as per bill marked 'Statement B'		119.93
26	Apr.	17	To telegrams in March bill of Western Union eight in all to Kansas City, Champaign and Jefferson City		7.84
27	April	19	To expense to Kansas City and return 19-21 inclusive, vis: berths, meals, fare on way and telegrams		31.80
28	Apr.	19	To cash in payment of statement of J. C. Rosenberger, April 14, 1905, in which principal items are MacDonald $25 and Wilcox $50, and remainder, incidentals, marked 'Statement C'		87.18
29	May	5	To expense to Kansas City Apr. 30-May 5 inc.:		
			Fare and berths	30.00	
			Meals on train	4.70	
			Hotel, stenographer three days, meals of associates,	19.75	54.45
30	May	10	To Barnard & Miller, printing report		1.00
			Amount carried forward,		$1303.07
			Amount brought forward		$1303.07
Item No.	1905				
31	May	17	To Barnard & Miller, printing second report		5.25
32	June	12	To expense to Kansas City June 6-8 inclusive:		
			Railway fare and berths	30.00	
			Meals in transit	5.00	
			Hotel	9.00	
			Incidentals	3.30	47.30
33	June	12	To telegrams in May bill		2.05
34	June	12	To Riley Publishing Company printing answer ancillary bill and answer to intervening petition		121.25
35	June	23	To expense to Kansas City to June 23rd:		
			Railway fare and berths	30.00	
			Meals in transit	5.30	
			Hotel, telegrams and incidentals	11.50	46.80
36	June	19	To Barnard & Miller for printing brief in case v K. C. & So. Ry. with second edition		104.00
37	Jul.	8	To expense to Kansas City:		
			Railway fare and berths,	30.00	
			Meals, hotel and incidentals	11.93	41.93

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38	July.	10	To cash in payment of bill of J. C. Rosenberger, dated July 10, 1905, and marked 'Statement D'		$133.85
39	Aug.	19	To express on package transcripts to Kansas City		1.00
40	Aug.	28	To telegrams June bill Western Union, six in all		2.00
41	Aug.	26	To same July and August		2.04
42	Sept.	14	To cash in payment of bill of J. C. Rosenberger, this date, in which certain leading items are as follows: F. M. Cook $90; Cert. copy bill complaint, $12.75, services Flinton, $20; F. A. Wright, $300; Doran, $150; Stenographer, $15.15, see bill marked 'Statement E'		609.76
43	Sept.	12	To expenses to Kansas City, this date, consisting of berths, meals, hotels, etc.		13.35
44	Sept.	18	To Barnard & Miller, printing brief, injunction matter before Judge Phillips		12.75
45	Oct.	4	To express on package from Kansas City		.25
			Amount carried forward,		$2446.85
			Amount brought forward,		2446.85
Item No.	1905				
46	Oct.	12	To expenses to Kansas City 9-12 inclusive, as follows:		
			Berths, Meals, etc.	$10.50	
			Hotel, extra meals, stenographer and telegrams	9.30	19.80
47	Oct.	12	To telegram to Johnson, Philadelphia		.45
48	Oct.	18	To expenses of A. M. Strong, attorney, assistant, while in Kansas City, as follows:		
			Railway fare, berth, meals	1.00	
			Telegrams and expressage	2.80	
			Board and room, 4 weeks	65.75	
			Carfare and sundries	6.00	91.55
49	Oct.	19	To expenses of self to Kansas City 17-19:		
			Mileage ticket	60.00	
			Berths and meals	11.50	71.50
50	Oct.	28	To telegrams, Sept. bill, Western Union		.60
51	Nov.	6	To express on package containing record		1.15
52	Nov.	13	To cash in payment of bill of J. C. Rosenberger, of this date, leading items as follows, marked 'Statement F', F. M. Cook $96, appeal from injunction $25, printing record, $547, Wright $500, etc.		1284.81
53	Nov.	15	To telegrams in Oct. bill, Western Union		2.94

54	Nov.	15	To expenses of A. M. Strong, Atty. assistant, while in Kansas City, Oct. 15-Nov. 15/05:		
			room rent, St. John apartment	$20.00	
			Board at Six Dollars per week	18.00	
			Incidentals	10.00	
			Railway fare, berth and meals	16.00	64.00
318					
55	Nov.	16	To C. O. Tichenor, Atty. for opinion as to Ultimate Liability of the Kansas City and Southern Railway		$ 500.00
56	Nov.	17	To special wrappers and cost of mailing said opinion to Directors and others		2.00
57	Nov.	20	To express on said report to New York		.35
58	Nov.	20	To Barnard & Miller, printing 108 copies of said Tichenor opinion		20.50
59	Nov.	24	To express on package to Kansas City		.55
			Amount carried forward		$4507.05
			Amount brought forward		$4507.05
Item No.	1905				
60	Nov.	25	To expenses to Kansas City, Nov. 23-25, as follows:		
			Berth	$ 5.00	
			Meals	4.60	
			Hotel	2.00	
			Incidentals	2.00	
			Mileage	60.00	73.60
61	Nov.	29	To postage and express on briefs and other packages		2.18
62	Nov.	29	To Barnard & Miller, printing brief for appellants, case v K C & So Ry		45.00
63	Dec.	9	To W. H. Edwards & Co., stenographers, emergency brief work and copying from Oct. 7th to Nov. 9th, 1905		28.52
64	Dec.	16	To express on two trunks from Kansas City		4.10
65	Dec.	18	To bill expenses of self, to Kansas City Dec. 18-20/05, as follows:		
			Berths	$ 5.00	
			Meals on train	4.60	
			Hotel, telegrams, incidentals	5.10	14.70
66	Dec.	20	To express on record to Kansas City		1.20
67	Dec.	20	To telegrams Nov. bill Western Union		2.19
68	Dec.	29	To cash in payment of cash advanced by J. C. Rosenberger in statement dated Dec. 28/05, marked 'Statement G' leading items as follows: Cook $12, traveling expenses J. C. Rosenberger to Chicago, Detroit and New York, $178.50,		

			Linton in dep. of Cone $20.00, Sullivan & Cromwell acct. of depositions $150.00		381.24
69	Dec.	29	To Barnard & Miller, printing cross-bill Cambria Steel Co. v. K. C. and So. Ry. Co.		29.25
70	Dec.	31	To telegrams Dec. bill Western Union		2.72
	1906				
71	Jan.	3	To cash advanced by J. C. Rosenberger for stenographic, notary and other services while in New York, in three depositions, see bill of Jan. 3, /06 marked 'Statement H'		65.70
72	Jan.	6	To express package from Kansas City		1.75
73	Jan.	13	To expenses to St. Louis Jan. 10-13, viz: Fare and berth, $6.45, stenog. and telegrams $3.20, hotel and meals, 3 days $19.25, inc. 75		29.65
			Amount carried forward		$5188.85
319			Amount brought forward		$5188.85
Item No.	1906				
74	Jan.	17	To expenses to St. Louis, Jan. 14-17 as follows:		
			Railway fare and berth	$20.00	
			Meals in transit	1.80	
			Hotel three days	11.25	
			Incidentals, including stenographic work	3.20	36.25
75	Jan.	17	To bill for printing Reply Brief in injunction suit v K. C. & So. Ry		9.75
76	Jan.	22	To express on two trunks containing records in suit v K. C. So. Ry		4.30
77	Jan.	22	To cash paid S. B. Willey, expert work		300.00
78	Jan.	22	To cash paid C. W. Hastings. (Sept. 30-05)		100.00
79	Jan.	22	To cash paid balance due F. A. Wright over and above previous payments charged in place		458.00
			Total		$6097.15
			Credit.		
	(1)		By amount refunded by Western Passenger Association on six 2M mile tickets $19.50 on each	$117.00	
	(2)		By proportion of telegrams in channel and Dock case	6.80	
	(3)		By reduction on account of hotel bills previously charged	40.00	
	(4)		By amount transferred to general account as per bill rendered October 20, 1905, being proportion of railway fare, berths, meals and hotel expenses in attending		

seven meetings of the Executive Committee at Kansas City	200.00	363.80
Debit Balance		$5733.35

Plaintiff's Exhibit 2

In the Circuit Court of Jackson County, Missouri, at Kansas City Harry S. Mecartney, Plaintiff vs The Guardian Trust Company, Defendant, Case No. 38412

'Exhibit 2'

Referred to in the First Count of and annexed to the Petition in said Cause.

June 25, 1907.

Guardian Trust Company,
To Harry S. Mecartney, Dr.
Cash Disbursements 'Belt Case'

Jan. 25, 1906 to June 25, 1907.
To debit balance brought forward from bill of January 25, 1906 $5733.35

Item No.	1906				
80	Feb.	6	To expense to Kansas City, three days:		
320			Railway fare and berths	$30.62	
			Hotel and meals	7.80	$ 38.42
81	Feb.	24	To expense to Kansas City, two days:		
			Railway fare and berth	30.00	
			Meals in transit	4.60	
			Hotel and meals	4.20	
			Telegram to St. Louis	.27	39.07
82	Feb.	21	To bill of J. C. Rosenberger for cash advanced by him (see statement I) less certain items in said bill previously charged in Statement H		125.87
83	Apr.	3	To express, two packages and one telegram, different dates		1.50
84	Apr.	21	To expense to Kansas City several days:		
			ticket (2M miles)	60.00	
			Berths	5.00	
			Meals on train and expenses	5.60	
			Hotel	7.80	
			Telegrams and expressage	1.90	80.30
85	May	1	To cost of typewritten copy of abstract of testimony and exhibits		37.60
86	May	8	To bill of J. C. Rosenberger for cash advanced by him (See Statement J)		132.16
87	May	8	To express on record to Kansas City and key for box		.60
88	May	14	To cost of typewritten copy of affidavits and Master's report, 37 pp. two copies		13.00
89	May	18	To telegrams to Kansas City, Mar., Apr.		1.14

90	May	19	To expense to Kansas City, three days:		
			Tickets and meals	30.00	
			Expense on train	5.00	
			Hotel	7.50	
			Stenographic service	4.50	46.90
91	May	26	To express on three packages		.-0
			Carried forward		$6251.21
			Amount brought forward		$6251.21
92	May	31	To Bill of Barnard & Miller, printing argument Cambria Steel Co. v. Belt R. R. Co., also argument on Issues of Intervention		123.00
93	June	1	To Edwards & Co., stenographers, copying documents, 59 pp. three copies at 25¢		14.75
94	June	1	To express on package to New York		.32
95	June	7	To expense to Philadelphia and New York:		
			Railway fares to and return	64.50	
			Philadelphia	5.00	
			Meals	5.00	
			Hotel, telegrams, etc.	21.00	
			One-half of above expense chargeable to this account		47.75
96	June	15	To express and postage on packages to New York		1.23
321					
97	June	18	To Barnard & Miller, printing analysis 'Item' complaints, etc.		$ 31.50
98	June	18	To same for printing exhaustive letter to Lloyd in connection with negotiations for settlement		30.00
99	June	20	To Clerk of U. S. Circuit Court, St. Louis copy of opinion in case v. K. C. &So. Ry.,		5.00
100	June	21	To expense to Kansas City, three days,		
			Berths	$ 5.00	
			Meals and other expenses on train	5.40	
			Hotel, stenographer and telegrams	9.00	19.40
101	June	21	To telegrams in May, six in all		2.18
102	June	30	To expenses to Kansas City, four days:		
			Ticket	60.00	
			Berth and meals on train	8.40	
			Hotel	7.35	
			Telegram and stenographers	2.30	78.05
103	Aug.	18	To costs advanced by J. C. Rosenberger, see Statement K		96.30
104	Aug.	18	To telegrams paid in June 1906		7.62
			Amount carried forward		$6708.31

Item No.						
			Amount brought forward			$6708.31
	1906					
105	Aug.	18	To expense of two trips to Kansas City between July 4 and 14, in argument of case, nine days in all:			
			Room in hotel		17.00	
			Railway fare		13.70	
			Berths		10.00	
			Meals on train		10.00	
			Other expenses		1.00	
			Meals at Kansas City		19.75	
			Stenographer and telegrams		3.60	75.05
106	Oct.	25	To expense to Kansas City, two days:			
			Hotel		30.00	
			Meals		7.50	37.50
107	Nov.	23	To expense of J. C. Rosenberger's trip Kansas City to Chicago, and return, November 21 and 22			39.50
108	Dec.	20	To telegram to Kansas City			.30
	1907					
109	Jan.	10	To expense to Kansas City, three days:			
			Berths, meals, hotel, etc.			39.40
110	Feb.	12	To telegrams, express, postage, Jan. Feb.			2.10
111	Feb.	12	To expenses to Kansas City, two days:			
			Ticket		50.00	
			Berth and meals on train		11.75	
			Expense at Kansas City		4.50	66.25
112	Feb.	13	To Barnard & Miller, printing supplemental argument, Cambria appendix			57.75
113	Mar.	4	To Barnard & Miller, printing supplemental argument, Cambria Steel Co. v. K C Suburban Belt R. R. Co.			64.50
114	Mar.	4	To same, printing 6 copies supplemental Analysis of Item 15			4.50
322						
115	May	20	To Expense to Kansas City, two days:			
			Train expense and berths		11.20	
			Hotel bills		10.35	21.55
116	May	24	To expenses to Kansas City, two days:			
			Ticket (2M miles)		50.00	
			Berths and other expenses on train		12.75	
			Hotel and other expenses		6.60	69.35
117	June	1	To C. H. Aldrich for writing opinion on accounting case			350.00
118	June	5	To cash to the order of C. O. Tichenor on account, for opinion in Cambria case			100.00
			Amount carried forward			$7636.06
			Amount brought forward			$7636.06
Item No.	1907					
119	June	5	To expense to Kansas City:			

120	June	13	To special stenographic service, "Suggestions' and 'Brief on Motion		6.00
121	June	14	To expenses to Kansas City, two days: Ticket (2M miles)	50.00	
			Berths, meals, hotel, etc.	15.25	65.25
122	May	19	To Barnard & Miller, printing suggestions for plaintiff in state court cases, outlining petition, etc.	10.50	
			Supplemental Argument in Intervention and Cross-bill, consolidation issue	85.00	95.50
123	June	17	To same, Suggestions to Plaintiff in support of motion to set cases in opposition to motion to stay		30.00
124	June	18	To same, reprinting corrected Supplemental Argument on consolidation issue, etc.		28.00
125	June	18	To express and postage sundry articles sent June 7-11-12		1.90
126	June	20	To sundry telegrams charged to us in our May bill, chargeable to this account		1.62
127	June	20	To express and postage on sundry articles		1.93
					$7878.86

Credits.

	1906				
(5)	July	16	By cash refunded on 2M mile ticket,	$19.50	
(6)	July	18	By cash refunded on 2M mile ticket,	19.50	
(7)	Aug.	18	By refund acct. costs U. S. Cir. Court of Appeals in K. C. So. Inj. Appeal	45.70	
(8)	Aug.	27	By part refund acct. 2M mile ticket	9.16	
(9)	Oct.	26	By cash refunded on 2M mile ticket	19.50	
	1907				
(10)	Apr.	27	By costs in injunction case	935.06	1048.42
			Debit Balance		$6830.44

323 'Plaintiff's Exhibit 3'

In the Circuit Court of Jackson County, Missouri, at Kansas City, Harry S. Mecartney, Plaintiff vs The Guardian Trust Company, Defendant, Case No. 38412.

'Exhibit 3'

Referred to in the First Count of and Annexed to the Petition in said case.

March 27, 1908.

Guardian Trust Company
To Harry S. Mecartney, Dr.
Attorney and Counselor,
145 So. LaSalle Street.

Cash Disbursements Belt Case.
June 25, 1907, to this date.

			Balance brought forward from statement	$ 6,830.44
No. of Item	1907			
129	June	26	To expense to Kansas City, June 21-23, berths, meals and expenses on train	16.75
129	June	27	To postage on briefs to Directors	.50
130	July	7	To three telegrams in June bill	1.85
131	Nov.	18	To telegram	1.21
132	Nov.	23	To expense to Kansas City and return Nov. 21-22	23.20
133	Dec.	1	To expense to St. Louis and return	19.60
134	Dec.	14	To expense to Kansas City and return, Dec. 14-16	34.20
135	Dec.	18	To preparing and expressing package to Kansas City	.75
136	Dec.	18	To Barnard & Miller, printing 'Suggestions in Opposition', etc. Cambria Steel; To same for printing answer	29.50
			Amount carried forward	$ 6958.00
			Amount brought forward	6958.00
No. of Item	1907			
137	Dec.	19	To Barnard & Miller, printing draft of decree, Cambria Steel	13.50
138	Dec.	19	To express on package to Judge McPherson	.45
139	Dec.	28	To telegrams in November bill	1.47
	1908			
140	Jan.	8	To bill of Adelaide Utter, stenographer, certified copy bill of complaint	12.35
141	Jan.	8	To cash as per statement by Rosenberger & Reed, expenses in Guardian Trust matters, from Jan. 2, 1907 to Dec. 14, 1907	110.86

Statement L.

142	Jan.	17	To cash Barnard & Miller, printing affidavit of H. S. Mecartney, 59 pages and revision	55.87
143	Jan.	24	To cash, expenses to Kansas City, Jan. 21-24 inclusive	37.00
144	Jan.	28	To cash, bill of Brown, Adams & Brown, court reporters, arguments on hearing of application for injunction in Swinney,	
324			Receiver, et al., in U. S. Circuit Court	107.00
145	Jan.	29	To telegrams in December and January bills	1.97
146	Feb.	18	To two telegrams	1.05
147	Feb.	24	To telegram from Kansas City	.50
148	Feb.	17	To expenses to Kansas City, three days	38.14
149	Feb.	27	To expenses to Kansas City, 2½ days	38.35
150	Feb.	29	Telegrams from Kansas City	1.44

151	Mar. 6-14	To express on package (.35) February telegrams ($1.50) express on brief (.60), cases to contain records ($2.85)		5.30
152	Marh. 20	Telegram from Kansas City		.40
153	Mar. 14	To supplementary items in bill of Brown, Adams & Brown, court reporters		17.00
154	Mar. 23	To bill of Brown, Adams & Brown, in case of Swinney et al. attendance federal court four days		10.50
155	Mar. 26	To bill of Barnard & Miller, printing bill Cambria Steel Co. etc.		32.07
		Amount carried forward		$ 7443.82
		Amount brought forward		$ 7443.82
No. of Item	1908			
156	Mar. 26	To expenses of H. S. M. to Kansas City and return, Mar. 23-29, six days		76.20
157	Mar. 26	To express on trunk filed with papers		.50
158	Mar. 26	To stenographic service in emergency matters		41.00
159	Mar. 26	To Rosenberger & Reed for costs advanced by them, as per their bill of April 17, 1908		28.25

Statement M

160	Mar. 26	To sundry telegrams		5.70
161	Mar. 26	To bill of Geo. H. Williams for dictation and copying		10.00
162	Mar. 26	To bill of Kansas City View Co., for photographs of the record		18.00
163	Mar. 27	To bill of Jas. C. Jones, at St. Louis for conferences with self and Rosenberger		250.00
		Total debits		$ 7873.57
	1907	Credits		
(11)	June 15	Rebate on ticket	$ 9.50	
(12)	June 26	Rebate on ticket	9.50	
(13)	Oct. 2	C. O. Tichenor	100.00	
(14)	Dec. 2	Rebate on ticket	9.50	128.50
		Net balance due for disbursements March 25, 1907		$ 7745.07

In the Circuit Court of Jackson County, Missouri, at Kansas City, Harry S. Mecartney, Plaintiff vs. The Guardian Trust Company, Defendant, Case No. 38412.

335 The following 'statements'

Are statements mentioned in the first count of the foregoing amended petition in said cause and in the foregoing exhibits thereto, of which statements 'A' 'B', 'C', 'D', 'E', 'F', 'G', and 'H' are referred to in said 'Exhibit 1', and of which

statements 'I', 'J' and 'K' are referred to in said 'Exhibit F'; and of which statements 'L' and 'M' are referred to in said 'Exhibit J'.

Statement 'A'

Kansas City, Jan. 17, 1905

H. S. Macartney

to J. C. Rosenberger, Dr.

Cash advanced as per receipts attached:

To Brown, Barnett & Adams, for stenographic services rendered in taking testimony before S. C. Douglass, Special Master, on December 20, 21 and 22, in the Cambria Steel Company matter, and transcribing same	$ 32.50
To R. C. Pearson, for stenographic services rendered in preparing brief in connection with Cambria Steel Company matter, for Mr. Rosenberger, Jan. 17, 1905	20.00
To Western Union Tele. Co. for telegrams to Mr. Macartney of date 12-22-04—22d—12-30-04—30d	1.80
	$ 54.30

(Paid J. C. Rosenberger 1/21/05)

Statement B

Kansas City, March 17, 1905

H. S. Macartney

to J. C. Rosenberger, Dr.

To cash advanced (Receipted Vouchers attached)

1905		
1/4	To drayage on testimony	.50
24	To telegram to Mr. Macartney	.60
	To telegram to Mr. Macartney	.50
25	To telegram to Mr. Macartney	.50
	To telegram to Mr. Macartney	.50
30	To telegram to Mr. Macartney	.50
2/3	To messenger to Bryant Bldg. for key to trunk	.15
15	To drayage on trunk on 2/3/05	.50
	To express charges on trunk on 2/3/05	.35
	To lunch and dinner with Wilcox	4.00
2/1	To R. J. Holmden, Steno. petition	2.00
	To Miss Adelaide Utter, Steno. copy order No. 2605	.35
	To Miss Genevieve Partin Steno. Int. Petition	4.75
7	To drayage on law books from Southern Off's	1.25
	To telegram—Chicago	.25
10	To R. J. Holmden, Steno. Exhibits	1.00
11	To Locksmith, to open desk R. J. Holmden for papers	.50
1	To R. J. Holmden, Steno. Pet. Guar. Tr. Co. v. So.	2.00
15	To docket fee Guar. Tr. Co. v. K. C. So.—petition	2.00
220	To J. M. Orr, Steno., 50 folios transcript	$ 15.00
	To R. J. Holmden, Steno. per statement	10.00
17	To Brown et al Steno. part pet. v. Southern	7.50
	To Brown et al Steno. exc. rendered Mr. Macartney	19.50
	Stenographic services 20-22	.50

31	To telephone Chicago	2.50
31	To Riley Pub. Co. cross bills Cambria case	42.75
	Total	$ 119.93

(Paid J. C. Rosenberger 4-3-05)

Statement C.

Kansas City April 14, 1905.

H. S. Mouriney,
to J. C. Rosenberger, Dr.

To Cash advanced:

1905		
3-27	To R. J. Holmden petition Guar. Tr. Co. v. Southern	2.50
28	To costs	2.00
	To telegram—St. Louis—3/15	.67
4- 1	To telegram—Chicago	.54
	To telegram—Chicago 3-3	.30
	To telegram—Chicago	.54
	To telegram—Harris Champaign	.60
10	To MacDonald—copy Knott letter	25.00
11	To F. B. Wilcox	30.00
14	To telephone to Chicago	2.75
		$67.10

(Paid 4-22-05)

Statement D.

Kansas City, July 10, 1905.

H. S. Mouriney
to J. C. Rosenberger, Dr.

(Expense Account)

Cash Advanced:

4-21	To express charges on papers	.35
4-27	To index to record Cambria case	2.45
4-27	To copy decree foreclosure—Provident case	15.50
4-27	To copy affidavit to T. L. Chadbourne	1.65
4-27	To R. J. Holmden, stenographer	40.00
4-27	To copy adoption contract and affidavit of Neal S. Dorsa	2.15
5-1	To telegram to Champaign	.30
5-1	To R. J. Holmden, stenographer, part amended petition Kansas City Southern	1.50
5-23	To express charges	.35
5-23	To telegram Chicago	.28
5-23	To express charges	.45
5-23	To F. M. Cook clerical services—classifying vouchers and assisting S. B. Wiley	13.00

6-1	To express charges	.25
6-7	To Thomas E. Moores for trunk	5.50
6-9	To express charges on Vols. 18, 19 and 20	.95
6-16	To telegram, Chicago	.30
6-19	To two weeks salary paid Cook for assisting Willey	24.00
6-21	To drayage on record	.25
227		
7-3	To F. M. Cook 2 Weeks salary to 7-1-05	$ 24.00
7-7	To W. U. Telegraph	.40
7-7	To Postal Tel. Co.	1.04
7-10	To check	25.00
7-11	By error in bill 4-14-05	$108.05
		.10
	Bal. Due	$108.05

(Paid J. C. Rosenberger 7-14-05)

Statement E.

Kansas City, Sept. 14, 1905

H. S. Mecartney
to J. C. Rosenberger, Dr.

7-15	To check, salary of F. M. Cook 2 weeks to this date	$ 24.00
7-22	To check to D. W. Amram of Philadelphia, for certified copy of bill of complaint of K. C. So. v. Regorg. Comm. to enjoin Degoigen settlement	12.75
8-2	To check to D. W. Amram, Atty. for obtaining certified copy of bill of complaint of K. C. So. v. Reorg. Comm. and for examining court files	10.00
8-2	To check, salary of F. M. Cook, 2 weeks to 7-30	24.00
7-3	To telegram to Mecartney, Chicago	.30
7-19	To telegram to Mecartney, Chicago	.25
8-12	To check of F. M. Cook, salary 2 weeks to date	24.00
8-17	To bill of A. D. Flinton for 4 days search in sub-cellar of the Nat'l Bank of Commerce among records of the year 1899, for book containing record of drafts drawn by the K. C. Sub. Belt on J. Degoijen, Jr. and testimony in regard to same	20.00
7-11	To transfer Co. from 7th and Wyandotte to 11th and Grand	.35
7-17	To Transfer Co. from 402 N. Y. L. Bldg.	.35
8-18	To hurry messenger boy note to H. A. Jetmore	.35
8-26	To hurry messenger boy note to H. A. Jetmore	.25
9-2	To F. M. Cook for services to date	18.00
9-7	To Postal Te. Cab. Co. cablegram to Kuhn & Co., London	10.20
9-9	To F. A. Wright by my check on acct. services as accountant	300.00
9-9	To Neal S. Doran by my check covering his bill of expert services	180.00
9-9	To check to Ida E. Ladd, stenographer	15.15
	Total	$ 603.75

7-14	By credit Balance	$25.00	
9-18	By part proceeds Macartney check dated 9-7-05 for $750 balance of $300 applied on service account	450.00	475.00
	Balance due,		$ 134.76

(Paid J. C. Rosenberger, Sept. 30, 1905).

Statement F.

Kansas City, November 13, 1905

H. S. Macartney
to J. C. Rosenberger, Dr.

To Cash advanced:

9-16	To check to F. M. Cook, salary	24.00
9-16	To check to R. J. Jetmore, stenographer	2.00
9-21	To certified copies of judgment in First National Bank case and replevin suit for steel rails	2.00
22S		
9-28	To docket fees to Jordan, Clerk, U. S. Circuit Court Appeals, docketing appeal for injunction	$ 25.00
9-30	To expense F. M. Cook, drayage on books	.70
9-30	To check, to F. M. Cook, salary	24.00
10-6	To check to Clerk U. S. Circuit Court of Appeals printing record	547.00
10-14	To check to F. M. Cook, salary	24.00
10-30	To check to F. M. Cook, salary	24.00
11-1	To check to H. P. Wright, witness fees	75.00
11-2	To check to Francis A. Wright, account	800.00
11-2	To drayage on books,	.75
10-5	To telegram to Macartney	.40
11-13	To railroad fare to Chicago and berth	15.00
11-13	To railroad fare Aurora to K. C. and berth	14.20
11-13	To three meals en route	2.75
11-13	To incidental expenses	4.25
		$1284.81

10-6	By check	$547.00	
11-6	By check	$575.00	1122.00
	(Paid 11-22-05 J. C. Rosenberger).		162.81

Statement G.

Kansas City, December 28, 1905.

H. S. Macartney
to J. C. Rosenberger, Dr.

11-24	To check to F. M. Cook, salary to Nov. 1st	6.00
12-1	To check to R. J. Holmden, stenographer, letters to Sullivan & Cromwell	2.00

11-19	To telegram to Mr. Mecartney	.50
12-7	To check to Mr. L. Heynecker for cablegram to Holland	7.00
11-9	To telegram to Mr. Mecartney	.30
12-16	To check to Adelaide Utter, Ct. Clerk for certified copy of order	3.35
12-16	To express on papers from New York	1.50
12-16	To salary F. M. Cook to date, replacing vouchers	12.00
12-16	To traveling expenses trip from K. C. to Chicago, Detroit and N. Y. 12-7 to 12-16-05,	178.50
12-14	To bill of J. J. Linton, N. P. Detroit, for taking deposition R. B. Cone	20.00
12-28	To check to Sullivan & Cromwell, acct. depositions	150.00
		$ 381.24

Credits:

12-9	By cash	$300.00
12-17	By cash	20.00
12-18	By cash	100.00
		$421.00
Credited by bal. $39.76, Total Debits		381.24

Statement H.

Kansas City, January 3, 1906.

H. S. Mecartney
to J. C. Rosenberger, Dr.

1-3-06	To express on papers,	$ .50
1-3-06	To check, to Mrs. Jennie Turner Powers, Shorthand Reporter, 32 Nassau Street, N. Y.	65.20
		65.70
	Credited by bill heretofore rendered.	38.76
	Balance due,	$26.94

320

Statement I.

Kansas City, February 21, 1906.

H. S. Mecartney
to J. C. Rosenberger, Dr.

Cash disbursements as follows:

12-5	To teleg. to Hawkes, N. Y.	$ .50
12-6	To teleg. to Chicago	.30
12-6	To teleg. to Chicago	.30
12-27	To teleg. to Mrs. Powers, N. Y.	.50
12-27	To teleg. to Sullivan & Cromwell	.24
12-28	To teleg. to Mrs. Powers	.50
12-4	To teleg. from Sullivan & Cromwell	.36
1-3	To express on papers	.50
1-3	To check to Mrs. Turner-Powers, N. Y.	65.20

1-4	To teleg. from Mr. Rosenberger, N. Y.	.62
1-5	To teleg. from McCormick	.62
1-12	To check to L. E. Taliaferror, typewriting (Copying)	10.00
1-15	To amt. paid Mr. Jennings, Steno. Answer and Pleas to 2nd Amended and supplemental ancillary bill	2.00
1-13	To express charges Vol. 47	.75
1-25	To check R. J. Golmden, stenographer	3.00
2-2	To Hurryup Transfer Co.	.75
2-5	To check to F. M. Cook, services searching for vouchers, etc.	2.50
1-5	To telegram to Powers, N. Y.	.30
1-5	To telegram to Chicago	.30
1-9	To telegram to Powers, N. Y.	.30
1-9	To telegram to Chicago	.32
1-4	To telegram from Powers, N. Y.	.50
2-8	To check to Fidelity Trust Company, acct. bill Francis A. Wright	100.00
	Total	$ 191.57

Credits			
	By bill heretofore rendered	$38.76	
	By check January 24th, 1906	100.00	138.76
	Balance due		$ 52.81

(Paid J. C. Rosenberger 3/1/06)

Statement J.

Kansas City, May 8, 1906.

H. S. Mecartney
to J. C. Rosenberger, Dr.

To cash advanced:

2-22-06	To charges on record	1.40
2-24-06	To Franklin Hudson Pub. Co.	17.00
2-26-06	To Miles F. Powers N. P. New York	10.00
2- 1-06	To Franklin Hudson Pub. Co. transfer	.25
3- 3-06	To check to Fidelity Tr. Co. F. A. Wright Acct.	158.00
3- 5-06	To check to Wulser Contracting Co. for cabinet	10.00
3-15-06	To 1 Mos. rent typewriter for abstracting	1.50
3-15-06	To check to Franklin Hudson Pub. Co.	12.00
3-15-06	To Hurryup Transfer Co.	.50
3-21-06	To Frank T. Riley ptg. for printing answer and pleas to 2nd Amended and supplemental ancillary bill	9.10
3-24-06	To Franklin Hudson Pub. Co.	11.00
3-26-06	To check to Miss Myrtle Christine, Stenographer abstracting record	12.60
4-2-06	To check to Fidelity Trust Co. account F. A. Wright	100.00

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4- 6-06	To check to R. B. Cone, N. Y.	$ 25.00
4-10-06	To Adelaide Utter, copy record entries in cases No. 2464 and 2468	4.50
4-12-06	To check to Adelaide Utter, Clerk, for certified copy of petition Case No. 2464, ordered by Mr. Jetmore	.95

4-15-06	To expense trip to Hinsdale		1.11
5- 2-06	To check to Franklin Hudson Pub. Co.		5.25
		Total	$380.16
3- 3-06	By check	$183.00	
4- 2-06	By check	100.00	283.00
		Balance	$ 97.16

(Paid 5/19/06 J. C. Rosenberger)

Kansas City, August 1, 1906.

H. S. Mecartney
to J. C. Rosenberger, Dr.

Cash Advanced:

4-24-06	To telephoning to Excelsior Springs	$ .20
6- 6-06	To check to G. F. Sheritt., copy of report of sale and order confirming sale case No. 7842	4.00
5-18-06	To check to I. L. Broadwin, N. Y. in re N. Y. depositions	15.00
5- 7-06	To telegram to Chicago,	.54
5- 9-06	To telegram to St. Paul	.62
	To telegram to St. Paul	.50
	To telegram to Chicago	.46
	To telegram to Chicago	.53
6- 2-06	To check to Miss Utter, clerk, copy petition and order, notice, etc.	7.25
6- 7-06	To check to L. M. Parry, Stenographer	1.95
5-31-06	To telegram from Jordan, clerk	.50
5-15-06	To telegram to Mr. Mecartney	.50
5- 7-06	To telegram to Hinsdale	1.31
5- 8-06	To telegram to Chicago	3.05
6-30-06	To check to R. J. Holmdem, work on petition in suit filed 7-2-06	1.00
7- 2-06	To docket fee suit Gr. Tr. Co. v. K. C. So.,	5.00
6- 4-06	To telegram N. Y. Mr. Mecartney	.80
6-16-06	To telegram to Mr. Mecartney, Chicago	.30
6-18-06	To telegram to Chicago	.46
6-26-06	To telegram to Chicago	.56
6-28-06	To telegram to Lloyd, N. Y.	.77
7-13-06	To funds advanced B. W. Lightburn, stenographer, services in Trust Co. argument	50.00
	Total	$ 96.30
7-30-06	By check from John D. Jordon, Clerk U. S. Circuit Court of Appeals, refund on costs, in K. C. S. Injunction appeal,	45.70
	Balance	$ 50.60

(Paid 8-20-06 J. C. Rosenberger).

Statement L.

Kansas City, December 18, 1907

H. S. Mecartney
to J. C. Rosenberger, Dr.

1907			
Jan. 2nd	To book case for Judge Douglass	$	10.00
Jan. 19	To car fare and messenger boy		.50
331			
Jan. 11	To telegram	$	.62
Jan. 12	To telegram		.50
Jan. 13	To telephone to Hinsdale		2.75
Feb. 20	To carrying books to Judge Douglass' house		.50
May 29	To telegrams to Mecartney		.52
May 31	To telegrams to Mecartney		.40
July 10	To check to George H. Roberts for drawing replies State Court cases		1.00
Dec. 2	To check to Quick Service Writing Co. for three Copies Supplemental Bill for injunction of K. C. S. et al. in Cambria Case		5.70
July 23	To Quick Service Writing Co. for three copies of brief in Guardian Trust Case		3.90
Nov. 27	To check to E. L. Mendenhall for printing brief on intervention of K. C. Southern		59.60
Nov. 27	To cash advanced for expense trip to St. Louis and return 11-25 at 11:45 P. M. to 8:00 P. M. 11-27		18.75
Dec. 7	To telegram to Mecartney, Hinsdale, Illinois		.83
Nov. 23	To telegram from Jones, St. Louis		.35
Nov. 25	To telegram to Jones, St. Louis		.35
Dec. 14	To check to Oscar Hochland for copy of proceedings ordered by Mr. Mecartney		4.50
		$	110.86

(Paid 1-29-08, J. C. Rosenberger)

Statement M.

Kansas City, April 17, 1908

H. A. Mecartney
to J. C. Rosenberger, Dr.

Cash advanced for expenses in Guardian Trust Company cases to date.

1907			
Dec. 21	To check to A. Utter, for two copies of appearance Docket Entries in case No. 2468	$	5.00
1908			
Feb. 22	To certified copy of petition of T. T. Crittenden for permission to transfer certain real estate and order of temporary injunc.,		2.25
Feb. 25	To certified copy of order overruling demurrer and order of temporary injuc.		.95
Feb. 28	To certified copy petition and application of Crittenden, Receiver, for instructions as to management of property		2.05

Feb.	29	To certified copy of order appointing Crittenden receiver, Central Imp. Co.	.85
Mar.	2	To certified copies of order denying motion to dissolve injunction, and order striking motion of G. T. Co. from files	1.40
Mar.	12	To check to Thomas S. Ridge for bond for costs on appeal	5.00
Mar.	21	To check to R. J. Holmden, stenographic services in preparing memo for J. C. R. and H. S. M.	7.00
Mar.	24	To Quick Service Writing Co., stenographic services in copying letters	1.25
Mar.	21	To check to Miss Thompson, stenographic services	2.50
		Total	$ 28.25

(Paid 5-18-08 J. C. Rosenberger)

In the Circuit Court of Jackson County, Missouri, at Kansas City, Harry S. Mecartney, Plaintiff v. The Guardian Trust Company, Defendant, Case No. 38412.

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332 'Exhibit 4'

Referred To In The Second Count Of And Annexed To The Petition In Said Cause.

March 27, 1908.

Guardian Trust Company
to
Harry S. Mecartney, Dr.

Cash Disbursements
Trimble & Braley Matter.

1906			
Jan.	30	Telegram to Kansas City	$ .34
Feb.	24	Telegram to Kansas City	.44
June	28	Express on package to Kansas City	.60
July	10	Expenses to K. C. and return	35.00
Aug.	22	Telegrams to Kansas City	.70
Aug.	27	Expenses to K. C. R. R. ticket $12.50; Berth $5.50; Meals on train $2.50; Hotel and other expenses, $11.20; Part mileage ticket no previously charged $9.16	40.86
Sept.	8	Expressage on package	.75
Sept.	19	Expressage on package to K. C.	.75
Aug.	25	Postage on briefs	.54
Oct.	9	Telegrams	.65
Oct.	9	Express on documents	.60
Oct.	9	Expense to K. C. R. R. Expense above mileage $5.69; Berths, Meals and hotels $12.20	17.89
Sept.	27	To Barnard & Miller, Printers 'Final Suggestions for Dft.' 65 copies	60.00
Oct.	3	Telegrams	1.03
Dec.	8	To Todd D. Denham, Court Reporter	14.25
Oct.	23	To Barnard & Miller, 'Props of Law'	17.25
Nov.	27	Telegrams	.72
Nov.	27	To sundry telegrams	3.60
Nov.	27	Stenographic expenses at K. C.	2.30

1907			
Sept.	28	To expenses K. C. and return, 3 days 'and mileage ticket)	68.20
Oct.	4	To expenses 2 days	16.70
Oct.	24	To Sterling Post Binder for files	1.75
Oct.	26	To expressage to Kansas City	1.00
Nov.	1	To special stenographers, Abs. of record	55.85
Dec.	2	To Miss Outwatre, Court Reporter, Arguments, Harkless, Mecartney & Eaton	50.40
Dec.	18	To Barnard & Miller, Printing 'Further Arguments Defense'	40.00
			$433.07

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Amended Answer

In the Circuit Court of Jackson County, Missouri, at Kansas City, Harry S. Mecartney, Plaintiff vs. Guardian Trust Company, Defendant, No. 38412.

I.

For its amended answer to the first count of plaintiff's second amended petition, this defendant admits that it is a corporation organized and existing under the laws of
333 the State of Missouri, and denies each and every other allegation in said first count in said second amended petition contained.

Wherefore, having fully answered, it prays that it may go hence without day, and have judgment for its costs.

II.

For second and further answer to the first count of plaintiff's second amended petition, the defendant says, that the plaintiff was employed by defendant as its attorney to represent it in certain litigated causes denominated by the plaintiff the 'Belt Litigation' or the 'Suburban Belt Litigation', and also in certain other litigated causes, called by the plaintiff the 'Channel & Dock Case.'

That the amount of plaintiff's compensation for his services in said two causes, was fixed and agreed upon by his written representation to this defendant, dated December 6th 1904, to the substance and effect that if said causes should be settled before final decree, plaintiff's fees would run from ten thousand ($10,000.00) dollars to fifteen thousand ($15,000.00) dollars, and if fought through to final decree, and through the court of appeals, they might run up to twenty-five thousand ($25,000.00) dollars.

Defendant states that it relied upon said written representations as a part of the contract of employment of said plaintiff, and that it paid plaintiff more than the amount provided for in said written representations.

Wherefore, having fully answered, this defendant prays that it may go hence without [delay] and have judgment for its costs.

III.

For third and further answer to the first count of plaintiff's second amended petition, the defendant says that it has paid plaintiff the amounts stated in said first count and more, and that said payments were greatly in excess of the reasonable value of all services rendered by him to it.

334 Wherefore, having fully answered, this defendant prays that it may go hence without day, and have judgment for its costs.

IV.

For fourth and further answer to the first count of plaintiff's second amended petition, defendant says that the plaintiff so negligently and unskillfully and improperly conducted the business of this defendant entrusted to him as its attorney, that his services were of no value to the defendant.

Wherefore having fully answered the said first count, this defendant prays that it may go hence without day, and have judgment for its costs.

I.

For its amended answer to the second count of plaintiff's second amended petition, this defendant admits that it is a corporation organized and existing under the laws of the State of Missouri, and denies each and every other allegation in said second count of said second amended petition contained.

Wherefore, having fully answered, defendant prays that it may go hence without day, and have judgment for its costs.

II.

For second and further answer to the second count of plaintiff's second amended petition, the defendant says that it has paid plaintiff the amounts stated in said second count, and more, and that said payments were greatly in excess of the reasonable value of all services rendered by him to it.

Wherefore, having fully answered, this defendant prays that it may go hence without day and have judgment for its costs.

III.

For third and further answer to the second count of plaintiff's second amended petition, defendant says, that the plaintiff so negligently and unskillfully and improperly conducted the business of this defendant entrusted to him
335 as its attorney therein, that his services were of no value to the defendant.

Wherefore having fully answered said second count, this defendant prays that it may go hence without day, and have judgment for its costs.

GATES & ENGLISH,
Attorneys or Defendant.

Plaintiff's reply was as follows:

Reply.

In the Circuit Court of Jackson County, Missouri, at Kansas City, January Term, 1911, Harry S. Mecartney, Plaintiff, vs. Guardian Trust Company, Defendant, No. 38412.

I.

Now comes plaintiff and for reply to defendant's amended answer to first count of plaintiff's second amended petition denies each and every allegation therein contained.

Wherefore, plaintiff prays judgment.

II.

Now comes plaintiff and for reply to defendant's amended answer to second count of plaintiff's second amended petition denies each and every allegation therein contained.

Wherefore plaintiff prays judgment.

REED, YATES, MASTIN
& HARVEY,
CHAS. M. BUSCH,
COWHERD, INGRAHAM,
DURHAM & MORSE,
Attorneys for Plaintiff.

(The recitals appearing on page 56, including the order appointing Referee, are in words and figures as follows, to-wit:

"On the 24th day of January, 1911 Term, the same being February 4th, 1911, plaintiff filed a motion to refer this cause to a referee, as appears by a record entry made at the time.

On the 24th day of the January 1911 term, the same being February 4th, 1911, plaintiff's motion for the appointment of a referee came on to be heard, and thereupon the court made the following order, as appears by record entry made at the time:

336 Order Appointing Referee.

'Now on this day come the parties and plaintiff's motion for the appointment of a referee having been taken up and considered, the court doth sustain the same, and upon the consent of the parties the court doth appoint Hon. Henry L. McCune, of Kansas City, Missouri, referee herein to hear and determine all issues of fact and law in this cause and to report his findings of fact and conclusions of law thereon to the court.'

Afterwards on the first day of the November, 1913, term, the same being November 10th, 1913, the Honorable H. L. McCune, Referee, filed his report together with the testimony taken before him as such referee, as appears by record entry at the time. Said report together with said testimony appears in the bill of exceptions to which reference is hereby made.

On the 4th day of the November, 1913, term, the same being November 13th, 1913, defendant filed exceptions to the Referee's report, as appears by record entry made at the time.

On the 5th day of the November, 1913 term, the same being November 14th, 1913, the plaintiff filed exceptions to the Referee's report, as appears by record entry made at the time.

Said exceptions of defendant and of plaintiff appear at length in the bill of exceptions to which reference is hereby made.

On the 49th day of the November 1913 term, the same being January 8th 1914, said cause was assigned to Division No. 5 of said court for the purpose of hearing and passing upon all matters in said cause, as appears by record entry made at the time.

(The recitals appearing on page 57, including the judgment of the Circuit Court, appearing on page 57, are in words and figures as follows, to-wit:

"Afterward, on the 15th day of the September, 1914 term, the same being the first day of October, 1914, the following proceedings were had and made of record before the Honorable Frank G. Johnson, Judge of Division No. 5, of said cause, the record entry being in words and figures as follows, to-wit:

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'Now on this day the court being fully advised in the premises and having read and considered the evidence and the arguments and briefs of counsel doth sustain the exceptions of plaintiff to the report of the referee herein and doth set aside the said report of the referee herein and doth set aside the said report and the findings of the referee.

And the court upon the evidence doth find the issues made by the first count of plaintiff's petition in favor of the plaintiff, and doth find that the balance due to the plaintiff from defendant with interest thereon from March 28, 1908, to this date upon the first count of his petition is the total sum of $111,046.11.

And the court upon the evidence doth find the issues made by the second count of plaintiff's petition in favor of plaintiff and doth find that the balance due to the plaintiff from defendant with interest thereon from March 28, 1908, to this date upon the second count of plaintiff's petition is the total sum of $4,778.46, making the total sum of $115,824.57, in which the defendant is indebted to the plaintiff on said first and second counts of his petition.

Wherefore, it is considered, ordered and adjudged that plaintiff have and recover of and from the defendant said sum of $115,824.57, with interest thereon at the rate of six per cent per annum from this date, together with his costs in this behalf incurred and expended and that execution issue therefor.

To which judgment and decision of the court, defendant excepts.

The court files memorandum opinion.'

On the 18th day of September, 1914, term, the same being October 5, 1914, and within four days after the rendition of the judgment hereinbefore set forth, the defendant filed a motion for new trial, as appears by record entry made at the time.

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On the 19th day of September, 1914 term, the same being October 6th, 1914, and within four days after the

rendition of the judgment hereinbefore set out, the defendant filed a motion in arrest of judgment, as appears by record entry made at the time.

On the 43rd day of September, 1914, term, the same being November 5, 1914, the following proceedings were had and made of record, the record entry being in words and figures as follows, to-wit:

Modified Judgment.

'Now on this day counsel for defendant having heretofore on November 4, 1914, upon the argument of the motion for a new trial herein, complained that the court did not by its judgment entered herein at the present term, to-wit: on October 1, 1914, expressly rule upon the exceptions of the defendant to the referee's report, and having companeled that thereby the defendants were deprived of the opportunity to preserve their objections and exceptions to the action of the court, and the court having at the time of said judgment fully considered all of defendant's said exceptions to the referee's report, and the court having deemed that the court by sustaining plaintiff's exceptions and by setting aside the referee's report and by rendering said judgment had by necessary implication overruled said exceptions of the defendant, and said judgment having been rendered at this the regular September 1914 term of this court.

Now therefore, in order that the record entry of said judgment may clearly express the decision of the court, it is now by the court, of its own motion, ordered that the record entry of said judgment entered herein at this term, to-wit: on October 1, 1914, be and the same is hereby amended by inserting therein after the word 'doth' where said word first occurs, the following language, to-wit, 'overrule the exceptions of defendant to the report of the referee, to which action and ruling of the court the defendant excepts and doth,' so that the judgment as correct shall read in words and figures as follows, to-wit:

339 'Now on this day, the court being fully advised in the premises, and having read and considered the evidence and the arguments and briefs of counsel doth overrule the exceptions of defendant to the report of the referee, to which action and ruling of the court, the defendant excepts and doth sustain the exceptions of plaintiff to the report of the referee herein and doth set aside the said report and the findings of the referee.

And the court upon the evidence doth find the issues made by the first count of plaintiff's petition in favor of the plaintiff and doth find that the balance due to plaintiff from defendant, with interest thereon from March 28th, 1908, to this date upon the first count of his petition is the total sum of $111,046.11.

And the court upon the evidence doth find the issues made by the second count of plaintiff's petition in favor of the plaintiff and doth find that the balance due to the plaintiff from the defendant with interest thereon from March 28th, 1908, to this date upon the second count of plaintiff's petition is the total sum of $4778.46, making the total sum of $115,824.57, in which the defendant is indebted to the plaintiff on said first and second counts of his petition.

Wherefore, it is considered, ordered and adjudged that the plaintiff have and recover of and from the defendant said sum of $115,824.47, with interest thereon at the rate of 6% [per cent] per annum from this date, together with his costs in this behalf incurred and expended and that execution issue therefor.'

Mr. Rosenberger: I now offer in evidence the opinion and decisions of the Supreme Court of Missouri in the case of Harry S. Mecartney, respondent, vs. Guardian Trust Company and Henry C. Flower, its Receiver, reported in Volume 274 Missouri Reports, at page 224.

Mr. Smith: Now I object to the opinion of the Supreme Court for the same reasons as we objected to the judgment, and we ask the right to offer in evidence the same evidence that we offered in support of our objections to the judgment.

Mr. Rosenberger: We object to the introduction of
340 any evidence at this time.

The Master: You will have the opportunity to introduce that evidence later. I think it will be more orderly not ot introduce it at this time.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Thereupon the opinion of the Supreme Court of Missouri in Mecartney vs. Guardian Trust Company, 274 Mo. 224 was received in evidence by the Master.

(Said opinion, as reported in 274 Mo. 224, is hereby, pursuant to stipulation of the parties, incorporated herein by reference, in lieu of being herein set forth.)

CHARLES A. BRALEY, being produced as a witness on behalf of the Guardian Trust Company, first duly sworn, testified in substance as follows:

"My name is Charles A. Braley. Since 1886, up to about ten years ago, I was a practicing attorney in Kansas City, Missouri. Since then I have not been in the general practice. While I was in active practice, I was a partner of Judge J. McD. Trimble up to within above five years before his death which was about 1918 or 1919. I was his partner at all times from the year 1896 up to the said 1912. We were practicing under the name of Trimble & Braley. Dobson & Douglas were attorneys for the Guardian Trust Company for about the first two years of its existence and thereafter Trimble & Braley represented it up to about the year 1899. The Trust Company was organized in about 1887. For a year or two prior to the appointment of Judge Black as Receiver of the Guardian Trust Company, after the company established a branch in Chicago, our firm was not general counsel for the company but it was, I think, represented as general counsel by
Thomas I. Chadbourne at Chicago, but matters per-
341 taining to Missouri affairs were referred to our office.
Chadbourne became general counsel about 1899. I recall the occasion of the appointment of Judge Francis M. Black, as Receiver of the Guardian Trust Company by Judge Thayer, on Nov. 30, 1900. Upon that appointment, Judge Trimble and I became counsel for Judge Black as receiver of the company. I recall the filing of the suits by the Cambria Steel Company and the Provident Life & Trust Company on Sept. 5, 1900. Wash Adams was appointed Receiver as successor to Judge Black who died during the receivership in May, 1902, and on Oct. 4, 1902, Judge Thayer entered an order discharging Wash Adams as Receiver and returning the Trust Company to the management of its own directors with some restrictions. During the period of Judge Black's receivership and the receivership of Wash Adams, Judge Trimble and I and those associated with us, were employed to protect the interests of the Guardian Trust Company in the Cambria Steel Company litigation and its allied litigations here in the United States Court. John A. Eaton, Dudly Eaton, Hyden Eaton and Robert Silvers were associated with us in conducting those proceedings on behalf of the Trust Com-

pany in the first part of the litigation. When Wash Adams was discharged as Receiver and the receivership was lifted, Judge Thayer made an allowance to Judge Trimble and myself for our services to Judge Black as Receiver. He made some allowance, I cannot tell just the exact figures.

Mr. Rosenberger: Handing you Trust Company voucher No. 146, I will ask you to examine it.

Mr. Braley: I have examined it.

The Master: That is not your item number in this account.

Mr. Rosenberger: No, that is the voucher number. This deals with Item No. 82. Your and Judge Trimble's receipt is attached to that voucher, is it not?

Mr. Braley: It is.

Mr. Rosenberger: And you and Judge Trimble received the sum of $7,125.00 as stated in the voucher?

242 Mr. Smith: I object to that question. The Kansas City Southern Railway Company and the Cambria Steel Company objected to any and all evidence in support of Item No. 82 on the grounds set forth in numbered paragraphs 1 to 7, inclusive, 9 and 10 of their written statement of objections and on the further ground because it is apparent on the face of the charge, that the Guardian Trust Company and its receiver are attempting to make their own apportionment in the amount of such expenses to be charged in this litigation and in support of said objections, said parties ask leave to offer evidence, documentary and oral, for the purpose of showing that the services covered by said item included services foreign to this litigation and upon issues on account of which costs as between solicitor and client may not be taxed, if they may be taxed on any issue, and were excessive. The written statement read into evidence in support of the objections to the introduction of voucher No. 146, covering Item No. 82, apply also to any and all other evidence in support of said item.

Said objections were, by the Master, overruled, and said offer of proof denied, to which ruling said parties duly excepted.

The Master: The Master does not quite understand why you are asking for three-fourths of that amount.

Mr. Rosenberger: On the basis of three-fourths of their time given to this litigation.

Mr. Smith: We object to the voucher and item, on the ground that it shows on its face that the Trust Company is here attempting to apportion the amount of the award without having any hearing on the facts, making their own arrangement and not giving us any day in court on the merits.

Mr. Rosenberger: That is what we are having now, a hearing on the facts.

The Master: Wait a moment: Is that an objection to the voucher? The voucher has already been introduced and now is that an objection to the testimony of Mr. Braley?

Mr. Smith: I am just making that objection to the
343 answer to your question, what he stated; the objection to the vouchers appearing in the written objection.

The Master: The objection will be overruled at this time.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Braley: During the period of that receivership between Nov. 30, 1900 and Oct. 4, 1902, Judge Trimble's time and Dudley Eaton's and for a small time, the time of Robert Silvers and myself was almost exclusively used in the prosecution, on behalf of the Guardian Trust Company, of its claims against the Belt Company and the Southern Company, and to the defense of the claims that were being asserted against it by the Southern Company and various other parties to that litigation. We were called upon and required to prepare very extensive defenses and defensive pleadings to various demands that were being asserted against the Guardian Trust Company by the Cambria Company and by the receivers of the Belt Company and by the various subcompanies that were parties to the suit. Judge Trimble, John Eaton and Dudley Eaton gave nearly all of their time, if not all, to that litigation and Robert Silvers, during his connection with the firm, gave more or less time but we were looking after more local business.

Mr. Rosenberger: Well, what proportion of the services compensated for by that allowance of $7,125.00 in your opinion is fairly to be said to be applicable to services rendered by Judge Trimble and your firm in representation of the Guardian Trust Company in this Cambria litigation?

Mr. Smith: That question, if your Honor please, is putting Mr. Braley in the position of judge and jury and witness, without giving us any facts on which to base the question at all. Just ask him to state what percentage or what proportion of the time was given without any inquiry as to what was done or what issues were involved in this matter or what law suits is taking from us any opportunity
344 to try out the issue of the value of those services and on what issue services were rendered and what the worth of them.

The Master: The objection is overruled. I take it Mr. Braley knows what he is talking about and what time he was giving to it and the time these other men were devoting to this litigation.

To which last ruling and action of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Braley: At least three-fourths of the time; I should say more.

Mr. Crane: What date does that embrace?

The Master: November 30, 1900 to Nov. 4, 1902.

Mr. Rosenberger: I now [feal,] if your Honor please, with Item 81, reading as follows: "To amount paid Trimble & Braley, attorneys, as retainer fee in Cambria Steel Company case, $1000.00).

The Master: What is the date of it?

Mr. Rosenberger: September 22, 1900.

Mr. Rosenberger: Mr. Braley, I will ask you to state whether your firm was employed to represent the Guardian Trust Company in this Cambria Steel litigation prior to the appointment on November 30, 1900, by Judge Thayer of Judge Black as receiver?

Mr. Braley: We were.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of any testimony in support of Item No. 81 of the account on the grounds set forth in numbered paragraphs 1 to 7, inclusive and 9 of their written statement of objections and in support of their objections, asked leave to offer evidence, for the purpose of showing that the services covered by said item, included services foreign to this litigation. The written state-

ment read into the record in support of the objections to Voucher No. 146, covering Item No. 82, applied also to any evidence in support of Item 81. Said objections were,
345 by the Master, overruled, and said offer of proof denied, to which rulings said parties duly excepted.

Mr. Braley: Our firm was employed to represent the Guardian Trust Company in this Cambria Steel litigation prior to the appointment of Judge Black as Receiver, by Judge Thayer, on Nov. 30, 1900. Refreshing my recollection by examining a bill annexed as exhibit to the original petition in suit No. 25346, in the Circuit Court in this county, entitled Trimble & Braley vs. Guardian Trust Company, I can testify that we received a retainer fee of $1,000.00 on Sept. 25, 1900, paid us by the Guardian Trust Company in that litigation.

Mr. Rosenberger: I now deal, Mr. Master, with the items numbered on the account 83 to 107, inclusive, being salary items paid Judge Trimble during the period October, 1902, to October 25, 1904, inclusive.

Thereupon the Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of any testimony in support of items No. 83 to 107, inclusive, on the grounds set forth in numbered paragraphs 1 to 7, inclusive, 9 and 10 of their written statement of objections, and in support of said objections, asked leave to offer evidence for the purpose of showing that the services covered by such items included services foreign to this litigation, and upon issues on account of which costs as between solicitor and client may not be taxed, if they may be taxed on any issue, and were excessive. The written statement read into the record in support of the objections to voucher No. 146, covering item No. 82, apply also to evidence in support of Items 83 to 107, inclusive. Said objections were, by the Master overruled, and said offer of proof denied, to which ruling, said parties duly excepted.

Mr. Braley: I cannot say whether the record shows that immediately upon the discharge of Wash Adams as Receiver, on Oct. 4, 1902, our firm or Judge Trimble for our firm, was employed as general counsel of the Guardian Trust Company but he represented the company and took care of
346 its affairs in this Cambria suit. I do not recall being present at a meeting of the Board of Directors of the company held on Oct. 22, 1902, the minutes of which seem to recite my presence, and that Judge Trimble was elected to

the office of general counsel, but I know he took charge of their affairs after the discharge of the receivership.

Mr. Rosenberger: I also call attention to this portion of the minutes of the same meeting (page 2031 of volume 3 of the Shedd record): "The question of proper compensation to the officers of the company for their services for the succeeding year was brought up for consideration. Whereupon, upon motion of Mr. Bradbury, seconded by Mr. Shedd, the president appointed the following committee to consult with the officers elect and agree upon the compensation to be allowed and to report the result thereof to this meeting. The committee as appointed by the president was composed of the following persons: G. L. Bradbury, William Waterall, and John A. Prescott. The meeting at this point rested awaiting the report of the committee. The committee returned to the meeting and made the following report, which was read by Mr. Prescott, fixing the salaries of the various officers of the company as follows. President, H. H. Harris, $500.00 per month" and so forth, including "counsel, J. McD. Trimble a $500.00 per month". With your recollection thus refreshed, if it is refreshed, you may state whether Judge Trimble's salary was $500.00 a month from the time of the lifting of the receivership up to some time in 1904?

Mr. Braley: I could not say without referring to our books.

Mr. Rosenberger: What is your best recollection on the subject?

Mr. Braley: I presume it was at least that.

Mr. Rosenberger: That is to say that is your recollection of it?

Mr. Braley: Yes, sir.

Mr. Braley: After Wash Adams was discharged as Receiver in October, 1902, the litigation involved in this
347 Cambria Steel case spread to nearly all of the railroad companies and their allies that were mentioned in the Bierce case, in which there were a great many defendants and certain plaintiffs. There was litigation in all of them after the receivership. I remember there was a case in which the defendants were the Kansas City Suburban Belt Railroad Company, the Guardian Trust Company, Northern Townsite Company, the Central Improvement Company, the Missouri Elevator and Terminal Company, Fairmount Amusement Company and in fact, all of the subsidiary companies of the

Belt Company. The litigation spread so that it involved all of the subsidiary companies. I remember the occasion of Judge Shannon C. Douglass being appointed by Judge Phillips about April 1, 1902, to take testimony on the issues made in the Cambria suit. Before the Master was appointed, I presume that the answers and pleadings were filed on behalf of the various defendants to the Cambria bill and to the ancillary bill that was filed by the Receivers of the Belt Company against the Guardian Trust Company. Our firm pressed this litigation to its final conclusion. That necessarily involved a great amount of preparation. A great amount of labor was involved in examining the accounts between these different companies and preparing them in proper shape for presentation to the Master. The transactions were very numerous and were between companies all doing business, or largely so, in or near the offices of the Trust Company. The auditor of the Guardian Trust Company and its allied companies, spent a great many days and nights getting out the accounts and statements.

348 Mr. Rosenberger: You may state whether the issues raised in this Cambria case were such as to involve an examination of the accounts of all the various parties to the suit involved.

Mr. Braley: I have a distinct remembrance of a conference on that subject, as to whether we should demur or whether we should consent to an accounting, which was pressed by the defendant. Some of the firm wished to demur. Judge Trimble took the view that the accounting was all on the books and would probably not take any longer than it would to try out the legal point on the demurrer, or some other pleading that would put the question in suit (issue). (pp. 275, 287.)

Mr. Rosenberger: Mr. Braley, I will ask you to keep in mind that the Special Master was appointed about April 1, 1902; that Judge Trimble resumed his duties as counsel for the Guardian Trust Company under its own management about December 1, 1902, and that the hearings before the Special Master Douglass began on January 15, 1903; and that between the last mentioned date and the date of his retirement from the case, about December 1, 1904, there had been one hundred and three sessions before Judge Douglass, as shown by the record in the Cambria Steel Company
349 case, at which evidence was introduced, proceedings had and that during the greater part of that time Mr. S. B. Willey was on the stand under examination and cross

examination, Mr. Willey being the auditor of the Guardian Trust Company and accountant called upon to examine the books; taking those facts into consideration and your own knowledge of the extent of preparation necessary to shape the evidence, conduct the examinations, attend the hearings, I will get you to state how much of Judge Trimble's time was engrossed, if any of it, during that period, from the time he again became general counsel at a salary of $6,000.00, about December 1, 1902, until his retirement December 1, 1904.

Mr. Smith: We object to this question for the additional reason that it calls for speculation and a conclusion. It has not been shown the witness was present at any of these hearings or that he knows what was done at those hearings and he don't know how long any session lasted or what was done in the meantime; nor can he tell absolutely what other things Mr. Trimble had or what other business Trimble & Braley had and were doing during this period for the Guardian Trust Company.

The Master: In view of the intelligence of the witness and matters he has knowledge of the objection will be overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Braley: Judge Trimble and the other lawyers I have mentioned, officed in the same offices that I did and I can confidently say that during that litigation, at least three-fourths of the time of Judge Trimble. Mr. Eaton and Dudley Eaton were used and employed in the prosecution of these cases. I remember one subject in particular, that the Orient was just starting and Judge Trimble paid little attention to that. These other lawyers mentioned, associated with myself and Judge Trimble, were compensated exclusively
350 by Judge Trimble and myself. The dealings of the Trust Company were entirely with Judge Trimble. The stress upon counsel in the Cambria litigation at that time was such that Judge Trimble was obliged to employ Wash Adams to assist him. That was after the receivership. Wash Adams was actively in the case.

Mr. Rosenberger: Can you give us some idea, Mr. Braley, of the extent of the exactions on Mr. Willey, the Trust Company's auditor, in this litigation involved, and the assistance given by him before the Special Master Douglass and

preparations he made therefor in the way of financial exhibits and statements of account as between the numerous companies involved?

Mr. Smith: We object to any evidence in support of the Willey charges on the grounds set forth in numbered paragraphs 1 to 5, inclusive, and 7 of our written statement of objections, and we object to the question for the additional reason that it calls for a conclusion of this witness as to the extent of the exactions on Mr. Willey who was doing this work by himself and not in the presence or hearing of Mr. Braley, therefore, calling for his conclusion on something that must be the result purely of his inference and would be hearsay evidence.

The objections were, by the Master, overruled, to which ruling The Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

Mr. Braley: Mr. Willey was called upon to give not only day but night service in preparing these accounts. In the day time he was busy testifying before the Master and at night preparing exhibits.

Mr. Rosenberger: Mr. Braley, I wish you would look at Trust Company voucher No. 2954, $10,198.13, covering Item No. 127, the Trimble & Braley judgment, and state whose signature that is to the last portion thereof.

Mr. Smith: The Kansas City Southern Railway Company and the Cambria Steel Company object to the introduction of any testimony in support of Item No. 127 on the
351 grounds set forth in numbered paragraphs 1 to 7, inclusive, 9 and 10 of their written statement of objections and in support of said objections, ask leave to offer evidence for the purpose of showing that the services covered by said item included services foreign to this litigation and upon issues on account of which costs as between solicitor and client may not be taxed, if they may be taxed on any issue, and were excessive. The written statement read into the record in support of the objections to the introduction of voucher No. 146, covering item No. 82, applies also to evidence in support of item No. 127. Said parties objected to the voucher for the further reason that the voucher is for a lump sum and does not attempt to specify what services were rendered or whether the services were rendered in this litigation or whether they were rendered for issues to which the claims for costs between solicitor and client are being claimed or may be claimed in any event.

Said objections were, by the Master, overruled, and said offer of proof denied, to which rulings, The Kansas City Southern Railway Company and Cambria Steel Company duly excepted.

Mr. Braley: The acknowledgment of satisfaction on said voucher No. 2954 was signed by both Judge Trimble and myself and the voucher is signed by the firm name, by myself. Our firm got that money.

Mr. Rosenberger thereupon offered in evidence the original petition in suit No. 25346 in the Circuit Court of Jackson County, Missouri, in Trimble & Brailey vs. Guardian Trust Company and the exhibits thereto attached, being the petition on which said case was tried.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction in evidence of said petition and exhibits on the grounds set forth in numbered paragraphs 1 to 7, inclusive, 9 and 10 of their written statement of objections, and in support of said objections, asked leave to offer evidence for the purpose of showing the service covered by said petition in-
352 cluded services foreign to this litigation. Said objections were, by the Master, overruled, and said offer of proof denied, to which ruling said parties duly excepted.

The petition and exhibits were received in evidence by the Master and are in words and figures, as follows:

In the Circuit Court at Kansas City, October Term, 1905.

J. McD. Trimble and C. A. Braley, Partners under the firm name and style of Trimble & Braley, Plaintiffs,

vs.

Guardian Trust Company, a corporation, Defendant.

Now comes the plaintiffs and for their cause of action against the defendant state that at the times hereinafter mentioned they were and for a long time prior thereto had been and still are licensed attorneys at law and engaged in the active practice of the profession of the law as partners under the firm name and style of Trimble & Braley, at Kansas City, Missouri, and that they were partners in the practice of their said profession during all of said times and still are such partners.

That the defendant, Guardian Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of Missouri.

That at divers times from the second day of November, 1898, to the 16th day of January, 1905, the plaintiffs as such attorneys at law, at the special instance and request of the defendant, rendered to the defendant professional services in and about divers and various legal matters and litigated causes, and did during said times at the instance and request of the defendant incur, advance and pay out certain moneys at divers times and in various amounts for and on behalf of the defendant in connection with the said legal matters and litigated causes.

That the items and particulars of the said professional services, rendered by the plaintiffs to the defendant in
353 connection with said legal matters and litigated causes, will fully appear, together with the respective dates thereof, from the itemized statement hereto attached, and that the various items of expense and money incurred and paid out for and on behalf of the defendant by the plaintiffs in connection with the said legal matters and litigated causes, together with the dates thereof, will also fully appear upon the said itemized statement hereto attached.

That the charges made for each item of services by the plaintiff to the defendant, as shown upon the said itemized statement, are reasonable, and the amounts charged for in each of the said items of said services respectively were and are reasonably worth the amount so charged therefor, and the charges made in the said itemized statement for expenses incurred or money paid out by Trimble & Braley for and on behalf of defendant were actually incurred and paid out by Trimble & Braley for and on behalf of the defendant as shown by the said itemized statement.

That the defendant has at various times between November 2, 1898, and the 21st day of April, 1905, made divers payments to Trimble & Braley on account of said services and expenses, all of which payments, together with the respective dates thereof, are correctly credited and shown on the said itemized statement hereto attached.

That on the 30th day of March, 1904, there was due to the plaintiffs on account of the said services and expenses, after deducting all of the payments theretofore made on account thereof, without computing any interest, a balance of Twenty-one Thousand Three Hundred and Twenty-three and 56/100 Dollars ($21,323.56).

That on the said 30th day of March, 1904, plaintiffs duly demanded of and from the defendant the payment of the said

balance, $21,323.56, then due as aforesaid, [by] the defendant wholly failed and refused to pay the same or any part thereof

That since the said 30th day of March, 1904, and
354 prior to the 1st of January, 1905, the defendant paid to the plaintiffs, on account of the said services and expenses, seven Hundred and Ninety and 81/100 Dollars ($790.81), consisting of two payments, one made on the .....day of....., 1904, of $25.36, and the other on July 12th, 1904, of $765.45.

That since the said 30th day of March, 1904, the day when the plaintiffs made demand for the payment of the balance so due as aforesaid, the plaintiffs, at the special instance and request of the defendant, have rendered to the defendant other professional services in connection with a litigated cause, for which services the plaintiffs charged the defendant the sum of Five Hundred Dollars ($500.00) as will appear from the said itemized statement hereto attached; that the services for which said charge was made were reasonably worth the sum so charged, and since the said 30th day of March, 1904, plaintiffs have paid out for and on behalf of the defendant other and further moneys by way of expenses, the items of which will truly appear from the itemized statement hereto attached.

That afterwards, to-wit: on the 20th day of April, 1905, the defendant paid to the plaintiffs on account of their said professional services and expenses so rendered and incurred by them, the further sum of Five Hundred Fourteen and 5/500 Dollars ($514.05), for which credit was duly given, as will appear from the said itemized statement hereto attached.

That after allowing credit for all payments which the defendant has made on account of the said services and expenses, there now remains due to the plaintiffs, exclusive of interest, the sum of $20,533.25.

That the plaintiffs have frequently demanded of and from the defendant the payment of said balance so due as aforesaid, but the defendant has wholly failed and refused to pay the same or any part thereof.

Wherefore, plaintiffs pray judgment against the defendant for the sum of $20,533.25, the balance due as afore-
355 said, and also for interest at the rate of six (6) per cent per annum from the 30th day of March, 1904, until rendition of judgment, together with the costs of this suit.

EATON & LOOMIS,
Attorneys for Plaintiff.

Kansas City, Mo. March 1st, 1904.

Guardian Trust Company, to

Trimble & Braley, Dr.
Attorneys at Law,
Rooms 713-720 Bryant Building.

1898		
Nov. 2	To expense J. McD. Trimble to Chicago	$ 20.00
Dec. 17	To cash for copy of deed of trust K. S. S. & G. Terminal Co. to M K. & T Trust Co.	8.00
1899		
Mch. 2.	To cash for telegram to J. McD. Trimble from Nathaniel Norton in re claim against Lay	.98
Apr. 29	To cash for 2 telegrams Norton to C. A. Braley and vice versa in re Lay matter	1.06
Apr. 29	To cash for telegram J. McD. Trimble to W. S. Taylor	.65
May 25	To cash for Mr. Braley's expenses to examine Wentworth Nine	5.12
Apr. 1	To advice, time and services other than legal in connection sale of rice and irrigation stock including trip to Chicago to see Oliver Snow, Mansfield, Shed, Bake., Harris, et al	100.00
July 12	To cash for 3 telegrams in re purchase Cuban iron properties	2.22
July 19	To cash for 7 telegrams in re holding directors' meeting of company in Chicago and change of its name and capital	2.85
July 27	To cash for 9 telegrams account Guardian Trust Co. in re electric automobile business with Lobdell of Chicago, the collection of claim against Lay, and Chicago Zinc mine property	5.31

April, May, June & July, 1899. To all advice and services in the matter of suit of Missouri, Kansas & Texas Trust Co. as trutee of Texas & Ft. Smith Ry. Co. in U. S. Circuit Court for Eastern District of Texas, being a suit to foreclose mortgage on railroad property and secure appointment of a receiver pending the foreclosure proceedings. The services rendered include the preparation of bills of complaint, the institution of the suit, the

securing of appointment and qualification of R. A. Greer as receiver, securing delivery of pos-
356 session of the property to him, the preparation and filing of an ancillary bill in U. S. Circuit Court for the Western District of Arkansas, and securing ancillary orders for appointment of the same receiver, the subsequent negotiations resulting in the dismissal of the suit, the discharge of said receiver, and settlement of his affairs and the costs of the suit $2500.00

After the appointment of the receivers of the Kansas City, Pittsburg & Gulf Rld. Co. in the Circuit Court of Jackson County, Mo. on April 1st, 1899, it was found necessary for the purpose of operating as a continuous line and an entire system, to do so in connection with the Texas & Ft. Smith Ry. Co., the lines of which formed a part of the system, and subject to successful operation in connection with the K. C. P. & G. Rld. Co. A bill was prepared for the foreclosure of the Texas & Ft. Smith Rly. Co. mortgage and filed in the U. S. Circuit Court for Eastern District of Texas at Beaumont.

Thereupon application was made to the Hon. D. E. Bryant, Judge of said court, for the appointment of a receiver, upon which application R. A. Greer was appointed, who thereafter qualified and took possession of all property, railroad and equipment belonging to the Texas & Ft. Smith Ry. Co. and thereafter proceeded to operate the same under the order of the court appointing him in connection with the receivers of the K. C. P. & G. Rld. Upon the appointment S. W. Fordyce and Webster Withers, Receivers, suit so begun was dismissed and the receiver discharged.

An ancillary bill was prepared and filed in the U. S. Circuit Court for Western District of Arkansas at Texarkana, and by order of Judge Rogers, R. A. Greer was appointed as receiver and thereupon took possession of all the lines of the Texas & Ft. Smith Ry. Co. located in the Western District of Arkansas.

For all services rendered in above entitled suits and their final disposal the above charge is made.

357 April, May June & July, 1899. To all advice and services in suit of M. K. & T. Trust Co. against K. C. Shreveport & Gulf Ry. Co., in Circuit Court of Caddo Parish at Shreveport, La., being a suit to foreclose a mortgage on the railroad property and secure appointment of receivers pending the foreclosure proceedings.

The services charged for include the preparation of the bill of complaint, the institution of the suit, securing the appointment and qualification of Trimble, Martin, Gilham, Youree and Furnum as receivers, subsequent negotiations which resulted in the dismissal of the suit, discharge of said receivers and the settlement of their affairs and costs of suits, $2000.00.

(The Kansas City Shreveport & Gulf Ry. Co. owned all of the lines operated by the K. C. Pittsburg & Gulf Rld. Co. in the State of Louisiana, under a contract or lease from that company.

After the appointment of receivers for the Kansas City, Pittsburg Gulf Rld. Co. it was found necessary to institute suit for appointment of receivers for the K. C. Shreveport & Gulf Rld. Co. interest upon the bonds of which was in default.

Thereupon a bill was prepared and filed in said court and application thereon was made for the appointment of receivers, and the court apointed J. McD. Trimble, E. L. Martin, Robert Gilham, H. L. Youree, and Richard Furum, Receivers, who qualified as such and after the appointment of Fordyce and Withers as receivers of all the properties of the defendant companies in the suit of the State Trust Company against the Kansas City, Pittsburg & Gulf Rld. Co., et al., the said suit was dismissed.

For all the services rendered in the above entitled suit, and for all services and the conduct of said receivership and the final disposal of said suit, the above charge is made).

Aug.	22	To cash for 2 telegrams in re payment taxes on Surinam property	2.82
Sept.	12	To cash for 2 telegrams between Mr. Stilwell and Judge Trimble about S. & Ft. S. & O. K. C. & E. Matters	1.00
358			
Sept	19	To cash for telegram Judge Trimble Sept. 14 in re same matter $	.92
Sept.	28	To cash for telegram Judge Trimble Sept. 14 in re same matter	.40
Nov.	1	To time and services preparing and filing amended answer in case Moore et al vs. Jones	25.00
Nov.	24	To cash for 2 telegrams in re Barnett's proposition of settlement	2.00
Nov.	29	To services and advice in preparing for trial of Lumber Company vs. Port Arthur & Mexican S. S. Co. whose ship was libeled and Trust Co. indemnified sureties on release bond	50.00
Dec.	8	To cash for 2 telegrams regarding Trust Co. meeting in Chicago	.74

		To advice and services in reference to sale of $191,900 1st mortgage bonds of S. W. Mo. Light Co. and 94,200 preferred and 94200 of its common stock	100.00
Dec.	9	To time and services preparing and filing answer of Guardian Trust Co. to the interples of Jones & Oglesby in case of Moore et al v Jones, et al	50.00
1900			
Jan.	8	To time and services drawing contract appointing company agent for sale of lots at Port Arthur, Texas	15.00
Jan.	15	To one day's time making copy of bill of receivers of K. C. P. & G. R. R. Co. vs. O. D. C. & E. R. R. Co. cross bill of Mo. Rly Construction Co. and order appointing receiver including services and expenses of stenographers	
Feb.	3	To cash for 2 telegrams between Mr. Stilwell and J. McD. Trimble	2.52
Feb.	9	To cash for telegram J. McD. Trimble to Silas W. Pettit	.56
Mch.	9	To cash for 2 telegrams arranging Trust Company meeting	1.24
		To cash for certified copy judgment and order allowing appeal in Jones v. Hamm	1.50
Apr.	18	To cash for deposit docket fee company v. Mo. Water & Light Co.	3.00
Apr.	27	To advice and services in matter of instituting suit against K. C. Suburban Belt R. R. Co. in replevin for $15,000. worth of railroad steel and suit for converting $10,000 other steel	150.00
Apr.	30	To docket fee in replevin suit company v. K. C. Suburban Belt R. R. Co.	3.00
		To cash for expenses in replevin suit Company vs K. C. Suburban Belt R. R. Co.	.35
359			
Apr.	30	To all advice and services in preparation for trial and trial of cases wherein Jones & Ogelbay on the one side and Guardian Trust Co. on the other claiming money $16,000 deposited with Board of Trade in connection with the lease of the Temple Block, case being Moore v Jones	$ 300.00
Apr.	30	To time and services in negotiations with D. R. Francis and conference with Kennett and reaching agreement for Mr. Martin to be President Crescent Elevator Co.	25.00
May	15	To cash for telegram in re payment Williamson note by Trust Co.	.68
May	28	To cash for telephone message Trimble to Chadbourne in Chicago	4.10

May 3 To retainer and services in instituting suit against the K. C. P. & G. R. R. Co. to recover on certain coupons, including filing petition 150.00

May 4 To one day's services in all advising about and supervising obtaining possession and removal of steel rails and railroad plates involved in replevin suit getting replevin bond approved and writ of replevin issued and sheriff in control 25.00

May 1st 1899 to June 1st 1900 To all services to date in suit now pending of the M. K. & T. Trust Co. against the Texarkana & Ft. Smith Ry. Co. in U. S. Circuit Court for Eastern Dist. of Texas, at Beaumont, Texas 750.00

(After the appointment of receivers Fordyce and Withers in the suit of the State Trust Co. v. K. C. P. & Rld. Co., et al, it was found advisable to institute suit for foreclosure of mortgage of the Texarkana & Ft. Smith Ry. Co. in U. S. Court for the Eastern Dist. of Texas.

Accordingly a bill was prepared for the foreclosure of the mortgage of the Texarkana & Ft. Smith Ry. Co. and filed in said court where said suit has since been pending. For services therein as above specified the charge is made.)

May 1st 1899 to June 1st, 1900 To all services in the suit of the M. K. & T. Trust Company v K. C. Shreveport & Gulf Rld. Co. et al, in the suit now pending in U. S. Circuit Ct. for Western District of Louisiana at Shreveport, from May 1st, 1899 to June 1st, 1900 750.00

(After the appointment of receivers Fordyce and Withers in the suit of the State Trust Co. v the K. C. P. & G. Rld. Co. et al., it was found necessary to file a bill for the foreclosure of the mortgage of the K. C. Shreveport & Gulf Rld. Co. covering its railroad and other property in the Western District of Louisiana.

360 For the preparation of said bill of foreclosure, the filing of the same, and all services in said cause between said date, the above and foregoing charge is made.)

June 12 To expenses in 2 trips Independence in matter Mo. Water & Light Co. case $ 1.50

June 13 To services preparing notice of trustees' sale of Johana Nerder property at Carthage and having same published 10.00

June 23 To time and services preparing trust deed from Janssen Place Land Co. to Trust Co. 10.00

June 30 To advice and services in preparing 2 powers of attorney to Alonso Fernandes to effect the necessary acceptances and transfers of Trust Co. concessions, granted by the Republic of Mexico 50.00

To services and advice in procuring from Secretary of State a certified copy of the Articles of Association including capital stock and change of name of the Trust Co. and having same certified by Mexican Consul for Mr. Ball's use in Mexico 50.00

July 14 To services preparing motion for new trial and in arrest of judgment, filing and arguing same, getting time on over-

	ruling motion within which to file bond and bill of exceptions and to preparing and filing affidavit in appeal and having same allowed, all in case of Moore v. Jones, et al	250.00
Aug. 27	To cash for carefare to Independence on account of case of Guardian Trust Co. v. Mo. Water & Light Co.	.30
Aug. 20	To time, advice and services concerning and in drawing agreement between the Trust Co. and the Air Line for the turning over of money due the Air Line and held as indemnity by the Trust Co. for executing as surety bond in sum of $15,000.00 to Metropolitan St. Ry. Co.	75.00
Aug. 29	To cash for expenses in serving subpoenas in replevin suit Trust Co. v. Suburban Belt	1.15
Aug. 31	To services in connection with case of Trust Co. v. Mo. Water & Light Co. consisting of advice concerning statement of accounts and the procuring of the books of the defendant company for their examination to ascertain what defendant's counter claim for $32,000 was based on	100.00
	To services in connection with the making of demand on K. C. S. B. R. R. Co. for the payment of its notes and giving notice that the Trust Co. would sell the collateral security notes Set. 7, 1900	75.00
Sept. 1	To time and services examining records of Suburban Belt Rld. Co. office and going over collateral and value of same in connection with collecting the K. C. S. B. R. R. Co. notes held by the Trust Co.	25.00
361		
Sept. 1 to 10	To services in connection with the taking of Wilcox' deposition in Trust Co. v. Mo. Water & Light Co. including an examination and preparation of all accounts of all dealings between the two companies for 9 years	$ 300.00
Sept. 7 8	To one day's time in preparing for and of election of directors of Central Imp. Co.	50.00
Sept. 12	To retainer in case Cambria Steel Co. v. K. C. B. R. R. Co. et al. in U. S. Circuit Court	1000.00
Sept. 13	To time and services in going to Carrollton, Mo. to look up records and facts in case of Trust Co. v. Mo. Water & Light Co.	25.00
Sept. 17	To cash for expenses in filing stipulation in case Trust Co. v. Mo. Water & Light Co.	.30
Sept. 18	To cash for expenses going to Carrolton to investigate records in case Company v. Mo. Water & Light Co.	5.00
Sept. 21	To time and services on trip to Webb City, Mo. to take depositions in case Tamblyn v. Victoria Zinc Mining Co. in which receiver was sought for Mining Co.	25.00

Sept.	25	By check received as retainer in Cambria case	1000.00
Sept.	25	To time and services going to and in Chicago preparing for plea and answer in Cambria Steel Co. v. K. C. Suburban Belt Ry. Co. et al, in U. S. Circuit Ct.	500.00
Sept.	29	To cash for expenses going to Webb City, Mo. to take depositions in case Tamblyn v. Victoria Zinc Mining Co.	6.10
Oct.	5	To cash for certified copy of the pleadings in case Tamblyn v. Victoria Zinc Mining Co.	4.00
Oct. to 6	3	To time and services four days in looking over the minute book of Kansas City Suburban Belt Ry. Co. and Consolidated Terminal Rd. Co. also Journal records and taking extracts from the same to use in suit Cambria Steel Co. v. Trust Co.	200.00
Oct. to 11	8	To 4 days time and services in Chicago in consultation with Mr. Chadbourne concerning suit Cambria Steel Co. v. Trust Co. and 4 foreclosure suite brought by Provident Life & Trust Co. against several parts of Suburban Belt Rld. Co.	400.00
Oct. to 11	8	To 4 days time and services of C. A. Braley in Suburban Belt Ry. Co. office looking up facts to contest the Cambria suit	200.00
Oct.	9	To Retainer, time and services in preparing and filing answer of company in case First National Bank of Kansas City v. Trust Co. a suit on note for $25,000 made by the Suburban Belt Rld. Co. and endorsed by Trust Co. as accomodation for Suburban Belt Co. the answer filed pleading ultra vires	300.00
362			
Oct.	12	To time and services in Chicago taking Mr. Stillwell's deposition in case Trust Co. v. Mo. Water & Light Co.	$ 75.00
Oct.	15	To time and services meeting with attorneys of Oglesbay and Jones on various occasions to go over and agree on bill of exceptions in Moore v. Jones and to final agreement thereon and having said bill of exceptions certified and filed	25.00
Oct.	16	To cash for expressage on package from Byrne at Texarkana	.25
Oct.	17	To cash for certificate in case Finch v. Company to obtain affirmance of judgment	1.00
Oct.	17	To cash for deposit of docket fee in Finch v. Company necessary in obtaining this affirmance	10.00
		To cash for telegram Sept. 25 Trimble & Braley to Chadbourne	1.25
		To cash for telegram Sept. 28 to Clerk Circuit Court at Carthage, Mo. in case Tamblyn v Victoria Zinc Mining Co.	.67
Oct.	5	To cash for telegram Trimble to Chadbourne	.38
Oct.	6	To cash for telegram Trimble to Chadbourne	.38

Oct. 20	To cash for expenses of D. W. Eaton to Leavenworth on account of case Provident Life & Trust Co. v. Union Terminal Rld. Co.	1.74
Oct. 22	To cash for copy 'Ex. 1' attached to bill in case Cambria Steel Co. v. Suburban Belt	2.40
	To cash for telegram Trimble & Braley to Clark United States Circuit Court	1.12
	To retainer and services in preparing and presenting petition of Trust Co. to be made a party to foreclosure suit of Provident L & T Co v. K. C. Suburban Belt Co. so as to resist foreclosure in the U. S. Court	750.00
	To retainer and services in prepering and presenting petition of Trust Co. to be made a party to suit of Provident L & T Co v K. C. & Independence Air Line Co. et al so as to resist foreclosure in the U. S. Court	750.00
	To retainer and services in preparing and pesenting petition of Trust Co. to be made a party to suit of Provident L & Tr Co v Union Terminal Co et al so as to resist foreclosure in U. S. Circuit Court	750.00
	To retainer and services in preparing and presenting petition of Trust Co. to be made a party in suit Provident L & T Co v. K. C. Suburban Belt Co. to foreclosure mortgage on Consolidated Terminal Co. so as to resist foreclosure in U. S. Court	750.00
363	To retainer in the case of Bierce et al v Trust Co. for receiver for Trust Co. in U. S Circuit Court	$1000.00
Oct. 22	To cash for telephone to McKeighan at St. Louis Oct. 23 regarding Bierce case	2.00
	To cash for telephone to Chadbourne at Chicago, Oct. 23, regarding Bierce case	2.75
Oct. 29	To cash for telegram Trimble to Chadbourne Oct. 19	.92
Oct. 30	To cash for certified copies of order in Bierce case	2.25
Oct. 31	To one day's time in investigation book of K. C. Suburban Belt Co. for preparation of Trust Co. defense in Cambria suit	50.00
Oct. & Nov.	To services on Preparation of intervening petition in suit of Barnett & Record Co. v. Port Arthur Channel & Dock Co. in U. S. Circuit Court at Beaumont, and obtaining order for filing same from Judge Bryant at Sherman, Texas	200.00
Oct. & Nov.	To services and counsel and opinions in injunction suits in Calcasieu Parish District Court to enjoin railroad and subsidiaries	50.00
	To services, counsel and opinions in the case in De Soto Parish, La. to enjoin subsidy tax voted by the Town of Mansfield	50.00

Nov. 1	To retainer and services in preparing and filing petition of Trust Co. to be made a party to case of Provident L & T Co v Union Terminal Rld. Co. in U. S. Court for District of Kansas so as to be able to resist foreclosure of mortgage	500.00
Nov. 5	To time and services in preparing and filing answer to bill of complaint of Provident L & T Co. to foreclose mortgage on K. C. Suburban Belt Rld.	500.00
	To services in preparing and filing answer to bill of complaint of Provident L & T Co to foreclose mortgage of Consolidated Terminal Railway	500.00
	To services in preparing and filing answer to bill of complaint of Provident L & T Co to foreclose mortgage of Union Terminal Rld Co.	500.00
	To services in preparing and filing answer to bill of complaint of Provident L & T Co. to foreclose mortgage on KV & Independence Air Line	250.00
	To service in preparing and filing answer in case Cambria Steel Co. v. Guardian Trust Co. et al in U. S. Circuit Court	750.00
Nov. 19	To one day's time and services in reference to resisting motion filed by Lathrop, Morrow, Fox & Moore, to set aside order of Federal Court appointing Wash Adams receiver of Mo. Elevator & Terminal Co. and of Central Improvement Co.	50.00
364		
Nov. 21	To one day's time and services in taking testimony on behalf of plaintiff in case of Cambria Steel Co. v. Guardian Trust Co.	$ 50.00
Nov. 22	To time and services rendered in same matter	50.00
	To cash for telegram sent Oct. 28, Trimble to McKeighan	.25
	To cash for telegram sent Oct. 26, Trimble to Chadbourne	.54
	To cash for telegram sent Oct. 27, Trimble & Braley to Guardian Trust Co. at Chicago	.30
	To cash for telegram sent Oct. 30, Trimble & Braley to Chadbourne at Chicago	.38
	To cash for telegram sent Oct. 27, Trimble & Braley to Judge Bryant	.34
	To cash for telegram from Judge Bryant to Trimble & Braley	.44
	To half cash for telegram sent Oct. 29 to Judge Bryant	.46
	To half cash for telegram Oct. 31 to Judge Bryant	.34
	To half cash for telegram Oct. 31 from Judge Bryant	.30
	To half cash for telegram Oct. 31 from Judge Bryant	.34
	To half cash for telegram Eaton to Oglesbay	.50
	To half cash for telegram Nov. 1st, Trimble & Braley to Eaton	.76
	To half cash for telegram Nov. 1st Braley to W. H. Pope	.32
Nov. 26	To cash for telegram Nov. 14 Trimble to Chadbourne	.38
	To cash for telegram Nov. 16 Trimble to Chadbourne	.80
	To cash for telegram Nov. 22 Trimble to Cleveland	1.75
	To half expense J. A. Eaton going to and at Sherman, Texas, Nov. 1 to 14 on account intervention in Port Arthur Channel & Dock receivership	10.

	To cash for notary fees acknowledgment of affidavit of Mr. Dean	.25
Nov. 27	To continuous services Oct. 24 to Nov. 27 in case Bierce et al vs. Guardian Trust Co. for appointment of receiver, preparing evidence and arguing demurrer at Kansas City and resisting application for appointment of receiver at St. Louis	3000.00
Nov. 28	By check received as retainer and on account of services Bierce case	2000.00
Nov. 28	To cash for telegram Nov. 28 Trimble to Chadbourne	.64
	To cash for telegram Nov. 28 Braley to Gilbert	1.00
Nov. 30	To cash for telegram Trimble & Braley to Chadbourne	2.90
	To cash telegram to Sharritt	.37
	To cash for telegram to Wing & Chadbourne from Trimble & Braley	.50
	To cash for telegram to J. E. McKeighan from Trimble & Braley	.31
1901	To cash for copy of complaint Provident L & T Co. v. Union Terminal Rld. Co.	4.50
Oct. 11	To cash for ticket to St. Louis and return to take up demurrer in Bierce case	9.50
Oct. 17	To cash for railroad fare and sleeper to St. Louis and return in matter of order in Bierce case	11.50
Oct. 21	To services in arguing demurrer to bill of complaint in case of W. W. Bierce et al vs. Trust Co. before Judge Thayer at St. Louis and procuring leave to except to certain parts of bill and answer the remainder	250.00
	To cash for telegram Trimble & Braley to Chadbourne Chicago Oct. 17	.52
Oct. 18	To cash for telegram Trimble & Braley to Chadbourne, Chicago	.40
365		
Nov. 15 25	To services in preparing exceptions to parts of bill in case of Bierce vs. Guardian Trust Co. and in preparing answer to remainder of bill	$ 300.00
Dec. 2	To cash for expressage on papers in Bierce case	.35
1902		
June 23	To cash for telegram A. M. Thayer to C. A. Braley	.81
	To cash for telegram to C. A. Braley from Judge McKeighan	.21
June 27	To cash for telephone to Judge McKeighan St. Louis about taking company out of hands of Receiver	2.00
	To cash for telegram to Judge Amos M. Thayer of St. Louis	.40
July 11	To time, services and advice in drawing application of company for discharge of receiver of company	200.00
July 11	To cash for telegram to McKeighan	.37
July 18	To cash for telegram to McKeighan	.33
Aug. 5	To cash for telegram to Judge Thayer	.92
	To cash for telegram to Judge Thayer	3.40
	To cash for cablegram Aug. 13 J. McD. Trimble to Kuhn, London	4.76
Sept. 4	To cash paid for copies of objections of complainants in Bierce case	5.18
Sept. 13	To cash for copies of documents Bierce case	.85

		To expenses of J. McD. Trimble to St. Louis and return to argue exceptions to parts of bill in Bierce case	27.25
Oct.	1	To cash for copies of documents for use in Bierce case	9.20
		To cash for copy of opinion of court in case of Moore v. Jones	1.00
		To expenses of J. McD. Trimble to St. Louis Oct. 4 in matter of discharge of receiver	26.50
Oct.	20	To cash for copy of order denying applicants leave to file amended and supplemental bill	.555
Oct.	22	To cash telegram Oct. 2 from Judge Thayer	.35
Oct.	25	To all time and services in matter of application of Trust Company for discharge of receiver and return of its property to the constituted authorities of the company subsequent to filing of application for such discharge	1500.00
Oct.	25	To all advice to Trust Company its officers and agents from day to day during the receivership from Nov. 30, 1900, to Oct. 25, 1902, concerning their powers, liabilities, and duties and the proper maintenance of the corporate organization pending the receivership	500.00
Nov.	13	To cash for telegram to clerk U. S. Circuit Court at Beaumont, Texas	.95
Dec.	3	To cash for telegram Blanchette to Trimble & Braley	.65
Dec.	8	To cash for express on Briefs in case Moore v. Jones	.50
Dec.	31	To cash telegram Dec. 15 from W. H. Pope, Marshall, Texas	.83
1903			
Jan.	12	To cash for expenses on two trips to Jefferson City, Jan. 9 and 12 to argue Jones vs Hamm in Supreme Ct	34.60
Jan.	24	By one-half rebate on C. A. Braley's Wabash Ticket on trip to Philadelphia	3.67
Feb.	18	To cash for expressage on briefs in Chicago Zinc Mining case	.25
Feb.	21	To cash for copy of opinion of court in Moore vs. Jones	9.50
366			
Feb.	26	To cash for telegram Jan. 26 F. B. Wilcox to C. A. Braley	$ .50
		To cash for telegram Clerk Supreme Court Feb. 18 to Trimble & B. in Jones vs. Hamm	.25
Feb.	28	By cash received account Port Arthur Channel & Dock Co. expenses	100.00
Mar.	4	To expenses C. A. Braley and Wash Adams to Sherman Texas	45.00
Mar.	17	To cash for copy of opinion State Trust Co. vs. K. C. Pittsburg & Gulf Rld. Co.	5.35
Mar.	18	To expenses case Mellier v Trust Co	.20
Mar.	20	To cash for copies of order appointing Judge Black & Wash Adams receivers	2.30
Mar.	21	To cash paid M. H. Lyon for legal services rendered Guardian Trust Co. in Chicago	10.00
Mar.	27	To cash for expenses of C. A. Braley to Joplin, Mo. Mar. 26 to 28, in Zinc case	17.55
Apr.	4	To cash for expenses verifying affidavit of service of notice of hearing at Sherman, Texas, of supplemental and intervening petitions in Port Arthur Channel & Dock suit	.25
Apr.	6	To cash for telegram Trimble to D. E. Bryant, 3-13	.50

		To cash for telegram Supreme Court Clerk to Trimble & Braley Mar. 19	.35
		To cash for telegram Mar. 20 Trimble & Braley to Clerk Supreme Court	.25
		To cash for telegram Mar. 23 Clerk Supreme Court to Trimble & Braley	.71
Apr.	11	To cash for certified copy of order in Moore v. Jones	1.00
Apr.	14	To cash for expenses verifying motion in Moore v. Jones	.75
Apr.	18	To cash for telegram Apr. 8 Clerk of Court to Trimble in Port Arthur Channel & Dock case	.68
		To cash for telegram Apr. 9 to Clerk of Court from Trimble & Braley	.40
		To cash for telegram Trimble & Braley to Clerk in Port Arthur Channel & Dock case	.95
		To cash for telegram Apr. 16 to Trimble & Braley same case	1.00
Apr.	25	To cash for expressage	.30
		By check for expenses to Sherman, Texas, in Port Arthur Channel & Dock case	100.00
Apr.	22	To cash expenses C. A. Braley to Sherman, Texas	25.68
Apr.	25	To cash telegram Scott to Trimble & Braley	.61
Apr.	28	To cash telegram Braley to Jos. Kling	2.63
Apr.	29	To cash telephone C. A. Braley to Scott in Chicago Zinc Mining case	.90
		To cash for telegram Braley to C. N. Clark	.53
		To cash for telegram Braley to J. S. Cameron	.85
		To cash for telegram Trimble & Braley to Clerk U. S. Circuit Court	.50
Apr.	30	To cash telegram from Judge Bryant to Trimble & Braley	.50
		To cash telegram C. N. Stark to C. A. Braley	.50
May	1	To cash 2 telegrams Trimble & Braley to Clerk U. S. Circuit Court	.98
May	2	To cash for telegram Judge Bryant to Trimble & Braley	.50
May	4	To cash for telegram J. McD. Trimble to C. A. Braley at Sherman, Texas	.95
367		To cash for telegram from Trimble & Braley to C. A. Braley at Sherman, Texas	.50
May	6	To cash for telegram C. A. Braley to J. Kling	1.20
		To cash for telegram C. A. Braley to C. N. Stark	.92
		To cash for telegram Judge Bryant to Trimble & Braley	.43
May	22	To half cost copy order Provident L & T Co. v. Port Arthur Channel Dock Co.	1.10
		To half C. A. Braley's expenses to Beaumont, May 13 to 20, account Port Arthur Channel & Dock case	32.50
		To cash for telegram Trimble & Braley to Bates in same case	2.06
May	27	To cash for telegram Trimble & Braley to Bates in same case	.50
June	18	To half C. A. Braley's expenses to Sherman, Texas, June 14 to 18, 1903	22.25
June	19	To cash telegram Bates to Trimble & Braley	.65
June	30	To cash for telephone to Wilcox at Chicago in Chicago Zinc Mining case	1.40
		To cash for telegram June 13 to Braley about hearing Port Arthur Channel & Dock case at Sherman, Texas	.3
		To cash for telegram June 19 to Bates	.5

		To telegram June 23 to Bates		.80
July	11	To cash telegram E. L. Martin to L. Heyneker		1.40
July	29	To half cash paid for copy report of commissioner in Provident L & T Co. v. Port Arthur Channel & Dock Co. case		3.00
Aug.	20	To cash for telegrams to and from C. L. Bates		.70
Sept.	14	To cash for telegram Trimble & Braley to Ivins, Kidder & Melcher, New York		1.01
Oct.	10	To cash for telegram Sept. 3 to Ivins, Kidder and Melcher		.98
Oct.	30	To cash for copy of order appointing receiver of O. K. C. & E. R. R. Co.		1.80
Nov.	21	To cash for telegram from C. L. Bates regarding ruling of Judge Bryant		1.18
Dec.	1	To cash for expressage briefs in First Natl. Bank case		.45
Dec.	10	To half C. A. Braley's expenses to Beaumont, Texas, account of hearing before Judge Bryant		41.50
Dec.	12	To cash for telegram Trimble & Braley to Bates		.83
Dec.	11	To cash for acknowledgment to four certificates of E. L. Martin to the plea of jurisdiction		1.00
1904				
Feb.	8	To half telegram Trimble & Braley from C. L. Bates		.42
Feb.	12	To half telegram Trimble & Braley to C. L. Bates		.31
Feb.	13	To half telegram Trimble & Braley from C. L. Bates		.28
Feb.	29	To half telegram Trimble & Braley to C. L. Bates		.53
1904				
		by cash		25.36
July	12	By cash		765.45
1905				
Jan.	10	To service in arguing case of First National Bank v Guardian Trust Co. before Supreme Court of Missouri at Jefferson City	$500.00	
Jan.	16	To expenses of Trimble on trip to Jefferson City in case of First Natl. Bank v. Guardian Trust Co.	14.05	
Apr.	20	By cash		514.05
		By Balance due exclusive of interest		20533.25
			$21047.30	$21047.30

368 Mr. Rosenberger thereupon offered in evidence the opinion and decision of he Supreme Court of Missouri in Trimble & Braley vs. Guardian Trust Company, 244 Mo. 228.

The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of said opinion in evidence on the same grounds urged against the introduction of the petition filed in the Circuit Court and made the same offer of proof in support of said objections. Said objections were, by the Master, overruled, and said offer of proof denied, to which ruling said parties duly excepted.

Mr. Smith: We object to the judgment and opinior of the Supreme Court, for the additional reasons that we were

not parties to the case in which that judgment was rendered and, for the additional reason, that no notice was ever served on us to defend the case; and for the additional reason, that neither the judgment nor the opinion show that the services were rendered in reference to the litigation in which it is sought to tax costs as between solicitor and client; and, for the additional reason, that the opinion in that case shows that there was only one part of the amount stated in the items that was allowed and the other ones being disallowed by the Supreme Court; and, for the additional reason, that that part which was allowed was for services claimed to have been rendered in filing petitions and answers, the purpose of which was to enforce the claim of the Trust Company against the Southern Company and had nothing to do with any allegations contained in the original bill in the Cambria case; but were ancillary bills or intervening bills filed in that litigation; and that the judgment and opinion are not binding upon us and don't fix or establish the value of the services rendered in this litigation which are now the subject of attack.

The Master: Was the judgment, Mr. Rosenberger, in two separate amounts or just the $2,250.00 and interest? Have you got the judgment there?

369 Mr. Rosenberger: I will answer your question in just a moment: the judgment was rendered for the aggregate of certain items, which included the two items of $2,250.00 and $4,500.00, respectively, with the interest thereon from the date of the filling of the suit by Trimble & Braley. Now it will be noted that payment made to Trimble & Braley was between ten and eleven thousand dollars and that the aggregate of the two items, $2,250.00 and $4,500.00, totaled only $6,750.00, the difference between that total and the amount of the judgment being represented by other items of service having no connection with the Cambria suit. But the Master will find that without difficulty on the reading of the opinion of the Supreme Court he will be able to segragate these two items applicable to the Cambria case from the other items that were involved in the Trimble & Braley suit. Do I make myself understood by the Master?

The Master: Yes, I understand the opinion will show that.

Mr. Rosenberger: The opinion will show that.

Mr. Smith: I object to the opinion and the statement of Mr. Rosenberger that it will show that, for the reason that

I insist that it does not show it and it cannot be determined from the opinion. In fact, as I read the opinion the amount of $2,250.00 was disallowed by the Supreme Court.

Mr. Rosenberger: Well, you are mistaken.

The Master: Subject to the objection, I will overrule the objection.

Mr. Crane: I am just getting it right: you are ruling, as I understand, what these parties got out of the litigation between themselves, whatever was derived, becomes binding on us?

The Master: Yes, I rule that when they were paid these expenditures at the end of the litigation, the judgment against the Guardian Trust Company. The Master is not going to retry those law suits to ascertain whether those services were reasonably worth that sum.

370 Mr. Crane: In other words, you hold that fixes the amount we are required to pay, whether we were a party to them or not a party?

The Master: As regards whether you are a party, if you are properly chargeable with costs as between attorney and client, then you took your chances. You might have come in and defended them, if you were liable for those costs as between attorney and client, and so that is a possible consequence if the law didn't excuse you.

Mr. Crane: Well, if they didn't invite us to come in how can we be bound by those judgments? What right had we to go in there? We had no such right. I just want to get your position.

The Master: I understand your point. The Master feels himself very much bound down by the opinion of the district judge and he is very anxious also to expedite, shorten the hearing. I think it makes for justice, makes for justice for all parties concerned, that we shouldn't consume too much time in this hearing before the Master in a case in which you have both appealed to the District Court and from the District Court to the higher court. I don't think it makes for justice for us to drag out this hearing and try the Mecartney case and the Trimble case; be at this for some length of time.

Mr. Rosenberger: I want the Master to know our attitude about that. That if these gentlemen have any proof, desire to prove any of these law suits against the Guardian Trust

Company or its Receiver which culminated in judgments and decrees against the Guardian Trust Company for attorney fees were collusively conducted or conducted in bad faith, we have no objection to that class of evidence and I assume that when the Master has made the statement he has just made he means with the qualification that if these gentlemen have any proof that any of these legal proceedings culminating in charges of expenses for attorney fees, or otherwise,
371 were collusively conducted or conducted in bad faith as between the adversary parties thereto that it would be open for them to show it.

The Master: Yes, that is true. The Master goes farther than that. If they can show any specific part of these judgments for services were not rendered in defenses against these suits, that, the Master thinks, should be excluded.

Mr. Smith: Just let me make an objection on that point and I would like to have it in this record. The proposition is this: a great deal of this litigation and of the matters that they are seeking to have taxed against us as costs are transactions that occurred twenty years ago and the judgments and the salaries that they are trying to assess against us cover transactions that we have no means of knowing about. Some of the men who handled that business are dead. We have no way of ascertaining just what and just how much of their time they devoted to these different things and it seems to me to ask us to go and hunt up those facts and to furnish the proof with reference to issues that are not connected with this litigation for the purpose of subtracting those amounts from this claim is not the legal and proper way to put in the evidence in this case on the issues as to what is the value of the services that were devoted to the issues involved in this controversy.

The Master: I will assume that the evidence will show that the judgments were rendered for services which would be, under the decision of the Federal Court, memorandum opinion of the Federal Court, taxable as costs between client and solicitor; there will be some showing to that effect, has been already.

Mr. Crane: Well, in addition to that I am making the broad objection—I guess it is understood by this time—that these judgments between other parties determining the amount that the Guardian Trust Company owes for fees, in the absence of notice to us, or request to us to be bound by them, or to defend those suits cannot be accepted as primary

evidence of what those services were worth, or as any evidence.

372 The Master: I understand.

Mr. Crane: It is still, regardless of those judgments, for them to prove them, and not for us to disprove them. That is the broad objection I want to make in regard to those judgments.

The Master: Yes, we understand. The objection is overruled, if you are considering it as a specific objection. I don't think so.

Mr. Smith: Yes, we are. We are making the objection as a general statement of this same, that these judgments are not binding. That is the reason.

The Master: All right; objection overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Companl, by their counsel, at the time duly excepted.

Said opinion of the Supreme Court of Missouri, reported in 244 Mo. 228, was thereupon received in evidence by the Master.

(Said opinion, as reported in 244 Mo. 228, is hereby, pursuant to stipulation of the parties, incorporated herein by reference, in lieu of being herein set forth.)

Mr. Braley: The suit of our firm against the Guardian Trust Company, the petition and judgment in which has been here introduced in evidence, was resisted by the company and contested from the Circuit Court to the Supreme Court. The company paid the fee on the decree of the Supreme Court.

On cross-examination by Mr. Smith, Mr. Braley testified as follows:

Mr. Smith: Mr. Braley, I believe you stated this litigation began somewheres around twenty-four or twenty-five years ago?

Mr. Rosenberger: Well, I object to that as too indefinite. The files show the exact date the 6th of September, 1900.

Mr. Smith: Well, before the Cambria suit was filed
373 there was a foreclosure proceeding of the Pittsburg & Gulf, wasn't there?

Mr. Braley: I believe there was.

Mr. Smith: And before that there was a suit filed on behalf of the Trust Company to put the Pittsburg & Gulf in the hands of a receiver?

The Master: Which suit?

Mr. Smith: The Grannis case.

The Witness: I forget; there was a plan up, I know. There was one client in the State Court.

Mr. Smith: And you filed that on behalf of the Trust Company, did you not, in the interest of the Trust Company?

Mr. Rosenberger: I object to that as having no relevancy.

The Master: The objection is overruled.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted.

Mr. Braley: I forget just whose interest it was in, Mr. Smith, but it was while I was in the office that there was in connection with the Trust Company a petition filed. I forget who the plaintiffs were.

Mr. Smith: Now when you spoke this morning about litigation spreading over and including practically all of the railroads you meant this whole litigation, did you not?

Mr. Braley: I mean the litigation covering all of that part of it that was in defense of the Cambria case where there was so many defendants; and also I meant the railroads; whether they were defendants or not, I can't say.

Mr. Smith: But you cannot at this time differentiate as to what part of the services of Trimble & Braley were devoted to the Pittsburg & Gulf foreclosure case and what part and during what interval of time they were devoted to the Cambria case and during what part of the time those services were devoted to foreclosure of mortgages down in Louisiana, Arkansas and Texas; and what part of it was devoted to
374 the Port Arthur Channel & Dock Company case? Can you pick out in your mind and say that during such and such an interval, they were devoting their time to this litigation or that litigation?

Mr. Rosenberger: That is objected to as carrying with it the assumption that these various litigations mentioned in the question were all being carried on at one and the same time, and the records show that the foreclosure of the mort-

gages on the Kansas City, Pittsburg & Gulf and its subsidiary companies had been completed, the properties had been sold at foreclosure sale and were in possession of the Kansas City Southern Railway Company by March of 1900, prior to the commencement of this Cambria suit.

Mr. Smith: Now, are you through?

Mr. Rosenberger: Yes.

Mr. Smith: The purpose of my question, if your Honor please, is to ask Mr. Braley if he can remember about these different transactions. That is the purpose of the question. I don't care what the record is. Now he is giving evidence about them, I want to know what he can remember about these matters from his recollection.

The Master: This is cross-examination and the Master will overrule the objection.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted, and still excepts.

Mr. Braley: Mr. Smith, you asked whether I can remember or not these cases. That is a little bit indefinite.

Mr. Smith: A little bit what?

Mr. Braley: A little bit indefinite. I can go into detail about the litigation that I was in; if you are asking about services between the times mentioned that were performed by Trimble & Braley and their associates, I told you it was at least three-fourths.

Mr. Smith: That is what I am asking you. When you were testifying about the time they were giving to this railroad litigation, all of it, the Pittsburg & Gulf foreclosure suit and the Cambria case, the Belt litigation, Port Arthur
375 Channel & Dock case, when you were giving that evidence you meant they were giving three-fourths of their time to the whole litigation?

Mr. Braley: To the litigation of the Guardian Trust Company and the Cambria case between the dates mentioned in the question asked me.

Mr. Smith: Now do you mean to say that three-fourths of the time they were giving to that litigation was with reference to the Cambria case and they were giving only one-fourth of their time to the Texas case, the Beaumont case, the Port Arthur Channel & Dock Company case?

Mr. Braley: They were.

Mr. Smith: You say they were giving only a quarter of their time to that case and three-fourths to the Cambria case?

Mr. Braley: Matters included in the Cambria case.

Mr. Smith: What were they doing in the Cambria case?

Mr. Braley: My remembrance is they were taking care of the Northern Townsite Company, the Guardian Trust Company, the—there was a real estate company down here, Central Improvement Company, I think, the elevator companies were in.

Mr. Smith: What were they doing? That is the question I was asking you.

Mr. Braley: They were defending them, and trying to keep them from foreclosure and protecting their property.

Mr. Smith: How were they doing it? Were they taking testimony on it?

Mr. Braley: Testimony and hearings all the time.

Mr. Smith: When did this testimony begin? When did they begin to take testimony?

Mr. Braley: I can't tell you the date.

Mr. Smith: Don't you know they didn't begin the taking of testimony until February, 1903?

376 Mr. Rosenberger: That is objected to, the record shows when that began.

Mr. Braley: That may be so, Mr. Smith. They would be spending between the time the suit was filed a great deal of time in looking over testimony before they did begin.

Mr. Smith: Hadn't taken any yet, had they?

Mr. Braley: I said they would spend a lot of time on testimony before they began taking it after the suit was filed.

Mr. Smith: Isn't it true they filed their answer in this case in November, 1900, and there wasn't anything more done in the way of court proceedings, in the way of taking testimony, or anything of that kind, until in January or February—after the 15th day of January, 1903?

Mr. Braley: If the record shows it that is true; that is, in regard to the filing of pleadings, but not about getting ready for testimony.

Mr. Smith: Do you know of their filing any pleading between the 1st of December, 1900, and the 15th of February, 1903?

Mr. Braley: I can't give you a single date.

Mr. Smith: Do you include in this answer to this question the foreclosure proceedings that were instituted against the Union Terminal Company and the Consolidated Company and the Air Line and Belt Line?

Mr. Braley: I don't remember whether those were in the Cambria case or not. Those were separate charges.

Mr. Smith: Weren't they working on those things at the same time?

Mr. Braley: That was in the foreclosure of the Belt case.

Mr. Smith: Well, were they performing these services you speak of in reference to that litigation during that time?

Mr. Braley: That was preceding this period.

Mr. Smith: Can you tell when they did do that work?

Mr. Braley: It was all accomplished by the time the for [—] of the Belt, which I think was in either 1900 or 1901.

377 Mr. Smith: Well, what did they have to do with any of the foreclosure proceedings prior to the final decree?

Mr. Braley: What did they do?

Mr. Smith: Yes, what did the Guardian Trust Company have to do, what services were rendered by attorneys of the Guardian Trust Company prior to that decree in the foreclosure cases?

Mr. Braley: I can't tell you what services were performed by the Guardian Trust Company. We filed answers and looked after the litigation.

Mr. Smith: That is what I am asking you, what services did you perform other than that?

Mr. Braley: You mean in those two cases?

Mr. Smith: In those foreclosure cases?

Mr. Braley. My memory don't go back to tell you just what services were performed twenty-five years ago.

Mr. Smith: Can you tell what services were rendered during any part of this period of time with reference to the Cambria case?

The Master: What period was that?

Mr. Smith: Any time from September 6, 1900, up to November, 1904.

Mr. Smith: Can you specify during any of that time what services they were rendering and in what suit?

Mr. Braley: They were getting ready for the testimony and filing answers and spending at least three-fourths of their time after case was filed.

Mr. Smith: They did spend a fourth of their time at something else, didn't they?

Mr. Braley: I can't say; they did spend at least three-fourths.

Mr. Smith: But you are just giving your estimate of what time they spent on it.

Mr. Braley: I am giving my estimate.

Mr. Smith: Was Mr. Wash Adams in that litigation during a considerable part of that time, this period?

378 Mr. Braley: I don't remember, I know he was in the Channel & Dock litigation, and he was in conference with Judge Trimble about other matters relating to the Guardian Trust Company.

Mr. Smith: But you don't remember whether he appeared in the Cambria case at all?

Mr. Braley: I don't remember whether he appeared in the Cambria case.

Mr. Smith: Mr. Braley, I wish you would do this: I wish you would state in detail what was done in the Cambria case by Trimble & Braley?

Mr. Braley: Holding conference all the time at various offices of the company and the Guardian Trust Company was getting ready and seeing experts about testimony that was to be introduced and filing pleadings and attending hearings.

Mr. Smith: How much of their time was devoted to the enforcement of their claim or considering the enforcement

of their claim against the Kansas City Southern and how much of their time directed to the defense of the suits that were brought by the Cambria people and these charges made in the ancillary bills?

Mr. Braley: I should expect they were all involved in the same case.

Mr. Smith: Yes; but you can't tell how much was devoted to one or how much to the other?

Mr. Braley: No, I can't.

Mr. Smith: Do you know when the plan for the construction of the Mexico & Orient, Kansas City, Mexico & Orient began?

Mr. Braley: No, I can't tell, Mr. Smith.

Mr. Smith: Well, wasn't it during this period?

Mr. Braley: It was along while we were on Wyandotte and 7th Streets; I could not tell you the years.

Mr. Smith: Wasn't the building or the planning for the building of the Mexico & Orient involved in the Bierce case when that petition was filed?

379 Mr. Braley: Not that I remember of.

Mr. Smith: Did you have another company called the United States & Mexican Trust Company?

Mr. Braley: Yes; I think it was the United States & Mexican Trust Company.

Mr. Smith: Was that part of this Guardian Trust Company or was it an independent institution?

Mr. Braley: I don't remember, but I think that was largely fathered by Mr. Haff and a man by the name of Rider and I don't remember that it was a part of the Trust Company at the present time.

Mr. Smith: Did you have anything to do with rendering services in that business at all?

Mr. Braley: Don't recollect of any.

Mr. Moore: You were counsel for the Kansas City, Mexico & Orient?

Mr. Braley: Mr. Trimble was.

Mr. Smith: Mr. Braley, one question I wanted to ask: in this employment of Mr. Trimble as general counsel, that included Trimble & Braley?

Mr. Braley: It did.

Mr. Smith: Whatever was paid to him went to the firm?

Mr. Braley: That is right.

Mr. Smith: What was the salary of Trimble & Braley before this litigation began with the Guardian Trust Company?

Mr. Braley: I can't say now without referring to the books.

Mr. Smith: Well, about how much was it?

Mr. Braley: I say I can't tell.

Mr. Smith: Well, it was substantially—

Mr. Braley: (interrupting) I think it was considerably more than $6,000.00 though I am not sure. I should think so.

Mr. Smith: That is your recollection, that it was that much, or more.

Mr. Braley: Yes, I should think it was, should have been. I can tell exactly by going back to the old books, Mr. Smith, if that is material.

380 Mr. Smith: Well, that is satisfactory to me, that it was that much or more. That was before any of this litigation began, that is what I am getting at?

Mr. Braley: Well, it was increased, as I remember, from time to time, but I cannot give you I mean from the first starting.

Mr. Smith: Yes; what I am getting at is, prior to any of this litigation, the Pittsburg & Gulf foreclosure or the Cambrie case, the salary of the general counsel of the Guardian Trust Company, Trimble & Braley, or Mr. Trimble was six thousand dollars a year or more?

Mr. Braley: I can't remember any of those checks, I might be inaccurate there, Mr. Smith, unless I refer to our ledger.

Mr. Smith: That would be your recollection about that, six thousand or more?

Mr. Braley: I am speaking of what it ought to be.

Mr. Smith: I am asking you to give your best recollection on that. If you cannot do that, I would like to have you look it up, because I would like to prove it?

Mr. Braley: Well, I would prefer to look it up and get the books and put it in and get it accurate. Now will you specify the time?

Mr. Smith: Why, prior to, for a year or two prior to January 1, 1899?

Mr. Braley: January 1, 1899.

Mr. Smith: Mr. Braley, Mr. Rosenberger refreshed your recollection from the minutes of the Trust Company of October 22, 1902, in which the salary of Mr. Trimble was fixed at $500.00 a month and he read therefrom the resolution fixing the salary of the president at $500.00 per month; let me refresh your recollection with reference to the other officers: president, H. H. Harris, $500.00 per month; first vice-president, E. L. Martin, $500.00 per month; secretary, S. B. Willey, $300.00 per month; treasurer, C. W. Hastings, $250.00 per month; counsel, J. McD. Trimble, $500.00 per month; do you remember those salaries were fixed at that time for those gentlemen?

381 Mr. Braley: I don't remember.

The Master: As to what date?

Mr. Smith: October, 1902.

The Witness: I have no independent memory of it.

Mr. Crane: Well, that is right after it came out of the receivership.

Mr. Smith: The fact that those men were receiving salaries of that amount would indicate that the company had a considerable amount of business, wouldn't it?

Mr. Braley: Well, yes.

Mr. Smith: Requiring the advice and counsel of attorneys; is that not right.

Mr. Braley: Yes.

Mr. Smith: And they would have hired and employed counsel even if there hadn't been a bit of work, would they not?

Mr. Rosenberger: I object to that as speculative.

Mr. Braley: I don't know.

The Master: Oh, I guess that is not proper.

The Witness: I don't know about that—

The Master: (Interrupting) Wait a minute, Mr. Braley: that objection was sustained to that question about whether they would hire anyone or not.

Mr. Smith: Yes; there had always been a salary paid to the general counsel prior to that time, had there not?

Mr. Braley: I think there had.

Mr. Smith: Even though there was no litigation of this kind going on; isn't that true?

Mr. Braley: Of this kind, I don't know what you mean.

Mr. Smith: I mean of this Cambria case or Pittsburg and Gulf case or any of this foreclosure litigation.

Mr. Rosenberger: I object to the injection of the
382 Kansas City, Pittsburg & Gulf case; that was closed up long before the Cambria dispute broke out.

The Master: I think it is proper to ask whether the business of that company required counsel whether they had Cambria litigation on or not.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted, and still excepts.

Mr. Smith: Mr. Braley, isn't it a fact that the Guardian Trust Company was trying to enforce a claim against the Kansas City Southern on account of some Pittsubrg & Gulf transactions, wherein they tried to hold the Kansas City Southern liable at that time for debts of the Pittsburg & Gulf Company to the Trust Company?

Mr. Braley: At what time?

Mr. Smith: After the Kansas City Southern had taken over the property of the Pittsburg & Gulf Company; that is, in March, 1900?

Mr. Braley: There was a time when—I can't remember that the Guardian Trust Company was. I know Trimble & Braley tried to enforce a claim against the subsidiary companies and I think make the Southern liable.

Mr. Smith: Don't you know the Trust Company had filed an intervening petition in that Pittsburg & Gulf receiver-
ship?

Mr. Braley: I don't recollect about that.

Mr. Smith: If they did that your firm was having to give it some attention, was it not?

Mr. Braley: Yes.

Mr. Smith: Were you present when this case was tried, this Trimble & Braley case was tried before Judge Ball as Referee?

Mr. Braley: Yes, sir.

Mr. Smith: Now let me ask you, reading from the testimony of Mr. Trimble in that case, if this will not refresh your memory?

Mr. Braley: Before the Master?

383 Mr. Smith: Before the Referee?

Mr. Braley: Referee Ball?

Mr. Smith: Yes; on the question of the allowance of $7125.00.

Q. How much was allowed you?

A. $7,000.00 for two years' services to the receivers—nearly two years—one year and eleven months I think. I took down to Judge Thayer at that time an itemized statement of the services we had rendered to the receiver.

The Master: Who is testifying?

Mr. Smith: Mr. Trimble.

A. (Continuing) "Not carrying out, however, any charges but simply a memorandum of the services rendered and after he had made allowance to the receiver and some other attorneys he asked what allowance I wanted. I told him we had represented the receiver for one year and eleven months—the receivers—and handed him the itemized statement, but did not examine it, and asked me how much I thought we ought to have. I told him I thought we ought to have $4,000.00 a year, and at the rate of $4,000.00 the year and eleven months. He replied very promptly, "We will just call it two full years and make it $3,500.00 a year". So he put it that way, for services to the receivers and in addition to that there was some expenses, some hundred or two hundred dollars that we had incurred, and that was allowed in addition to the $7,000.00."

Mr. Smith: Now do you remember whether that was in all?

Mr. Braley: I don't know.

Mr. Smith: You don't know whether that included the services in the Cambria case or other litigation?

Mr. Braley: No.

Mr. Smith: Now in the exhibit attached to that petition, I notice here a charge: "To cash for expenses on two trips to Jefferson City, January 9th and 12th, to argue Jones vs. Hamm in the Supreme Court:" was that some business you were doing for the Trust Company?

384 Mr. Rosenberger: At what time?

Mr. Smith: The date here is January 12, 1903, expenses for trip on January 9th and 12th.

Mr. Smith: So that you were performing some services for the Guardian Trust Company at that time?

Mr. Braley: Yes.

Mr. Smith: Here is another item: "To cash for expenses on briefs in Chicago Zinc Mining Case"; was that litigation or something you were doing for the Guardian Trust Company during that period?

Mr. Braley: I don't remember the case.

Mr. Smith: How long had the case of Jones v. Hamm been pending when you went to the Supreme Court and argued it in January, 1903?

Mr. Braley: Well, I should imagine at least two years.

Mr. Smith: Yes; and you had been performing services in that case during that time?

Mr. Brailey: What services were necessary to perform, yes.

Mr. Smith: That had nothing to do with this Cambria litigation at all?

Mr. Braley: Nothing at all.

Mr. Smith: And you have no recollection that the Chicago Zinc Mining Case had anything to do with it?

Mr. Braley: I can't say about that.

The Master: Pardon me, what is it you are reading from?

Mr. Smith: From that exhibit they filed this morning.

The Master: From what case?

Mr. Smith: The Trimble & Braley case.

The Master: Was that before the Master?

Mr. Smith: Yes, this is before the Master. It is in the amended petition they filed there, I think. I am reading this from the report of the Referee, I think.

Mr. Smith: I also see reference here to cash for copy of opinion of the court in Moore v. Jones; what was that case, was that something you had in the Supreme Court of
385 Missouri?

Mr. Rosenberger: What date?

Mr. Smith: The money was paid February 21, 1903.

Mr. Braley: Moore against whom?

Mr. Smith: Moore against Jones?

Mr. Braley: I don't remember that case.

Mr. Smith: If there was such a case and you were making a charge for it it was some service you were performing for the Trust Company?

Mr. Braley: Yes.

Mr. Smith: And you don't remember how much time was given to that case, or what it was?

Mr. Braley: I don't remember what it was. Never knew of any Jones case except this Jones-Hamm case.

Mr. Smith: Now under March 4, 1904, there is an item: "To expenses C. A. Braley and Wash Adams to Sherman, Texas, $45.00. You were giving some attention to the case in Texas during that time, were you?

Mr. Braley: The Port Arthur Channel & Dock case.

Mr. Smith: Yes; and that was not part of this Cambria litigation?

Mr. Braley: Well, I can't recollect, Mr. Smith, whether it was involved. It was in reference to the Channel & Dock and they were all in the Pittsburg & Gulf case rather.

The Master: Pardon me: do you remember, was the Channel & Dock in the reorganization of the Kansas City Southern?

Mr. Rosenberger: Yes.

The Witness: We deposited bonds and stock in the reorganization and I think it must have been in the reorganized plan of the Philadelphia committee.

The Master: What is that?

Mr. Rosenberger: Philadelphia plan, Philadelphia committee.

Mr. Smith: There was much litigation over that Port Arthur Channel & Dock question, was there not?

386 Mr. Rosenberger: I object to that as too indefinite a question.

The Master: It is cross examination; go ahead.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted.

Mr. Braley: Well, there was—there was a foreclosure proceeding and, as I remember it, there wasn't much litigation. There was more time spent on the reorganization than there was on the litigation.

Mr. Smith: Don't you remember, Mr. Braley, there was a very hot contest over that and that a large amount of testimony was taken?

Mr. Braley: In what?

Mr. Smith: In that case, in the Texas case; large amount of testimony taken in it in which the Port Arthur Channel & Dock Company was claiming a million and a half dollars against the Trust Company?

Mr. Rosenberger: I object to that as an unwarranted assumption.

The Master: So far as that objection is concerned, this is cross examination and I am going to be very liberal.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted.

Mr. Braley: At a certain time I think, I know Mr. Frank Hagerman and I took testimony in Philadelphia, if I remember right, on the Channel & Dock case. I remember another time Wash Adams and I went to Port Arthur to take evidence in the Channel & Dock case and went from there to

see Judge Bryant at Denison, Texas. Now that was the time that I took trips, trips that I took on the Channel & Dock case, as I remember.

Mr. Smith: Is that all the work that was done in that case by anybody?

Mr. Braley: They filed their pleadings and took testimony, whatever it was.

Mr. Smith: But your recollection is it was a very insignificant thing, this Texas litigation?

387 Mr. Braley: The Guardian Trust Company had a bill against the Channel & Dock Company of $20,000.00, more or less, if I remember right, and I think the Channel & Dock case was settled; settled by agreement between Mr. Pam and Mr. Sam Moore.

The Master: Max Pam?

Mr. Braley: Yes.

Mr. Smith: Mr. Braley, again I see another entry here on March 27, 1903: "Expenses of C. A. Braley to Joplin, Missouri, March 26th to 28th in Zinc case"; what was that?

Mr. Braley: That was the foreclosure, I think, of the Orannoco Mining Company.

Mr. Smith: That was service you rendered for the Guardian Trust Company?

Mr. Braley: They were part stockholders, among a lot of other stockholders; they were for minor stockholders.

Mr. Smith: But that was service you were rendering for the Guardian Trust Company?

Mr. Braley: Yes, sir.

Mr. Smith: And it had nothing to do with this Cambria litigation?

Mr. Braley: No, sir; Mr. Smith, nothing to do on the record, but the receivership was prompted by Lidenburg, Thalma & Company, who were also in the litigation up here.

Mr. Smith: But you don't mean to say that the Cambria litigation produced this other litigation?

Mr. Braley: No.

Mr. Rosenberger: You don't seem to say the contrary either, do you?

Mr. Smith: I object to that, because that is carrying the burden of proof a little far, I imagine.

Mr. Rosenberger: We expect to show—we don't make the charge yet—it was all part and parcel of the same scheme. And those bills were filed the same day, one in Port Arthur and one here; all timed to take place at the same time; all part of the reorganization plan.

388 Mr. Smith: Let me ask you, Mr. Rosenberger; is it your purpose here to claim that the expenses incurred in the Texas litigation are chargeable in this litigation as costs between solicitor and client?

Mr. Rosenberger: Yes. We have a double theory about that matter; the first is, that the filing of the Texas suit by the Barnett & Record Company, which was the plaintiff in that case, corresponding to the position of the Cambria case up here, was a part and parcel of the same plan by the reorganization committee and the Kansas City Southern Company to engross the terminal properties and bring them under the lien of the Kansas City Southern's mortgage; all part and parcel of one plan. That is one branch of our contention. The other is: that in respect to the Mecartney suit, the fee, in which some services were rendered in the Texas case, we expect to show the services rendered by Mecartney in the Texas case were comparatively insignificant as compared to the services rendered in this Cambria case. In other words, that—

Mr. Smith: (Interrupting) Are you trying to load into this case attorney fees incurred in the Texas litigation?

Mr. Rosenberger: Well, I don't want to answer that question in the form in which it is propounded. We are not trying to load anything on anybody.

Mr. Smith: I just wanted to know whether that was the situation.

Mr. Crane: To put it milder, are you trying to collect here for those fees?

Mr. Rosenberger: Yes, sir, absolutely.

Mr. Smith: Regardless of your settlement of that litigation and agreement in reference to the payment of costs in that litigation?

Mr. Rosenberger: Yes.

Mr. Smith: Judgment in that case was entered by agreement between you and the Kansas City Southern Railway Company and the Port Arthur Channel & Dock Company, that is to be ignored.

Mr. Rosenberger: Yes; and, furthermore, that services rendered by attorneys in the Texas case, as compared
389 with these enormous litigations here in Kansas City, were compartively insignificant.

Mr. Crane: Well, what is the difference, if you are trying to collect them? Doesn't make any difference whether significant or insignificant, we are entitled to all the defenses we have.

Mr. Rosenberger: Well, one is collectible as a whole, and even if it isn't, the services rendered in the Texas case and charged for by the attorneys are of trifling consequence as compared to services rendered in this terrific litigation here in Kansas City.

Mr. Smith: Mr. Braley, I will read you another entry from the petition: "April 8, 1903, to cash for telegram to clerk of court to Trimble in Port Arthur Channel & Dock case"; and on the same day: "To cash for telegram April 9th to Clerk of court from Trimble & Braley"; and on the same day: "To cash for telegram Trimble & Braley to clerk in Port Arthur Channel & Dock case"; those all indicate you were giving some attention to the Port Arthur Channel & Dock Company case during that time?

Mr. Braley: Indicates we were looking after their business.

Mr. Smith: On April 22nd I see item: "Cash for expenses—

The Master: What year?

Mr. Smith: 1903.

Mr. Smith: (Continuing) "To cash for expenses C. A. Braley to Sherman, Texas, $25.68; what was that about? Was that in this litigation?

Mr. Braley: As I remember it, it was a hearing before Judge Bryant at which Wash Adams and a man in the Southern's office by the name of Lucas was present.

Mr. Smith: Well, I see on March 20th—going back to that item—March 20, 1903, you and Mr. Adams made a trip down

there and then did you make another trip on April 22nd down there?

Mr. Bailey: I don't remember.

Mr. Smith: On April 29, 1903; "To cash for telephone C. A. Braley to Scott in Chicago Zinc Mining Company case"; do you recall what that was?

390 Mr. Braley: No, I do not.

Mr. Smith: It wasn't part of this litigation, at any rate?

Mr. Braley: No.

Mr. Smith: Under May 4, 1903: "To cash for telegram J. McD. Trimble to C. A. Braley at Sherman, Texas"; do you remember that was the third trip you had made down there inside of two months?

Mr. Braley: No, I do not remember.

Mr. Rosenberger: Might have been on the same trip and charge made at a different time, might it not?

Mr. Braley: Could have been.

Mr. Smith: This $500.00 a month that was allowed to Mr. Trimble, that went into the firm account of Trimble & Braley?

Mr. Braley: I so testified this morning.

Mr. Smith: That is what I understood. Now here is June 30, 1903: "To cash for telephone to Wilcox at Chicago in Chicago Zinc Mining case"; does that refresh your recollection about what that Zinc Mining case was?

Mr. Braley: No, I don't know what the case was; but I know that F. B. Wilcox had charge of a mine down at Orannoco, which was called the Chicago Zinc Company's; but I don't remember the litigation, if there was any.

Mr. Smith: Now in October 30, 1903, is an item: "To cash for copy of order appointing receiver for O. K. C. & E. Railroad Company"; what was that?

Mr. Braley: That was part of the Northern Connecting Railway system.

Mr. Smith: Was that being foreclosed during that period?

Mr. Braley: I can't say, Mr. Smith.

Mr. Smith: You wouldn't attempt to say it wasn't being foreclosed during that period.

Mr. Braley: I would not.

The Master: Pardon me, Mr. Smith: The Master is a little bit confused: these payments of $500.00 a
391 month, $466.66 a month to J. McD. Trimble, which you say the firm of Trimble & Braley get the benefit of, running over a period from November, 1902, to October, 1904, did Trimble & Braley or Judge Trimble receive further compensation for special services, or did that cover everything?

Mr. Braley: I don't remember that we got any further compensation for the Guardian Trust Company's business.

The Master: That is what I mean.

Mr. Braley: There were other companies which were allied to that.

The Master: As far as the Guardian Trust Company was concerned those annual retainers paid for all the services rendered?

Mr. Braley: Yes, sir; that was my understanding.

Mr. Smith: Mr. Braley, I think this ought to be thoroughly understood, but I will ask it again; that retainer that was covered by that provision in the minutes of the Guardian Trust Company of $500.00 a month, or whatever it may be, to Mr. Trimble, what was the amount that was paid for the firm of Trimble & Braley and the Guardian Trust Company was entitled to advice and counsel and services of either you and Mr. Trimble or the firm for their retainer?

Mr. Braley: Yes.

Mr. Smith: I notice from the record in the Shedd case, pages 2038 et seq., amongst the assets listed of the Trust Company; twenty-two bonds of the Omaha, Kansas City & Eastern Railroad; sixteen hundred ninety-five shares of International Light, Heat & Power Company; sixty-eight shares of the Crescent Elevator Company; account against Louis Lombard; account against Durango Railway Concession; were those all matters that were requring the attention of the legal department during that period?

Mr. Braley: Well, not much, if any, Mr. Smith; depends upon whether it was in litigation or not; might have been just on the books.

Mr. Smith: Did you have any controversy over the Northern Townsite Company?

Mr. Braley: None that I remember of.

Mr. Smith: What were the Fisheries bonds, do you know anything about them?

392 Mr. Braley: I am of the opinion that those were some bonds taken by the Trust Company to stock a fishery plant down at Sabine Pass, Texas.

Mr. Smith: Did you have to give advice on those matters?

Mr. Braley: Wasn't anything to give any advice about, except they were purchased and put on the books.

Mr. Smith: During that period of time was there any litigation ever came up of First National Bank against the Guardian Trust Company as an endorser on a note of the Suburban Belt?

Mr. Braley: Yes, sir.

Mr. Smith: And the trial of that case was handled by your firm, was it?

Mr. Braley: By Mr. Trimble.

Mr. Crane: What time was that?

Mr. Smith: I can't give you the exact time, but it was during this period.

Mr. Crane: Well, will the record show when it was?

Mr. Smith: Yes, I think it will be shown some time before we get through with it, because it will probably come up, I believe it is shown in here.

Mr. Smith: And that case was tried in the Circuit Court here in Kansas City and went to the Supreme Court?

Mr. Braley: I think it did.

Mr. Rosenberger: Mr. Braley, don't you recall that the arguments in the First National Bank case vs. Guardian Trust Company were made in the year 1905 and nearly a year after you and Judge Trimble had retired from all connection with this Cambria case?

Mr. Braley: I don't have any recollection of dates, Mr. Rosenberger.

Mr. Smith: You mean the argument in the Supreme Court?

Mr. Rosenbeger: Yes, the handling of the case in the Supreme Court.

393 Mr. Smith: Yes; but I am talking about the trial of it in the Circuit Court.

Mr. Rosenberger: I know, Mr. Mecartney represented them and charged a fee for it and collected it. No charge is made for it in this account at all.

Mr. Smith: Yes, but I am talking about the earlier history of the case. He didn't try the case.

Mr. Rosenberger: We sued on the note; don't know what trial there was to it except a legal question involved in the State court.

Mr. Smith: How much was he paid for his services in the Supreme Court?

Mr. Rosenberger: I really don't know, but I know this: that no effort is being made to charge the Kansas City Southern Company with it, so I don't think it is pertinent question.

Mr. Smith: I think it is pertinent to this case. The litigation was going on during this litigation.

The Witness: The record shows for itself, Mr. Smith.

Mr. Smith: Yes, I think so.

Mr. Rosenberger: I know the Guardian Trust Company got stuck for that judgment and I included it in our claim against the Belt Company and we collected for it, and that judgment that was finally rendered in the United States Court of Appeals was included in our claim.

Mr. Smith: That case was instituted about October, 1900, according to this thing, because you were charging a retainer for services in preparing and filing answer in suit for twenty-five thousand dollars on note made by the Suburban Belt Company and endorsed by the Trust Company.

The Master: In 1900?

Mr. Smith: In 1900; that is when the retainer was.

Mr. Smith: Isn't that the fact?

Mr. Braley: I could not tell you.

394 Mr. Rosenberger: What date in 1900?

Mr. Smith: October 9, 1900. I don't say that is the date it was begun. I say that is the date this record shows from your petition you have given us here the retainer was charged.

The Master: You say it was not argued in the Supreme Court until 1905?

Mr. Rosenberger: Yes, that was after Mecartney came in.

Mr. Smith: Now I notice in this statement appearing on page 2093 of the Shedd record, "Settlement of Josiah Quincy case", do you know what that was?

Mr. Rosenberger: What date?

Mr. Smith: I can't tell you that, Mr. Rosenberger. It is a statement that is made as of from October 22, 1904, to October 22, 1905.

Mr. Rosenberger: Well, that is during Mr. Mecartney's term.

Mr. Smith: I just asked him if he knew anything about it. It may be possible that is true.

Mr. Smith: Did I ask you whether you handled the Northern Connecting foreclosure proceedings, I believe I asked you that question, do you remember whether you did?

Mr. Braley: I don't remember.

Mr. Rosenberger: No; I will tell you who handled that, Mr. Solomon who was Mr. Cooper's partner.

Mr. Smith: Well, didn't you file some pleadings in that or make some intervention in it?

Mr. Braley: I was up there in the case once, I think it was on a matter about the stock of the company, if I remember right.

Mr. Smith: Some matters you were representing—the Trust Company in?

Mr. Braley: No, no; I may have represented them, but what I am speaking of was about representing a matter of my own.

395 Mr. Smith: Did I ask you whether the Orient was being organized during this period of time?

The Master: Yes; he said it was while they were down on Seventh Street.

Mr. Smith: You stated in answer to a question that this retainer did not cover services for subsididary companies, but if the Trust Company had relations with those subsidiary companies or performed services for them that Trimble & Braley performed any service for the Trust Company in reference to that matter and the retainer covered those services, did it not, services to the Trust Company?

Mr. Braley: I might answer this: suppose one of those companies got into trouble and the Trust Company owned one-twelfth of the stock of that company, it wouldn't be charged to the Trust Company, but charged to the original company.

Mr. Smith: Yes, but services of the Trust Company with reference to this, your services to the Trust Company with reference to any transactions with a subsidiary company were included in your retainer?

Mr. Braley: Not necessarily.

The Master: He means they would have to pay one-tenth of it?

Mr. Smith: No.

Mr. Rosenberger: No.

Mr. Smith: I think you misunderstood. What you said was this, that if there was any question between the Trust Company and the subsidiary company where services were to be rendered to both of them the services were charged to the subsidiary company?

Mr. Braley: That is unless the Trust Company had the original suit against the subsidiary company, which they didn't generally have. I mean our fees didn't include services for subsidiary companies.

The Master: That is what I understood.

396 Mr. Smith: I understood if there were services performed the services were charged to that subsidiary company.

Mr. Smith: Were there any services that were performed by you for the Trust Company with reference to the Second Street Improvement Company's stock during that period?

Mr. Braley: I don't remember of any. That was a separate corporation, and represented all the stockholders, but don't remember there was any contest between the stockholders.

On redirect examination by Mr. Rosenberger, Mr. Braley testified as follows:

Mr. Rosenberger: Mr. Braley, Mr. Smith has directed your attention to the charge of an expense item for cost of the certified copy of the decree of foreclosure in the Kansas City & Northern Connecting Railroad Company case, do you recall that that railroad company, which I will call the Northern Company, was built by the Kansas City Suburban Belt as contractor in return for certain stocks and bonds of the Northern Road?

Mr. Braley: Yes, the Suburban Belt had a contract to build a certain road for it.

Mr. Rosenberger: Do you recall in the Cambria case a great outcry was made in bills of complaint of the Belt receivers, and later by the Southern Company, claiming that the Belt Company had overreached the Northern Company in the performance of that contract?

Mr. Braley: I don't recall that.

Mr. Rosenberger: Well, do you recall that the accounts of the Northern Connecting Railroad Company with the Kansas City City Suburban Belt Railroad Company and also with the Guardian Trust Company in disposing of the securities of the Northern Company on behalf of the Belt Company were involved in the accounting of this Cambria suit?

Mr. Braley: I know there was a question as to accounting and expense, but I don't know in what suit it came in.

397 Mr. Rosenberger: Don't you know there was a vast amount of testimony introduced by the Southern company through their auditor, Mr. Johnson, and perhaps by Mr. Mecartney, in the effort to sustain the charges that were being made by the Southern Company and the Cambria Company and Belt receivers in respect to the building of the Northern Company?

Mr. Smith: He hasn't said he even attended—

Mr. Braley: (Interrupting) I don't recall it, Mr. Rosenberger, I had very little to do with that litigation.

Mr. Rosenberger: You don't recall, in fact, how it happened you wanted a certified copy of that foreclosure decree?

Mr. Braley: No, sir.

Mr. Rosenberger: I think that is all.

Mr. Rosenberger: Now, if the Master please. I assume it is not necessary to introduce in evidence here any of the files in the court which appointed the Master in any of the litigation which is referred to in this account. As, for example, the files in the Cambria case; the files in the Shedd case; the files in the Bierce case; the files in the foreclosure suits brought by the Provident Life & Trust Company against the Belt Company and its constituent or dependent railroad companies.

The Master: Well, the Master will say off hand, he being a mere appointee of the Federal Court and acting under its control, that the Master would take judicial notice of the entire files in the Federal Court.

Mr. Smith: Well, in addition to my written objections, I want to make an objection to that: we are agreeable to the proposition that the Master and the District Court may have before them the complete record in this case so far as it is presented in the record of the Supreme Court of the United States, the printed volume. We object to the assumption
that all other matters in other litigations in which
398 the Guardian Trust Company has been a party may be deemed before this court. We were not parties to the Shedd case; we were not parties to the Bierce case and I don't know on what theory those things can be treated as in evidence here.

Mr. Rosenberger: I am not alluding to the Shedd case.

Mr. Smith: You said Shedd and Bierce cases.

Mr. Rosenberger: No, I said the Bierce case.

Mr. Smith: The Bierce case is not part of the litigation and we object to the records in the Bierce case, except as they are offered. And I think we ought to have some sort of understanding or stipulation about what may be before the Master in this case, because if everything in this case that is taken in the testimony taken in this case is before the Master, why that means all this evidence that has been taken heretofore. Now I don't understand that this record is going to be as big as that.

Mr. Rosenberger: I don't want anything I said to be tortured into the idea I have offered all of this in evidence. It is but for the purpose of avoiding that I make the inquiry with a view of an understanding with the Master about it. Now, for example, there is this enormous record that was made before the Special Master in the Cambria suit, the very case in which you are sitting. I assume that that is open to the Master for his examination without being offered in evidence. I think that the court will certainly take judicial notice of the files in this case.

The Master: I think the Master—

Mr. Rosenberger: (Interrupting) Just a moment, I am not through.

Mr. Smith: Before your Honor rules on that question, I should like to make an objection.

The Master: I am not ruling on it. I am just making the remark that the Master would feel very much inclined to feel at liberty to look at anything which was in the record in this case. I haven't ruled on it, but that is my view.

399 Mr. Smith: Here is the point of it: of course, it is understood that your Honor feels under the constraining hand in disposing of certain issues in this case according to the opinion of the District Court.

The Master: Oh yes.

Mr. Smith: Now there was an intimation here by Mr. Rosenberger in the informal conference that it is to be presumed Judge Van Valkenburgh saw the full evidence. Well, Judge Van Valkenburgh didn't see the full evidence. If there is to be a hearing on this case and certain evidence is to be excluded I would assume that it must, it cannot be said hereafter the Master had this evidence and examined it. I think we should have an understanding as to just what the Master is going to view in this case. If you are going into this evidence back there, then we want to present that evidence.

The Master: What do you mean by "that evidence"? I don't know that I can follow you.

Mr. Crane: Mr. Ashley, Mr. Smith means this, when you come to make up your report.

The Master: Yes.

Mr. Crane: We want to be able to know exactly what you have taken into consideration. For instance, it wouldn't

be a matter of record or it wouldn't be fair to us if your Honor at the conclusion of this case is going to go to the testimony. There migth be some portion of it that we didn't know anything about, or that your report wouldn't disclose, or anything of that kind. But if you said, "I have considered this testimony taken from that record there," something of that kind, why, all parties know just where you stand on that; what he wants you to go to and what we want you to go to, then the record before the court is clear.

The Master: Are you speaking here about the issue on good faith?

Mr. Crane: I am speaking of the whole action, the whole thing.

Mr. Smith: Everything involved in this matter.

The Master: We are foreclosed on the issue of presenting testimony on good faith.

400 Mr. Smith: Yes; but we are saving our record on that.

The Master: Certainly; certainly.

Mr. Smith: Now then, we don't want it to go to the Court of Appeals that the Master has ruled on that evidence taken before Judge Douglass.

The Master: Oh no.

Mr. Smith: That is what I have got in my mind exactly.

Mr. Moore: We want to have it so we can make our record up for the Court of Appeals.

Mr. Rosenberger: I concede opposing counsel are at liberty to refer, without formal introduction in evidence, to any part of the files in this Cambria and its related litigation, in the District Court. I consider I am at liberty to do the same thing; in fact, I consider that is before the court. The Master is at liberty to examine it.

The Master: The Master might feel at liberty, but the Master feels the opinion has foreclosed him on that issue of good faith and he is not going to pass on how much evidence the Federal Court has—or the District Court has, as he concludes he is bound by the United States Court of Appeals in its opinion.

Mr. Smith: What Mr. Rosenberger would like to do in this case I think would be to have your Honor exclude a con-

sideration of all of this evidence and then say, when we go into the appellate court, if we must, I have brought up all of that record, all there, and the Master had a perfect right to go into it and it is to be presumed he examined that evidence and found the issue, as a matter of fact, against us on these issues involved before the Federal Court.

The Master: I don't think that would be fair.

Mr. Smith: What kind of a record have we got?

The Master: You don't think that would be fair, do you?

Mr. Rosenberger: I wasn't paying strict attention to what Mr. Smith was saying.

The Master: Mr. Smith says this: If by the ruling or memorandum opinion of Judge Van Valkenburgh—he
401 acting, as he says, on the opinion of the United States Circuit Court of Appeals—these gentlemen are foreclosed from going into the question of good faith in the bringing of these suits, or the Cambria is foreclosed by the Judge's memorandum opinion that they were not brought in good faith, then he does not want the report of the Master to be based on any of the evidence in that court; nor does he want you in the Court of Appeals to contend that the Master had the evidence before him when he made his report. Is that it?

Mr. Smith: Yes, sir, that is it. In other words, when you make your report we want your report to cover the thing that was heard by you, and nothing else.

Mr. Crane: He wants the Master to simply submit and base his report on his own investigation, or base his report on the instructions he had received from the Federal Court.

Mr. Smith: And evidence adduced before the Master.

Mr. Rosenberger: I think that is perfectly true.

The Master: That seems fair.

Mr. Rosenberger: And I don't want anything I said here to indicate I am willing that anything else should be done. But when it comes to determining whether a certain paper was filed on a certain day, what that paper was in this case, this Cambria litigation, I would consider that it would be wholly unnecessary; and, in fact, improper to offer that paper in evidence. It is part of the files of the court.

The Master: I think you are perfectly right.

Mr. Smith: Let me just make this suggestion: here is a record now offered in the Supreme Court of the United States; that is the record before the Court of Appeals.

The Master: In what case?

Mr. Smith: In this Cambria case.

Mr. Rosenberger: That is just what we say, Mr. Smith; he had the entire record before him when he made his ruling.

Mr. Smith: Who did?

402 Mr. Rosenberger: Judge Van Valkenburgh.

Mr. Smith: Oh no, he didn't have anything of the kind. You know perfectly well Judge Van Valkenburgh never saw a syllable of that case.

Mr. Rosenberger: Mr. Smith, you mean to say Judge Van Valkenburgh was required to close his eyes to the entire record had or made in this suit?

Mr. Smith: I am saying, Mr. Rosenberger, when you and I were arguing this case before Judge Van Valkenburgh we were arguing a naked proposition of law, without one particle of evidence before that court, except what was there in this record of the Supreme Court of the United States; and not another thing there.

Mr. Crane: Mr. Rosenberger, Judge Van Valkenburgh said over and over again that he was guided by that opinion of the Court of Appeals and he didn't care to go back of it; didn't care to go into the evidence, and wasn't going to. He was going to take that for what he thought it meant. That was his attitude.

Mr. Rosenberger: Yes, but what you were trying to do before Judge Van Valkenburgh was to entirely re-open that case and introduce evidence at this time for the purpose of demonstrating that the Southern Company and the Cambria Company and the Provident Company brought these suits in good faith.

Mr. Crane: That is one thing we were trying to do.

Mr. Rosenberger: That is the evidence he said he wouldn't hear; but to say he didn't have the record in this Cambria case before him judicially is to question what his right was as judge of that court, having in charge the files and papers of that court.

Mr. Crane: He may have had the right, but he certainly didn't do it.

Mr. Smith: We never talked about the evidence up
403 there when we were arguing about the form of the decree and when he handed down his opinion on the form of decree.

Mr. Rosenberger: If I have any conception of the rules in equity in the Federal Courts it is that the Chancellor in the eye of the law has before him all the time every paper and every document that is on file in that suit.

Mr. Smith: Well, we also have an idea that in equity, Mr. Rosenberger, when a Chancellor passes on the question without examination of evidence it is not to be assumed he has examined evidence that he hasn't seen.

Mr. Rosenberger: Now if you are talking about evidence you were offering before Judge Van Valkenburgh, you were asking for an opportunity at that time to present evidence to vindicate your good faith. Judge Van Valkenburgh declined to let you do that. That is the only evidence I heard you talking about.

Mr. Smith: You don't remember you went up there and presented a form of decree and we were arguing that then without any discussion of evidence, or anything of the kind; and his memorandum opinion was handed down without any reference—

The Master: (Interrupting) Arguing what question?

Mr. Rosenberger: The question of taxability of the costs.

Mr. Smith: Let me make this statement so you will know what the matter was. There was a motion filed for an entry of final decree in this case.

The Master: By whom?

Mr. Smith: By the Guardian Trust Company and its Receiver, maybe Shedd, I have forgotten which, but I think both.

Mr. Crane: Both.

Mr. Smith: Both; and we had a hearing on that matter in November, as I recall it, 1922, and there was presented at
that time a form of decree prepared by Mr. Rosen-
404 berger to be entered in the case and we prepared a form of decree to be entered in the case and the qustion that

was considered by the court was the language that was included in Mr. Rosenberger's form of decree that costs should be taxed as between solicitor and client; and that was the only thing argued on that occasion; and that is what the memorandum opinion was handed down upon. There was no evidence offered. When that question was argued we told the court—in my part of that argument I told him I didn't know anything about the facts of the case; I had never examined the case and if you will read that memorandum opinion you will see he says he is bound by the decision of the Court of Appeals and not by any evidence he has read in this case, in any finding he has made.

Mr. Rosenberger: I think we are going far afield in this discussion here.

Mr. Smith: I think we are trying to protect our rights.

Mr. Rosenberger: The question before Judge Van Valkenburgh was one of law and upon the record that was before him, including the opinion of the Court of Appeals. All in the world that I am urging here or suggesting here is this: suppose it became material here to establish the date on which the Cambria suit was filed, is it going to be argued that I have got to go and get the original bill of complaint and offer it in evidence to show the date on which it was filed? Suppose the question arises as to the contents of that bill of complaint, have I got to go and get that bill of complaint and formally offer it in evidence and make it a part of the Master's record, when it is part of the files in this case? I say again, that the rule is thoroughly established that in a cause in equity every paper, every document and file in the suit is known judicially by the court, and, therefore, I don't feel it incumbent upon me to offer it in evidence.

The Master: You want it offered in evidence?

Mr. Smith: I want just simply this: I am perfectly willing to consent to everything the Court of Appeals had before it when it decided this case shall be deemed presented
405 to the Master and the District Court. That is all included. But what he is saying about the date of the filing of these things is all in this record. That is what the Court of Appeals decided the case on, if they made any decision upon this question of costs in his favor it is based on that record.

The Master: What about that, Mr. Rosenberger? Are you satisfied?

Mr. Rosenberger: Not at all. As I say, I am insisting here that Judge Van Valkenburgh and you, the Master, judicially know the files in this case and its dependent and related litigation and it is not incumbent on us to drag those files over here and encumber the record with them and unless the Master feels that some contrary rule is in force, I don't propose to do it. I don't propose to be a party to weighing down this record with all that mass of documents, bales of it.

The Master: The Master doesn't wish to do any injustice to parties to this cause, but the Master would certainly feel at liberty to at least look at the files in this cause if he thought it was important. But the thing that seems to be disturbing the representatives of the Kansas City Southern is that as this question of good faith is foreclosed and they are foreclosed from presenting any evidence on that subject, they don't want to go into the upper court, if they appeal from the District Court—if the Federal Court should confirm the Master and they should go up on appeal—they don't want to go into the Federal Court and find themselves and be foreclosed from introducing any evidence to show their good faith, on the theory that the memorandum opinion already mentioned by the Federal Court is based on the evidence. They claim it was not based on evidence and that Judge Van Valkenburgh said he felt bound to follow the Court of Appeals' opinion. I do remember he does say that very distinctly. Of course, as to how far he examined the evidence in the files in his own court, why, nobody knows but himself, and I don't suppose he is accountable. That is his own matter.

Mr. Smith: I think, your Honor, has that advantage—and it is always a mistake for a lawyer to talk when he has a ruling in his favor—but we have got to make a record
406 in this case. What is the Court of Appeals going to say, if we have an understanding here that all these files are before the Master? Suppose they say: "You haven't brought all these files up here; may be there is something important that is not here, may be something that will help you out."

Mr. Rosenberger: Let me simplify this: I am not asking for any stipulations about this. I am willing to stand on what I believe to be the law about it and my whole purpose in making the remark which precipitated this discussion was to simply indicate to the Master my theory of the case is, all these files are before the Master. If I am wrong about it, I am going to have to pay the penalty. If I am right, I am right.

The Master: And the Master frankly says that is something he is in doubt about. In the little investigation I have made now I think in this sort of affidavit, stipulation you formerly made that you were going to offer here what you believed Mr. Sam Moore would testify to; you were going to offer it, then as the Master felt precluded by the memorandum opinion of the court that these suits were not brought in good faith the Master would exclude that evidence. Now exclude it on the theory that that matter had been foreclosed by the memorandum opinion, because I could not exclude it on any other theory, because if I did, as I understand the law of chancery, why, the evidence would have to be admitted and sent up, because the Appellate Court could not judge. They would want to send it back here because we had excluded certain evidence. I feel my justification for letting you offer what you think you can prove by Mr. Sam Moore and then excluding it is that memorandum opinion as based on that question. That is my view of it.

Mr. Crane: In other words—

The Master: (Interrupting) I am foreclosed.

Mr. Smith: In other words, there doesn't rest on you the duty or obligation of hearing that question at all. In other words, you are not hearing that question.

407 The Master: I think I am foreclosed.

Mr. Smith: We think if you would go into that record you wouldn't have any difficulty in finding that this litigation was instituted in good faith and on some good grounds.

The Master: I am not going against the ruling of the Federal Court or the Court of Appeals.

Mr. Crane: I don't believe there is such between us. I agree with Mr. Rosenberger and I am not going to ask him to bring over all the files and papers in the case.

Mr. Rosenberger: They are all here.

Mr. Crane: The record of the Supreme Court is not here. They take up the entire record.

Mr. Rosenberger: No, that is not. That is the reason of the praecipe, bringing into the record certain parts of it.

Mr. Smith: This record of the Court of Appeals was taken to the Supreme Court and they took everything in the Court of Appeals and took it up to the Supreme Court.

The Master: I understand, but the Master doesn't understand from that they got everything in the District Court.

Mr. Smith: Oh no, naturally not. And I gather from Mr. Mecartney's evidence there were three hundred orders made over there.

The Master: Now I am not going to preclude myself from looking at something if I want a date.

Mr. Smith: You will find it here.

The Master: May be something that isn't there.

Mr. Smith: And we think this now: I don't think, as Mr. Crane says, it makes any particular amount of difference, but I don't think, while there is nothing that anybody thinks is going to hurt them if you are going over there to see them, I think the decision you will have to make here has got to be on the evidence offered before you.

The Master: I think so too. I am not going to foreclose myself, however, from looking at a paper. I am not
408 going to be unfair to you, if I can help it.

Mr. Smith: If you do look at it it will go in the record. Now that is what I am figuring on.

The Master: I mean I am not going to be unfair on that proposition. I understand I am foreclosed from considering good faith and I am going to exclude your offer of testimony on good faith, on that theory. Now if I am foreclosed, I am not going further and dig out something that I am foreclosed on.

Thereupon, the Master adjourned the further taking of testimony in the above entitled cause until Friday, the 1st day of February, 1924, at two o'clock P. M.

* * * * * * *

Friday, February 1, 1924.

Pursuant to adjournment as above stated, on Friday, February 1, 1924, at two o'clock P. M. the Master resumed the further hearing of testimony in the above entitled cause. The parties appeared as before.

Thereupon the following proceedings were had:

Thereupon Mr. Rosenberger offered in evidence the opinion and decision of the United States Circuit Court of Appeals, reported in 280 Fed. 64, in Mecartney vs. Guardian

Trust Company, for attorney's fees due him subsequent to March 27, 1908, said opinion being offered in support of Item No. 136.

Mr. Smith: The Kansas City Southern Railway Company and the Cambria Steel Company objected to the introduction of this opinion in evidence on the grounds set forth in numbered paragraphs 1 to 10, inclusive, of their written statement of objections. And for the following reasons:

(1) The services rendered by him in this litigation after the final decree of June 25, 1910, were voluntary services. In support of this objection we offer in evidence the following statement contained in 'Suggestions in Support of Petition for Leave', etc., purporting to be signed by Messrs. Newell H. Clapp and Enoch J. Price, but which state-
409 ment was in fact the statement of H. S. Mecartney.

It is apparent from the volume of the record here that due diligence has been used to prepare this application. In fact, without Mr. Mecartney's aid—volunteered without compensation, it would scarcely have been possible to present it thus early. (Page 966 printed record in the United States Supreme Court in this cause).

In his Testimony on this subject, MR. MECARTNEY testified:

Q. I find that in the transcript that on January 20th, 1913, the following order was made: 'These cases came on to be heard and on motion of Edward S. Shedd, et al., petitioners [—] for leave to file suggestions, etc., (reading same). Are those suggestions that are there referred to the same as Exhibit 117 which you have identified. A. They are.

Q. Pursuant to that order, did you file these suggestions with the court? A. I did. I did it pursuant to both these orders. (Pages 1415, 16 record in Mecartney case in state court).

(2) If it was Mr. Mecartney who presented in the Court of Appeals the contention that The Kansas City Southern Railway Company was liable for the debts of the Kansas City Suburban Belt Railroad Company, and that judgment should be entered against the Southern Company, the fact that such contention was not made by other counsel for the Trust Company in that case was because of the conduct of Mr. Mecartney as counsel for the Trust Company prior to that time in putting the issues in this case in such shape that his successors as counsel for the Trust Company in charge of the litigation were led to believe that that issue could not be pre-

sented in the Court of Appeals. In his argument before Judge McPherson against the application for the second injunction against the prosecution of the state court cases Mr. Mecartney, in speaking of the Southern Company said:

It is not an affirmative claim on our part to a personal judgment—we could not get judgment on it. But, as the pleadings stand, we are not seeking personal judgment
410 against the Southern Company. In that case the Southern Company is a mere intervenor (page 57 of the argument before Judge McPherson).

I want to make this additional objection, that the statement as to the performance of services after March, 1908, is misleading. There isn't any claim that I know of that Mr. Mecartney rendered any services after March, 1908 and before June 25, 1910, the date of the final decree. I think the offer ought to be limited to whatever services were rendered by him in the Court of Appeals.

Mr. Rosenberger: Well, it is, the services I speak of are limited to those that are reviewed and discussed by the United States Circuit Court of Appeals in the decision and opinion just offered in evidence.

The foregoing objections to the introduction of said opinion were, by the Master, overruled, to which ruling the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

The opinion and decision of the United [—] Circuit Court of Appeals, recorded in 280 Fed. 64, was thereupon received in evidence by the Master.

Said opinion, as reported in 280 Fed. 64, is hereby, pursuant to stipulation of the parties, incorporated herein by reference, in lieu of being herein set forth.

Clifford Histed thereupon duly produced as a witness on behalf of the Guardian Trust Company, being first duly sworn, testified in substance as follows:

My name is Clifford Histed, attorney at Law, Kansas City, Missouri. I have been engaged in the practice of law in Kansas City, twenty years, and during all of that time have been a partner of Mr. James H. Harkless, under the firm name Harkless and Histed. I was employed by Mr. Harry S. Mecartney to assist him in connection with the litigation

between the Guardian Trust Company and the Port
411 Arthur Channel & Dock Company and the Provident Life & Trust Company. That was in the latter part of 1904 or the first part of 1905. At the time of my employment that litigation had been pending for a number of years in the United States District Court or Circuit Court at Beaumont, Texas. That litigation was commenced by the filing of a creditor's bill at Beaumont, Texas, by the Barnett & Record Company, a creditor of the Dock Company, in which the relief asked, among other things, was a Receiver for the Dock Company.

Mr. Rosenberger: And that bill was filed in September, 1900?

Mr. Histed: I don't remember the dates, but it had been filed, pending there.

Mr. Rosenberger: Is there any dispute about that?

Mr. Smith: Filed in September, 1900, September 10, is our information.

Mr. Histed: Prior to my entry in the case, the Provident Life & Trust Company, as the Trustee in the mortgage executed by the Dock Company, and the secured bond holders had intervened in the suit and asserted claims against the Guardian Trust Company which was the defendant to the appeal of the Barnett & Record Company. Long prior to my entry in the case as assistant to Mr. Mecartney, the Guardian Trust Company had filed a cross petition against the Dock Company asserting a demand against it in the neighborhood of $20,000.00, if I remember right. My recollection as to the nature of the Trust Company's claim is very vague. I think probably it was for money advanced. Long prior to my entry into the case, the Provident Company, as Trustee, had filed a bill for the foreclosure of its mortgage against the Dock Company and that bill had ripened into a decree and sale of the property to the new Dock Company known as the Port Arthur Canal & Dock Company. The claim which the Provident Company was asserting against the Guardian Trust Company was, I think, that is was liable on stock subscriptions for capital stock to a very large amount, over a million dollars, that is stock subscriptions made to the Port Arthur Channel & Dock Company.
412 The Guardian had subscribed for capital stock of the Port Arthur Channel & Dock Company and had not paid for the stock. The Provident Company, under its creditors' bill, was seeking to make the Guardian Company pay their stock subscription. I think the amount of the

Provident Company's claim against the Trust Company on that stock subscription was a million and a half dollars. I had nothing to do with that litigation until I was employed by Mr. Mecartney, the last part of December, 1904, or the first of January, 1905. My connection with the matter ceased when the matter was wound up in May or April, 1905. After my entry into the case, no further litigation was conducted in court in the matter. Our services consisted first in informing ourselves of the situation concerning the testimony that had been taken and the state of the record and forming some opinion about the merits of the controversy and negotiating settlement. The matter was compromised and settled in April or May. All I did was to examine the papers in the case and the testimony which had been taken prior to my employment to form a conclusion as to the rights and liabilities of the respective parties and to settle the case. No testimony was taken either by me or Mr. Mecartney. I made report to Mr. Mecartney after I had formed an opinion as to the case and as to what ought to be done with it. Immediately following that report, Mr. Mecartney and Mr. Moore got together and settled the thing up.

Mr. Rosenberger. Before that statement was made, Mr. Mecartney wrote a letter to the Guardian Trust Company and recommended a settlement?

Mr. Smith: I object to that settlement because it is calling for hearsay evidence.

The Master: I can't see its materiality.

Mr. Rosenberger. The whole purpose of this testimony here, Mr. Histed's testimony, is to show the value of the services rendered by Mr. Mecartney in the Dock case, so that the Master may be able to determine what that
413 value was and if persuaded that any allowance should be made therefor will know how much to allow and, that being true, it becomes material in determining that value what the terms of the settlement were.

The Master: So far as the settlement involved expenditure of time in making contracts, I think it might be material.

Mr. Rosenberger: I think it would be material not merely in the matter of time, but in every matter involving fees the result of the thing is a very material factor. If Mr.

Mecartney had collected a million dollars, for example, it would have a very material bearing or ought to have, on your mind.

The Master: Yes.

Mr. Rosenberger: On the other hand, if he collected nothing, that is an important matter.

The Master: That is true.

Mr. Crane: Let us understand one thing; I understood you were not going to retry the Mecartney case.

The Master: No.

Mr. Crane: Now we are starting to retry it piecemeal.

Mr. Rosenberger: I can't agree with that statement.

The Master: I said this: if you could show that any part of the judgment for fees in the Mecartney case was a service that was entirely foreign to the Cambria litigation, that I would like to hear it, consider it; but I am not willing to try the Mecartney case. If you gentlemen could show some of the issues included in the judgment for services rendered were entirely foreign to the litigation, I would like to hear that testimony.

Mr. Rosenberger: I want to be clearly understood here; I don't want to be accused later of opening the door to a lot of irrelevant matter. I am not offering proof here of the value of Mr. Mecartney's services that are included in the judgment which he obtained in the State Court for
414 services in the Cambria case. But I am offering to prove what the value of his services were in the Port Arthur Channel & Dock Company case, and, for this reason; in his petition filed in the State Court, which resulted in a judgment, he brought suit in the first count of that petition for the value of services rendered by him in the Port Arthur Channel & Dock Company case as well as in the Cambria case and that ripened into a judgment on that first count. No segregation is made in that judgment as between those two law suits. Now then, the position of these gentlemen is that because Mr. Mecartney included some element which they claim was foreign to the Cambria suit, he ought not to recover anything for the enormous labor that he did in the Belt-Cambria suit.

Mr. Crane: No, that is not the situation.

Mr. Rosenberger: Let me finish.

Mr. Smith: Yes, it is; yes, it is.

Mr. Rosenberger: My answer to that, as already indicated, is that this Texas litigation was all part and parcel of the same scheme of the Southern Company, and its promoters, the reorganization committee, which is dealt with in the opinion of the Court of Appeals; and, second, that if I be wrong in that proposition, that it then becomes the duty of the Master to determine what the fair value was of the services rendered in the Texas case and make some allowance to the Southern Company for that value.

Mr. Smith: Are you through, Mr. Rosenberger, with your statement?

Mr. Rosenberger: Yes.

Mr. Smith: If the Master please, it is clearly understood that we are contending that no attorney fees can be taxed as costs in this case. That goes without saying any more about it?

The Master: Yes.

Mr. Smith: Now, then, we are contending this: that this judgment isn't binding on us, because we weren't parties to that judgment.

The Master: I understand that.

415 Mr. Smith: And we further contend if you are going to try any issue in this case as to the value of Mr. Mecartney's services the only issue that is proper to be tried here is the question of the services rendered in the Cambria case, if evidence on that issue is competent at all. Now we object to this method of getting at this fact, because the question for determination, if you are going to consider such values, is to try out the question of what services were rendered by Mr. Mecartney in the Cambria case, and not go into a foreign issue and try that and then subtract that allowance from this. Now we want to object to it for the further reason, if I haven't already stated it here, that we want to object to any evidence as to the value of these services for the purpose of taxing them as part of the costs in this case; that is, any part of the services in the Texas case, on the ground that this court has no power to tax the costs in that case in Texas, as an additional ground.

Mr. Crane: Now let me supplement that just a moment: I want to make this objection to it further; now, Mr. Rosen-

berger is attempting to make binding on us as to the amount of Mecartney's fees in the Cambria litigation the judgment, decision of the Supreme Court of Missouri. That is a unit, one thing: the services in the Cambria case; and in the other cases are allowed in that as a unit. Now he proposes to take out part of that by evidence as to what is reasonable value of those other services and then subtract it and leave the residue as the amount fixed by the Supreme Court. To which we cannot offer any evidence whatever. That is so plain. Now we say that that is objectionable and cannot be done. Either he has got to stand by the judgment itself as an entirety, or else he has got to introduce evidence of what the services are reasonably worth and abandon the judgment.

Mr. Rosenberger: Counsel is in error.

Mr. Smith: Just a minute, Mr. Rosenberger.

Mr. Crane: The record shows it is not only this case that we are talking about, but there are a lot of other things
416 besides that judgment, in that one unit.

Mr. Rosenberger: Well, counsel is mistaken in both statements. The only item of service that could not be attributed by any interpretation to the Cambria suit is this Texas suit, and there is no warrant for the statement that any other services are included in Mr. Mecartney's suit in the State Court, which was affirmed by the Supreme Court of Missouri. In the second place, it is not contended here by us that these gentlemen are precluded from offering proof, if any they have, as to the value of Mr. Mecartney's serivces in that Texas suit.

Mr. Crane: How about the last offer?

Mr. Rosenberger: The last offer is foreclosed, I think, by the decision of the Supreme Court.

Mr. Crane: That is it.

The Master: Well, the Master understands—

Mr. Smith (Interrupting) May I ask a question? Mr. Rosenberger, do I understand you to say the opinion in the Missouri Supreme Court covered only services in the Cambria case and the Texas case?

Mr. Rosenberger: Yes; but my contention is the Cambria case and the Texas case were both included in the same thing.

Mr. Smith: But do I understand you to say that is all that was included in that judgment?

Mr. Rosenberger: Certainly.

Mr. Smith: Well, we object to that, because it is contrary to the fact.

Mr. Rosenberger: Well, it is a statement of fact; can be shown.

The Master: Well, the Master is inclined to sustain this objection. Mr. Rosenberger's position is, he regards the Dock case as part of this entire scheme of litigation by the Cambria Company and the other, Provident Companies, who all went into the reorganization. I understand that this Dock Company did go into the reorganization finally in the reorganization. That is his first proposition. Second is: if the Master should not agree with him about that, then he
417 wishes to show that whatever services were rendered by Mr. Mecartney, or Mr. Histed, as his assistant, or assisting and co-operating with him in the Dock case, were very inconsiderable. Now I think the Master cannot quite occupy those two positions. I have got to take the judgment in the Mecartney case as binding, although the Southern was not a party, and refuse to try the Mecartney case again or else try it all. So I will sustain the objection.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted, and still excepts.

Mr. Smith: Now just a moment,—

Mr. Rosenberger: (Interrupting) Well, now, I don't want this case to come back to the Master if Judge Van Valkenburgh should disagree with you. I want this proof in the record. The Master is at perfect liberty to decline to consider it after it is in, but I don't want a re-reference here to take this testimony.

The Master: Well, I think it may perhaps be better to let it in and rule it out, for the reason we don't want to come back here.

Mr. Smith: If I may make a suggestion; it is the other way, you rule it out and then let it in.

The Master: Yes, I rule it out and then let it in; but it goes into the record. The Master does not consider it.

Mr. Rosenberger: Before that settlement was made, Mr. Mecartney read a letter to the Guardian Trust Company and recommended a settlement?

Mr. Histed: Well, in point of time that extended from about the 1st of January until the 1st of May.

Mr. Rosenberger: You gave some testimony on this subject in Mr. Mecartney's suit against the Guardian Trust Company for fees, did you not?

Mr. Histed: Well, I don't recall it; if it is on record I expect I did.

418 Mr. Rosenberger: Well, as to the time you put in and as to the nature of the services, I will ask you whether your recollection would be refreshed by reading your testimony at that time, namely, in May, when you were giving that testimony?

Mr. Histed: It undoubtedly would.

Mr. Rosenberger: I read to you this question and answer and will ask you to state whether it refreshes your recollection about it:

"Q. (by Mr. Bush) Some time in 1904, were you employed by the plaintiff in this case to render him assistance, as assistant counsel in what is known as the Channel & Dock cases then pending? If so, I wish you would please state in a general way the time you spent and the services rendered in that matter and explain the nature of the litigation.

A. I was employed by Mr. Mecartney in December, 1904, in that matter. At that time the case was pending in the United States Circuit Court for the Western Division—I forget what the Division is in Texas, but, pending in the Circuit Court in Texas. The case was entitled The Provident Life & Trust Company vs. The Port Arthur Channel & Dock Company. It involved on the one hand, the branch in which I was employed and being a counter-claim, or cross bill against the Guardian Trust Company. At that time issues had been joined upon the controversy and a considerable volume of testimony had been taken. The particular object of my employment was to review the case as it had progressed, to also investigate the further questions of fact and law which may be brought to bear upon the litigation, to assist in the prosecution of the litigation thereafter, in the interest of the Guardian Trust Company. In connection with my employment I, therefore, primarily made a complete analysis of the pleadings and of the testimony, abstracted the testimony. I took a stenographer and made three copies of that, dictating an abstract of the testimony as I went along,

making a digest of it and I would say from the time
419 that I went into the case until it was terminated by a settlement later, I put in at least thirty days."

Does that refresh your recollection about it?

Mr. Histed: I can't remember a bit of that; but think likely that is true.

Mr. Histed: I don't recollect that I ever talked with Mr. Moore, the counsel for the Kansas City Southern Company, regarding the settlement. I may have done so. I knew at the time of my employment of the pendency of this Cambria suit in Kansas City. We made no appearances in Court in connection with the Texas suit other than that we probably entered our appearances of record or perhaps filed a stipulation for continuance or something of that kind.

Mr. Rosenberger: We offer in evidence the original stipulation of settlement which has just been produced by counsel for the Southern Company as Exhibit 1.

The Master: This evidence going to the value and the amount of the services rendered by Mr. Mecartney's assistant in the Dock case is excluded by the Master for the same reasons heretofore stated; but will be put in the record to avoid a re-reference to the Master should the upper court not agree with the Master in his ruling.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted.

Mr. Smith: Now before you make this offer, Mr. Rosenberger, I want to ask that all of the settlement go in, not just the one document. I want it all to go in.

The Master: The Master excluded it, but it is up to Mr. Rosenberger to put it in.

Mr. Smith: Well, if he doesn't put it in, I will. I suppose when he offers it we can offer it in turn.

The Master: If Mr. Smith is going to offer the rest of it I think it would save time to put it all in at once.

420 Mr. Rosenberger: We also offer in evidence the two documents which accompany that agreement of settlement, both being dated April 4, 1905. May they be marked Exhibits 2 and 3?

The stipulation of settlement above offered in evidence by the Guardian Trust Company, and excluded by the Master, as above stated, is here marked by the Reporter "Gr. Tr. Co. Ex. 1., G. P. 2/1/24"; and the two documents accompanying said agreement of settlement, last above offered in evidence by counsel for Guardian Trust Company, one being a release by the Guardian Trust Company and the other an indemnity bond, are here marked by the Reporter, respectively, Gr. Tr. Co. Ex. 2, G. P., 2/1/24" and "Gr. Tr. Co. Ex. 3, G. P. 2/1/24."

Mr. Rosenberger: Here is the agreement of settlement.

Said agreement of settlement, the same being marked Guardian Trust Company's Exhibit 1, is here read to the Master by Mr. Rosenberger, the same being in words and figures as follows, to-wit:

Guardian Trust Company, Exhibit No. 1.

"Agreement made this 30th day of March, 1905, between the Guardian Trust Company, party of the first part, and Port Arthur Channel & Dock Company, Port Arthur Canal & Dock Company, and The Kansas City Southern Railway Company, parties of the second part, Witnesseth:

That the parties hereto have mutually agreed to compromise and settle certain litigation pending in the Circuit Court of the United States at Beaumont, Texas, as follows:

1. The Guardian Trust Company hereby releases and discharges the Port Arthur Channel & Dock Company on its claim in the sum of approximately Twenty One Thousand Nine Hundred Sixteen and 44/100 Dollars ($21,916.44) and interest thereon which is the subject of an intervention or cross bill filed by the Guardian Trust Company and now pending in the case of Provident Life & Trust Company of Philadelphia against the Port Arthur Channel & Dock Company, et al, in the Circuit Court of the United States for the Eastern District of Texas at Beaumont, Texas; and the Guardian Trust Company further releases and discharges the Port Arthur Canal & Dock Company and The Kan-
421 sas City Southern Railway Company from any and all liability on account of the account above mentioned.

2. The Port Arthur Channel & Dock Company hereby releases and discharges the Guardian Trust Company from any and all liability for an accounting in respect of transactions had between the said Trust Company and the Port Arthur

Channel & Dock Company and acknowledges that the accounts between said companies adjusted by wiping out the balance as provided in the preceding paragraph shall stand and not be further inquired into.

3. The Port Arthur Channel & Dock Company hereby releases and discharges the Guardian Trust Company from all and all liability to it as a subscriber to the capital stock of the Port Arthur Channel & Dock Company. And the Port Arthur Canal & Dock Company as the successor by purchase at foreclosure sale of the property of the Port Arthur Channel & Dock Company and as the owner of the bonds of the Port Arthur Channel & Dock Company hereby joins in such release and acknowledges satisfaction of any claim which it may have against the Guardian Trust Company by reason of the latter's alleged liability as a subscriber to the stock of the Port Arthur Channel & Dock Company.

4. There is pending in the United States Circuit Court at Kansas City, Missouri, a bill for an accounting brought by the Kansas City Suburban Belt Railroad Company and its receivers against the Guardian Trust Company; and a petition in intervention brought by the Kansas City Southern Railway Company against the Guardian Trust Company; and a crossbill filed by the Guardian Trust Company against The Kansas City Southern Railway Company. It is understood and agreed that the proceedings had or to be had in said suit at Kansas City shall be in no manner affected by the settlement or compromise of the matters mentioned in the foregoing paragraphs.

GUARDIAN TRUST
COMPANY,
By H. H. Harris, Prest.

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PORT ARTHUR CANAL
& DOCK COMPANY,
By S. R. Knott, President

PORT ARTHUR CHANNEL
& DOCK COMPANY,
By S. R. Knott, President.

THE KANSAS CITY
SOUTHERN RY.
COMPANY,
By S. R. Knott, President."

Mr. Rosenberger: Accompanying that, as part of the same settlement, is this:

Counsel for Guardian Trust Company here reads to the Master, Guardian Trust Company, Exhibit 2, which is in words and figures as follows:

Guardian Trust Co. Exhibit 2.

"In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

State Trust Company, Complainants,
No. 2331. vs.
Kansas City Pittsburg & Gulf Railroad Company, et al., Defendants.

The Guardian Trust Company hereby indemifies and agrees to save harmless The Kansas City Railway Company from any and all claims whatsoever in the nature of attorney's fees, which claims are made by Trimble & Braley in the interventions of the above entitled cause, filed on March 20, 1900, and set forth on pages 499 to 503, inclusive, in the printed record and on pages 504 to 508, inclusive, of the printed record; such claims hereby indemnified against amounting respectively to the sum of Twenty Seven Hundred and Fifty Dollars ($2750.00) and Thirty Two Hundred and Fifty Dollars ($3250.00) or a total of Six Thousand Dollars ($6,000.00).

GUARDIAN TRUST CO.
By H. S. Mscartney, if Solicitor."

April 4, 1905.

Approved as to form:
J. H. Wood, Asst. Atty.

Guardian Trust Company's Exhibit 3 is in words and figures as follows, to-wit:

Guardian Trust Company's Exhibit 3.

423 "In consideration of the sum of Twelve Hundred and Fifty Dollars ($1250.00) to us in hand paid, the receipt of which is hereby acknowledged, we hereby jointly and severally release and discharge the Port Arthur Channel & Dock Company, the Port Arthur Canal & Dock Company, The Kansas City Southern Railway Company and its associated companies, to the same extent as they were named respectively filed by us in the case of Provident Life & Trust

Company vs. Port Arthur Channel & Dock Company, pending in the Circuit Court of the United States at Beaumont, Texas. No unpaid costs to be taxed against us.

J. McD. TRIMBLE,
By Trimble & Braley

S. B. WILLEY,
By Trimble & Braley,

C. A. BRALEY."

April 4, 1905

Approved as to form:
J. H. Wood, Asst. Atty.

Mr. Histed: With my recollection refreshed by the reading of the stipulation of settlement, dated March 30, 1905, I would not still say that my services extended up to May, 1905. I was only giving tentative dates. I am not very exact about dates. I was not employed at all by the Guardian Trust Company but solely by Mr. Mecartney and for his account. I charged Mr. Mecartney for all of the services rendered in the Texas case, $1,050.00. The work that Mr. Mecartney did was in conjunction and in conference with me. Taking into consideration the nature and merits of the claims of the Guardian Trust Company and the Provident Company, respectively against each other, and the Canal Company, the amount of work we did and the result, $3,500.00 would, in my opinion, be the fair value of all the services rendered by me and Mr. Mecartney in that Texas suit.

On cross examination, by Mr. Smith, Mr. Histed testified, in substance, as follows:

Mr. Smith: It is understood, if the Master please, that by this cross examination we are not waiving our objection to this evidence being incompetent but merely making our cross examination because the evidence has been admitted.

424 The Master: The Master thinks you can cross examine without waiving your objections.

Mr. Smith: Mr. Histed, as a matter of fact, who did the work in that thing as between you and Mr. Mecartney?

Mr. Histed: Well, of course, Mr. Mecartney was the principal counsel on the case, Mr. Smith.

Mr. Smith: Yes; but you did the lion's share of the work, did you not?

Mr. Histed: Well, I did the work of examining the record, getting out the digest of the testimony.

Mr. Smith: You were a thoroughly established and well recognized lawyer at this Bar at the time that was done?

Mr. Histed: Well, I was practicing law here.

Mr. Smith: Didn't he pay you $1,800.00?

Mr. Histed: Well, I had some other matters with him and I think I got all together $1750.00 out of Mecartney.

Mr. Smith: Well, as a matter of fact, Mr. Histed, didn't you do as much in the work, or more in this matter, than he did?

Mr. Histed: Well, the truth is, Mr. Smith, when you get down to it it was more heavy thinking than anything else.

Mr. Smith: Aren't you the one who did the thinking?

Mr. Histed: Well, I don't know about that Mr. Mecartney has a very active mind, I understand; does a great deal.

Mr. Smith: Didn't you prepare the abstract of the evidence?

Mr. Histed: Yes sir.

Mr. Smith: And make an analysis of the pleadings?

Mr. Histed: Yes, sir.

Mr. Smith: And afterwards you made a report to him?

Mr. Histed: Yes, sir.

Mr. Smith: And what you did was either to negotiate with Mr. Moore or he with Mr. Moore on the settlement of the case?

Mr. Histed: That is correct.

425 Mr. Smith: And did you recommend this settlement?

Mr. Histed: Yes.

Mr. Smith: Now that litigation, Mr. Histed, was amicably disposed of, was it not?

Mr. Histed: Yes, sir.

Mr. Smith: There was a complete and final settlement of it?

Mr. Histed: Yes, sir.

Mr. Smith: And a decree was drawn and entered?

Mr. Histed: Yes.

Mr. Smith: Evidencing the disposition of the case?

Mr. Histed: Yes, sir.

Mr. Smith: I will ask you to examine that decree and see if you remember that being the decree?

The Master: The Master is not clear, but you propose on this cross-examination to introduce this yourself?

Mr. Smith: I understand this: that I want to prove by this witness that there was a full and complete settlement of the matter, if he is going to testify on the matter at all.

The Witness: I think that stipulation practically shows that, does it not?

Mr. Smith: I want to show what the purpose of this decree is, if the court please, I want to show either by this witness, or independent of him, this provision in the decree: "It is further ordered, in accordance with the agreement stated in open court that the Guardian Trust Company pay one-half of the costs unpaid, in all the matters hereby dismissed, and that the Port Arthur Channel & Dock Company pay the other half thereof." I want to show that the costs were disposed of in that case by agreement. I offer this decree as part of the cross-examination of this witness.

Said decree last above offered in evidence by counsel for the Kansas City Southern Railway Company is re-
426 ceived in evidence by the Master, the same being marked by the Reporter: "K. C. So. Ry. Co.'s Ex. "A" G. P. 2/1/24".

Said Kansas City Southern Railway Company's Exhibit "A" is in words and figures as follows, to-wit:

Kansas City Southern Railway Company's Exhibit "A"

"In the Circuit Court of the United States for the Eastern District of Texas, at Beaumont.

The Provident Life & Trust Co. of Philadelphia,

vs.

Port Arthur Channel & Dock Company, Guardian Trust Company, and Francis M. Black, Receiver, of Guardian Trust Company, Defendants.

The Barnett & Record Company, Complainant,
vs.
Port Arthur Channel & Dock Company, Defendant.

Equity Nos. 10 and 11 Consolidated.

Wednesday, April 5th, 1905. On this day, in the above numbered and entitled cause, the Provident Life & Trust Company of Philadelphia, by its solicitors, having filed herein a dismissal of its cross-bill and cross-complaint; and the defendant, Port Arthur Channel & Dock Company, having by its solicitors filed a dismissal of its cross-bill and cross-complaint; and the intervener, C. A. Braley having filed a dismissal of his bill of intervention, and the intervener, J. McD. Trimble, having filed herein a dismissal of his bill of intervention; and S. B. Willey having filed herein a dismissal of his bill of intervention; and the Guardian Trust Company, the original defendant, by its solicitors, having filed herein a dismissal of its bill of intervention and cross-bill, and E. L. Martin, E. O. Height, L. Heyneker and O. H. Dean, Trustees of the Port Arthur Townsite Company, having filed herein a dismissal of their bill of intervention as such Trustee, it is ordered by the Court that the cross-bill or cross-complaint of the Provident Life & Trust Company of Philadelphia, filed herein, be, and the same is hereby dismissed; that the cross-bill of the Port Arthur Channel & Dock Company be,
427 and the same is hereby dismissed; that the intervention of C. A. Braley be, and the same is hereby dismissed; that the intervention of J. McD. Trimble filed herein, be, and the same is hereby dismissed; that the intervention of S. B. Willey filed herein, be and the same is hereby dismissed; that the intervention and cross-bill of the Guardian Trust Company, filed herein, be, and the same is hereby dismissed; and that the intervention of E. L. Martin, E. O. Haight, L. Heyneker and O. H. Dean, Trustees of the Port Arthur Townsite Company, be, and the same is hereby dismissed.

It is further ordered, in accordance with the agreement stated in open court that the Guardian Trust Company pay one-half of the costs unpaid, in all the matters hereby dismissed, and that the Port Arthur Channel & Dock Company pay the other half thereof.

This order of dismissal is entered on the stipulation that it shall in no manner affect the merits of companion litigation pending in courts in the State of Missouri between the parties or some of them herein named.

(Signed) D. E. BRYANT, Judge.

(Filed 6th day of April, 1905)."

"United States of America, Fifth Circuit, Eastern District of Texas

I, J. R. Blades, clerk of the District Court for the Eastern District of Texas, do hereby certify the foregoing to be a true and correct copy of the Order of Dismissal in Cause Nos. 10 7 11, on the Equity Docket of said court, entitled:

The Provident Life & Trust Co. of Philadelphia,
vs.
Port Arthur Channel & Dock Co., Guardian Trust Co., and Francis M. Black, Receiver of Guardian Trust Co., Defendants,

The Barnett & Record Co., Complainant,
vs.
Port Arthur Channel & Dock Co., Defendant.

as fully as the same now appears on file and record in my office at Beaumont.

428 To Certify Which, witness my official hand and seal of said (Seal) court at Beaumont, in said District, this the 23rd day of Jan. A. D. 1924.

J. R. BLADES,
Clerk U. S. District Court, E. D. T.
By Susie Kerr, Deput."

Said Exhibit "A" is endorsed on its back as follows: "Eq. No. 10 & 11. United States District Court, Eastern District of Texas. The Provident Life & Trust Co. of Philadelphia vs. Port Arthur Channel & Dock Co. Guardian Trust Co., and Francis M. Black, Receiver of Guardian Trust Co., Defendants. Certified copy of The Barnett & Record Co. Complainant, vs. Port Arthur Channel & Dock Co., Defendant. Order of Dismissal."

Mr. Smith: Mr. Histed, do you remember that there were about four thousand pages of testimony heard or taken in that case?

Mr. Histed: It was a large volume, Mr. Smith, I expect there was.

Mr. Smith: And that had been taken by Trimble & Braley?

Mr. Histed: Yes.

Mr. Rosenberger: Why, do you know it had been taken by them?

Mr. Smith: Why, I don't recall that, but somebody had taken this testimony; I just—

Mr. Smith: (Interrupting) Is there any claim that anybody else had been of counsel in the case between Mr. Mecartney and Trimble & Braley?

Mr. Rosenberger: Why, I don't know. I do know there wasn't four thousand pages of testimony.

Mr. Smith: Well, all I know is Mr. Mecartney's word for it in his petition.

Mr. Rosenberger: Yes, but in his testimony he said he was mistaken about that; said there was about two thousand.

Mr. Smith: There was a good big mass of testimony?

Mr. Histed: Well, I am not undertaking—I suppose the Master understands that—I am not undertaking to count the pages.

429 Mr. Smith: But somebody had spent a [deal] deal of time and effort in taking testimony?

Mr. Histed: Yes, sir, I am talking about the brief interval I was in that.

Mr. Smith: I understand, but there is involved in here the question of somebody's else's work besides Mr. Mecartney's?

Mr. Histed: Yes, sir.

Mr. Smith: And a very large volume of pleadings, files in this case, as many as three hundred?

Mr. Histed: There were a good many names and things like that I didn't charge by memory with.

Mr. Smith: But it meant somebody had done a large amount of work?

Mr. Histed: Yes, sir.

Mr. Smith: Now you know Mr. Mecartney in his suit had claimed his services in this Texas matter were worth $7,500.00, do you not?

Mr. Histed: I don't know, Mr. Smith, what Mr. Mecartney claimed.

Mr. Rosenberger: Claimed how much?

Mr. Smith: $7,500.00.

Mr. Rosenberger: You are mistaken, because he claimed they were worth $5,000.00.

Mr. Smith: I haven't been proven mistaken yet on any of these things.

The Master: What is the question?

The Witness: He wants to know if I know Mecartney claimed $7500.00.

Mr. Smith: I read from the answer of Mr. Mecartney on page 216 of the record—

Mr. Rossenberger: (Interrupting) You mean an answer in testimony?

Mr. Smith: Yes, sir.

Mr. Rosenberger: Well now, you are offering that as original evidence?

Mr. Smith: I am offering this. You are offering this record. You are offering this record, but I want to offer
430 this at the time of the [of the] cross-examination here of this witness. What is the nature of your suggestion?

Mr. Rosenberger: My suggestion is, that so far I have offered only the record proper in that case. You are now offering to read some testimony given by Mr. Mecartney in that suit.

Mr. Smith: Well, I take it that in this matter if the Master is to admit the judgment the record goes with it, whatever is in this record. Now the statement of Mr. Mecartney showed what was involved in the case, I should think that would be proper.

The Master: That the Cambria suit?

Mr. Smith: This is Mecartney's suit against the Guardian Trust Company. I want to read from his answer on page 216 just this part of it.

The Master: Read it.

Mr. Smith: I am reading it: "I can also estimate the features of the litigation which were finished, practically finished, taking the Dock case as a lump sum and did estimate it at the value of $7500.00."

Mr. Rosenberger: That was given at the hearing of his case?

Mr. Smith: Yes; sworn to by him.

The Master: The witness answered the question. Read the question, Miss Parlin, to Mr. Histed.

The following question here read by the Reporter:

Miss Parlin: Now you know Mr. Mecartney in his suit had claimed his services in this Texas matter were worth $7,500.00, do you not?

Mr. Smith: Refreshing your recollection from that testimony would you now attempt to say what the value of his services were in the matter?

Mr. Rosenberger: I don't think his recollection would be refreshed by what Mr. Mecartney testified to in 1911 about it.

The Master: No, I don't think so. The Master doesn't think so. That objection I sustain.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel
431 Company, by their counsel, at the time duly excepted.

Mr. Smith: I just want to put this question: this claim that was made by the Provident Company against the Port Arthur Channel & Dock Company was a claim that was made under the deficiency judgment in the foreclosure case, wasn't it?

Mr. Histed: Yes, sir.

Mr. Smith: I mean the claim that was made by the Provident Company against the Guardian Trust Company on account of the stock subscription was a claim based on the deficiency judgment in favor of the Provident Company in its foreclosure proceeding?

Mr. Histed: Yes.

Mr. Smith: Mr. Mecartney was chief counsel in that Texas litigation?

Mr. Histed: Yes, sir.

Mr. Smith: On your side?

Mr. Histed: Yes, sir.

Mr. Smith: Assuming that he as chief counsel had fixed the value of his services at $7,500.00 would you say that was an unreasonable amount?

Mr. Rosenberger: Wait just a minute: that is objected to as merely argumentative: and, further, because the witness has already expressed his opinion as to the value of the whole service.

The Master: This is cross examination, objection overruled. He says assuming the whole thing was worth $7,500.00 would you consider that unreasonable, was that the question?

Mr. Smith: No, I said assuming Mr. Mecartney put that value on it would you say that was unreasonable, an unreasonable figures to put on those services?

The Master: Objection overruled.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted.

Mr. Rosenberger: Let me ask you this question first: Would your opinion be altered, Mr. Histed, from your own knowledge of what was done if somebody else had a
432 contrary opinion to yours?

Mr. Histed: I might—it is difficult to answer either question propounded by Mr. Smith or question propounded by Mr. Rosenberger categorically.

The Master: Yes, I think one at a time is enough.

The Witness: But as a lawyer, everybody recognizes the fact that the value of a lawyer's services is largely a matter of judgment; and also recognizes the fact that one would hesitate to criticize a bill another lawyer might have presented, but, as I said in the first place, of course, I figured that taking into consideration, this litigation, the findings and the result accomplished, I had charged $1,000.00, got paid for my services and looking on it as a reasonable fee I figured $3,500.00—$2,500.00 more—would be a reasonable charge for Mr. Mecartney to make.

Mr. Smith: Nevertheless—

Mr. Histed: (Interrupting) But to argue with Mr. Mecartney, or anybody else, on the issue as to whether if he should have charged $7,500.00 he was extravagant or exorbitant, I would hesitate to say so.

Mr. Smith: Well, there was a million and a half dollars involved on one side, wasn't there?

Mr. Histed: On paper, yes.

Mr. Smith: And that was gotten rid of?

Mr. Histed: Yes.

Mr. Smith: And a huge mass of testimony taken and a great many things presented by the pleadings and he had disposed of the litigation?

Mr. Histed: Yes, sir.

Mr. Smith: And—maybe I am putting it improperly—but there is a spread between the opinions of lawyers as to the value of services?

Mr. Histed: Very decidedly in this case, apparently.

Mr. Smith: And you say $3,500.00, but you wouldn't say $7,500.00 in that case was an unusual fee to be rendered by a lawyer?

433 Mr. Histed: If Mr. Mecartney charged $7,500.00 for his services there and got paid I wouldn't undertake to quarrel with him about it.

On redirect examination by Mr. Rosenberger, Mr. Histed testified as follows:

Mr. Rosenberger: I now offer in evidence as Exhibit 4, Mr. Mecartney's bill to the Guardian Trust Company, dated February 19, 1908, addressed to its Executive Committee, the same being Exhibit 38 in the Mecartney record, appearing at pages 453 to 457, inclusive. Here is what is said in regard to the Texas case:

"The Channel & Dock Company, Texas case, was compromised nearly three years ago for less than $30,000.00 and represents a finality as respects benefits received by the Trust Company. The fees easily earned in bringing that complicated $1,500,000.00 claim to an end (my assistants cost me $1,500.00 not included in the above figures) were not less than $5,000.00.; expended as to charge—$5,000.00.

Mr. Histed: In this litigation down in Texas, a receivership was granted upon the original bill of the Barnett & Record Company. In that receivership, the property was administered up to the time it was sold at foreclosure and conveyed to the successor company, the Port Arthur Canal & Dock Company. In that receivership, there was the usual crop of interventions and administrative orders and a great many pleadings estimated by Mr. Smith at around three

hundred. (Mr. Smith: I got it from Mr. Mecartney.) The Guardian Trust Company did not have anything to do with these pleadings made up on interventions of outsiders and other people who had claims against the company. The main pleadings that concerned the Guardian Trust Company were the bill of complaint of the Barnett & Record Company, the answer filed by the Guardian Trust Company thereto and the cross bill filed by the Canal Company and the intervention of the Provident Company asserting a big claim against the Guardian.

S. B. WILLEY, being produced as a witness on behalf of the Guardian Trust Company, first duly sworn, testified
434 on direct examination by Mr. Rosenberger in substance, as follows:

My name is Sidney B. Willey, 3653 Bellview Avenue, Kansas City, Missouri. I first became connected with the Guardian Trust Company about 1894 or 1895. Its name at that time was Missouri, Kansas & Texas Company. I belive it was originally incorporated in 1887 under the name of Real Estate Trust Company, and then by a change of name in 1889 became the Missouri, Kansas & Texas Trust Company, and in 1899, the Guardian Trust Company. It was the same concern all the time, so far as I am aware. My first employment with the company was as auditor. I don't remember how long I continued to be auditor but was afterwards made Secretary and then became Treasurer and then became Assistant Treasurer and member of the directory. I was officially connected with the Guardian Trust Company up to November 30, 1900, when Judge Black was appointed Receiver. At that time I was acting as Auditor and Secretary. When the court appointed Judge Black, receiver, Judge Black sent for me and asked me to go to Chicago and take charge of the property of the company that was then there with a view of undertaking to close out the Chicago office and remove things to Kansas City which was eventually done, and then at his request, I continued with him as a sort of right hand man for him until his death in May, 1902. Then Wash Adams was continued as Receiver of the company until his discharge by the court on October 4, 1902. When the receivership was lifted, it was understood and ordered, in fact, that the company should not continue in new business but should liquidate its affairs and clean up what it had. That liquidation was to be done by the executive committee that had been appointed by the Board of Dirtcors. I was a member of the Executive

Committee. At the annual meeting in October, 1904, I was elected Secretary of the Company and Mr. Harris was elected, President, and Judge Trimble was elected general counsel. At the annual meeting in October, 1905, a faction or group headed by Mr. Prescott succeeded in obtaining
435 control of the company and they elected their Board of Directors and afterwards appointed him to liquidate the affairs of the company. I had continued to be Secretary up to that time but stepped out when Mr. Prescott came in. That ended my official connection with the Guardian Trust Company as a corporation. I recall the application made in April, 1916, by the Shedds and other stockholders of the Guardian Trust Company for a receivership of the company. That resulted in Mr. Henry C. Flower being appointed receiver. Upon his appointment, I was named by him as Assistant to the receiver. I was with him about two years. During the period that I was Auditor and Secretary of the Guardian Trust Company, most of the disbursements made by the company for its corporate purposes, were placed before me for disposition and vouchers were prepared and recorded under my direction and passed over to the Treasurer and to that extent, the funds were disbursed under my direction. During the period of Judge Black's and Wash Adams' receiverships, the same method obtained, that is vouchers were prepared and passed by me and given the Treasurer for payment. When they were discharged as receivers, the executive committee generally passed upon the disbursements of any magnitude brought before them. During the period, October, 1904, to October, 1905, I handled the making up of vouchers, the same as I had done before. They were all passed by me but as I say, if there were matters of any magnitude, they were discussed by the Executive Committee and authorized by the Executive Committee and then vouchers were prepared and recorded in the usual manner. During the period from the appointment of Mr. Flower as receiver, up to the time I left his service, I had supervision of all details connected with the making of disbursements and with the taking of proper vouchers and receipts from the parties to whom disbursements were made. At all the times I was connected with the company or with its receivers, the company had a voucher system by which a voucher was prepared in favor of the party that was to
436 receive the money and the body of the voucher set out what the payment was to cover. Generally the vouchers showed very fully what the payments were made to cover. It was the practice in the regular course of busi-

ness to attach to the voucher, such explanatory papers as would throw light upon the disbursements and they would be filed away with the voucher and be part of it. I filed, at Mr. Rosenberger's request, and under his instructions, the data for the account and demand of the Guardian Trust Company for disbursements of its costs and expenses on file with the Master here.

Mr. Rosenberger: Did you in compiling that account get out of the files of the Guardian Trust Company all of the original vouchers which pertain to the items on that account and which are enumerated therein?

Mr. Smith: We object to this evidence, for the additional reasons in the former objection that it was entirely immaterial, and it does not make any difference how the account was gotten up. The question that is to be determined by the Master is what—that is to be determined by the Master, subject to objections we have made, is what services have been performed that may be charged as costs as between party and party or as between solicitor and client, if any such may be taxed; and it doesn't make any difference about the method of getting up this account; the account cannot be offered in evidence, cannot prove itself.

The Master: The objection will be overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel at the time duly excepted.

Mr. Willey: These voucher numbers are all collected in this statement I prepared here. The vouchers referred to in the statement and produced here before the Master are the original vouchers of the Guardian Trust Company which I got out of the files and from [—] the statement was compiled. In getting out these vouchers entries on the books of
437 the Guardian Trust Company showing that the disbursements shown by the vouchers had actually been made by the Company for the purposes stated in the vouchers and that is where I got the voucher numbers enabling me to find the particular vouchers covering disbursements. I got them off the books of account of the Guardian Trust Company and its various receivers. These books of account were kept in the regular course of business and were the entries made at the time the transactions occurred, as shown by the vouchers, and those vouchers were made up and issued in the regular course of business.

Mr. Rosenberger: I call your attention to abstract of the record in the Supreme Court of Missouri in suit of Harry S. Mecartney, respondent, vs. Guardian Trust Company, appellant the decision of which has been introduced in evidence and particularly the plaintiff's Exhibit No. 1 annexed to Mr. Mecartney's petition in that suit referred to in the first count of that pettition, and also call your attention to the count that is the subject matter here of investigation, and particularly to that feature thereof which enumerates certain items of disbursements by designating them as MeCartney items, and ask you how you compiled the account and the meaning of the expression "Mecartney Item Number", as it appears on the account before this Master?

Mr. Willey: As we have no regular vouchers of the ordinary character for things of that kind, and the only information I could get of them was in this bill of Mr. Mecartney's, I listed them as Mecartney items so as to distinguish them from ordinary Guardian Trust Company vouchers. The Guardian Trust Company was charged with and required to pay and did pay these items designated on the account as the Mecartney items. I was assistant to Mr. Flower, Receiver, at the time the Mecartney judgment was paid.

Mr. Smith: The Kansas City Southern Railway Company and the Cambria Steel Company object to the introduction of any evidence in support of each and all of said Me-
438 cartney items, being items numbered 110, 112, 113, 115, 118, 201, 211, to 245, inclusive, and 251 to 411, inclusive, on the grounds set forth in numbered paragraphs 1 to 10, inclusive, of their written statement of objections. We further object to Item No. 112, covering the amount paid to C. O. Tichenor for these additional reasons:

(1) The services rendered by Mr. Tichenor were rendered not to aid in this litigation but to assist counsel for the Trust Company in retaining the confidence of the Trust Company in himself.

(2) It appears from the opinion of Judge Johnson that only $250.00 was paid Mr. Tichenor. (Mecartney record, page 1435). We further object to any and all evidence in support of item No. 115, covering the amount paid to C. O. Aldrich for the reason that services rendered by Mr. Aldrich were rendered not to aid in this litigation, but to assist counsel for the Trust Company in retaining the confidence of the Trust Company in himself. We further object to any and all evidence in support of Item No. 201, covering a premium

on the appeal bond on the appeal taken by the Trust Company from orders prior to the final decree of June 25, 1910, for the following reasons:

(1) Said appeals were taken by the Trust Company which fact is conclusive evidence that there were reasonable grounds for the contetnions made by the Southern Company on those issues.

(2) Said appeals were improvidently taken by the Trust Company.

(3) The costs of said appeals were taxed by the Court of Appeals and the District Court has no authority to retax the same or to tax other costs in addition to those taxed by the Court of Appeals. In objecting to any evidence in support of Items 278 and 284, we ask that the parties to whom such payments were made be produced for cross-examination.

The foregoing objections were, by the Master, overruled, to which ruling, said parties duly excepted.

Mr. Willey: Voucher No. 1203, covering Item No. 135, was prepared under my direction and was approved by me.

439 Mr. Crane: We object to the recital in the voucher as not proving itself that these services were rendered in the Cambria Steel Company case, because the record already in evidence shows that that is not the fact; shows it was for other services in other cases besides the Cambria Steel Company case.

The Master: The objection is overruled. The voucher was put in evidence some time ago in connection with Mr. Leavens' testimony and is relevant at this time. Still I won't preclude you against objecting at this time; the objection is overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Smith: I move to strike it out, if it has been admitted in evidence, for the reason stated by Mr. Crane.

The Master: The objection is overruled. The Master does not overrule the objection on the theory that it is binding on the Kansas City Southern or the Cambria Steel Company but it is evidence of the thing and purpose for which the voucher was issued.

Mr. Smith: We contend not properly, because we contend, as shown by Mr. Histed, it included litigation in the Texas case and a good deal of other litigation which has nothing to do with this case.

The Master: The Master has already excluded that case.

Mr. Smith: I know, but this judgment includes the Texas case and several other cases and considerable other service rendered.

The Master: Proceed, Mr. Rosenberger.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Willey: Judge Trimble was counsel for Judge Black, Receiver, during the period named in Voucher No. 146, covering Item No. 82 of the account. The Cambria bill was
440 filed September 6, 1900. I think the administrative part of the receivership, including a good deal of the legal work, was done by Judge Black himself. He was often in consultations with Judge Trimble. Judge Black would go up to his office and have Judge Trimble down in the office of the Receiver. I was very often called in consultation with them on matters that they were discussing. I was very often called by Judge Trimble to his office regarding the preparation of necessary data in the case and worked together with him on the litigation. From my observation, Judge Trimble was putting in most of the time that he was in the building either in his own office or down in the Receiver's office on the Cambria case. He would call me every little while up there. He didn't take up any matters with me in any case except the Cambria case. I had numerous and constant consultations with Judge Trimble about the company's litigation but only in connection with the Cambria case.

Mr. Rosenberger: Now there is a charge made in this account on this Cambria case of three-fourths of the amount paid to Judge Trimble by way of allowance made by Judge Thayer; I will ask you to state whether it was within your observation that Judge Trimble was giving at least three-fourths of the time he spent as counsel for Judge Black and Wash Adams, receivers, to this Cambria suit?

Mr. Smith: I object to that.

Mr. Willey: I would say, yes.

Mr. Smith: Wait a minute: I object to that question as calling for a conclusion of this witness on a matter he is not qualified to answer; that he cannot tell what was the nature of the service that was rendered, because he is not a lawyer. It is not shown here that he was with Judge Trimble in the performance of all of the work of Judge Trimble's; don't see how he can be qualified to make any estimate.

The Master: The objection will be sustained, I think.
441 We have already had Mr. Braley, he is far more competent to testify about that than this witness.

Mr. Rosenberger: Is the Master ruling that because he thinks some witness is perhaps better qualied than another that, therefore, the other witness cannot testify at all?

The Master: No, the Master is not making such a ruling; but the Master is ruling this witness does not appear to the Master to be qualified on the subject you asked about. I sustain the objection.

Mr. Rosenberger: I just don't want the Master to be misled by the argument of Mr. Smith's. I am not asking this witness as to the value of Judge Trimble's services; that is not the question. I am asking him for the proportion of the time he spent that was within his observation.

The Master: The Master still thinks he will have to sustain the objection, because he don't believe that a layman could qualify to tell, from merely going from office to office and observing the apparent activities of a lawyer; just what he is devoting his time to.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted.

Mr. Rosenberger: Mr. Willey, did you hear the Master's statement that you are basing your opinion just by going from office to office and, if so, is that a correct statement, that you are basing your opinion just simply by seeing him in his office or his seeing you in your office?

Mr. Willey: No. My opinion is based on the fact that Judge Trimble would call me there and have consultations with me on what he thought was necessary to be required to be done in the Cambria case. And I would prepare statements in various ways and take them up and we would discuss them together. Sometimes he would want those phrased different and I know I spent all of my time and from my ob-

servation—that is all I can make the statement on—I think that he spent pretty near all of his time for months on doing nothing but this Cambria steel case business. I don't
442 see how he could have time to do anything else.

Mr. Smith: I object to that answer and move to strike it out, because it is a conclusion of the witness and an argument, because the witness isn't qualified to determine what the character of the business was that Mr. Trimble was doing.

The Master: Your objection is overruled. I think he has shown himself to be qualified to state what proportion of the time he spent on it.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Willey: These consultations with Judge Trimble were had every day. I recall that Judge Philips appointed Judge Douglass as Special Master to take the testimony in the Cambria suit about April 1, 1902. My entire time and about every night was devoted to making up an accounting of the items referred to in that suit. That accounting involved a mass of subsidiary companies in addition to the accounts between the Guardian Trust Company and the Kansas City Suburban Belt Railway Company. Among those subsidiary companies was the Kansas City & Independence Air Line, the Consolidated Terminal Railway Company, the Union Terminal Railway Company, the Central Improvement Company, the Fairmount Amusement Company, the Northern Townsite Company, the Kansas City Terminal Construction Company, the Missouri Elevator & Terminal Company. All of these other companies were made defendants to the bill of the Belt receivers. The accounts which I prepared extended, in a general way, from the organization of these railway companies and the Trust Company. The Receivers of the Belt Company and afterwards The Kansas City Southern Company challenged each and every transaction those companies ever had between them. The accounting involved the disposition of all the securities issued by those railroad companies and the various subsidiary companies. These
443 securities had been issued to the extent millions of dollars and had been sold and marketed through the financial agency of the Trust Company at that time called the Missouri, Kansas & Texas Trust Company. The Trust Company in that proceeding was required to account for its disposition of those securities and for what it had done with the

proceeds. It had been the practice for the Trust Company to make disbursements on behalf of these various railroads and their subsidiaries and the transactions were thousands in number. Then too, there were particular items which were the subject of challenge such as the Degoigen matter involving about $89,000.00 which was a complex intricate transaction. It was necessary for me to examine and ransack all those accounts and get out vouchers on them. Virtually all of this work in preparation of these hearings, was done under Judge Trimble's directions. I would take the matters up with him and if something came up I was not clear about, would consult with him. On top of that, Judge Trimble was getting information and data from me as to the state of these accounts so he might prepare his answers and pleadings in the court and also getting information from me as to the history of the various dealings that the Trust Company had had with the reorganized committee which had charge of the reorganization of the Kansas City, Pittsburg & Gulf. All of these matters bore on this Cambria suit. I have a very vivid recollection of the hearings before Judge Douglass which began in January, 1903. I was present at all of them. I prepared, in tabulated form, the entire accounting as between the companies, some forty or fifty volumes of it, and then I was examined upon all of these various tabulated statements, about particular vouchers and cross-examined and re-examined for hours and hours and hours, day after day, and then at night I would prepare additional data to have ready for future hearings which was a matter of days and nights for months and months. Judge Trimble was always present in all of these hearings, conducting examinations. Wash
444 Adams was with him only part of the time after he ceased to be Receiver. I had very many meetings with Mr. Doran who had been auditor of the Kansas City Suburban Belt Railway Company examining the Belt books and in consultation with him. This also was in connection with the Cambria case. My whole time was devoted to this matter during that period. Judge Trimble was present at every one of those hearings, actively in charge of the litigation. He had with him at times, Mr. Eaton, and after Mr. Wash Adams ceased to be Receiver, he appeared at the hearings with Mr. Trimble.

On Monday, Feb. 4, 1924, at 9:30 o'clock A. M., S. B. Willey resuming the stand on behalf of the Guardian Trust Company, further testified in substance, as follows:

Mr. Rosenberger: I call your attention to Item No. 109 on this account reading: "To Wash Adams in settlement of

his bill for services in Cambria case." Did you pay that $6,000.00 in person to Mr. Wash Adams in the form of a check of the Guardian Trust Company?

Mr. Smith: The Kansas City Southern Railway Company and the Cambria Steel Company object to the introduction in evidence of any testimony in support of Item No. 109 on the grounds said property in numbered paragraphs 1 to 10, inclusive, of their written statement of objections and in support of their objections to said evidence, asked that the Trust Company and its Receiver be required to produce the letter of Wash Adams of June 10, 1904, set forth on page 298 of the record in the case of Trimble & Braley vs. Guardian Trust Company, 244 Mo. 244, in which it is shown that the services for which Mr. Adams was paid were not confined to this litigation but that Mr. Adams in requesting the payment of his fee stated the amount of his claim as being $3,000.00 for services in the Cambria case and $3,000.00 in the Texas case.

The foregoing objections were, by the Master, overruled, to which ruling, said parties duly excepted.

445 Mr. Willey: I think the check was signed by Mr. Charles Hastings at that time Treasurer. Whether I took it over to Mr. Adams office or not at the time, I don't remember. I negotiated a settlement with Wash Adams which resulted in this payment of $6,000.00, having been requested by the Executive Committee to visit Adams and see what I could do with him regarding a compromise of the claim which he had put in for a considerably larger sum. I talked with him and reported back to the Committee what Mr. Adams and I had agreed upon and the committee authorized the payment of the amount to Mr. Adams. My recollection is that Mr. Adams' claim was to cover both the Texas case and the Cambria case, and in my negotiations with him, there was nothing said as between the two cases. It was simply a matter of compromise, settlement in full for the amount that he claimed. I don't know what his services were in the Texas case. I do know that he was very attentive upon the hearings in the Cambria case. It is my recollection that Mr. Adams at all times after his discharge as Receiver in October, 1902, and up to the time that Mr. Mecartney was employed, was working with Judge Trimble on the Cambria case.

Mr. Rosenberger: Now, I want to inquire of you in reference to charges made in Items 180 and 181 relating to your own time and services that you were putting in on the Cam-

bria case and to the time and services that were put in by Miss Jennie L. Gott, stenographer.

Mr. Smith: The Kansas City Southern Railway Company Cambria Steel Company object to any and all evidence in support of Items 180 and 181 on the grounds set forth in numbered paragraphs 1 to 5, inclusive, and 7 of their written statement of objections, and on the further ground that it appears that those items cover the salaries of officials and employees of the Trust Company and its Receiver and they may not be properly charged or taxed as costs in any event even if costs as between solicitor and client may be taxed, in this case.

The foregoing objections were, by the Master, overruled, to which ruling, said parties duly excepted.

446 Mr. Willey: Jennie L. Gott was a young lady who had been in the employ of the Guardian Trust Company for a long time and with the Missouri, Kansas & Texas Trust Company, its predecessor, as a stenographer in the office. After I was called upon to make these tabulated statements showing the various transactions between the different companies relating to the Cambria suit, I would prepare them in pencil the night before and give them to her to tabulate and to get in shape to place before the attorneys in the hearings before the Master on the succeeding days. She devoted her entire time to preparing those statements and had no opportunity to do anything else. More than one-half of my time during the period from Dec. 1, 1900 to June 1, 1901, was devoted to the preparation of the data relating to the Cambria suit. I did the work of an expert accountant but I was not paid any amount that would cover any such thing as that. That is to say, I was paid the salary specified in Item No. 180, but as a matter of fact, was rendering services worth a great deal more than that. From June 1, 1901 to December 1, 1904, my time was entirely devoted to examining the records and books and preparing tabulations therefrom for use of the Receiver and counsel of the Trust Company at the hearings before the Special Master and in assisting the Trust Company and its receivers in said suit in attendance upon such hearings as an expert witness. The statements contained in Item No. 181 of the account relating to the services of Miss Gott are correct statements of fact. She worked down there under my direction and observation.

Mr. Rosenberger: In compiling this statement of account here that is the subject matter of injury on what basis did

you prepare that statement with reference to the items of charge therein so far as the nature of the disbursement is concerned and the case to which it was applicable?

447 Mr. Smith: I object to this question on the ground that it is imposing upon the witness the duty and the power to determine the issue that is for the Master to determine in this case, that is, what items are to be charged and what are not, if any of them are to be charged; calling for the conclusion and opinion of the witness. It submits to Mr. Willey the power to give his conclusions as to what he thought constituted the proper items to be entered.

The Master: Of course, the inclusion of what Mr. Willey's theory of making this account, wouldn't be binding at all upon you, but he is an expert accountant and I think he may testify as to how he made up his account, from what documents and from what sources and how he arrived at it and whether the vouchers were examined and whether he took vouchers that showed on their face what they had been expended for, and so forth.

Mr. Crane: I want to make the further objection that it is wholly unnecessary and does not prove anything. He has made up his account and the vouchers and items are here. Such ones as he wants to introduce evidence about, he can introduce. Such items as we want to attack, we can do so. It doesn't make any difference about the theory; they show on their face what they are, the vouchers and book accounts. Now what possible good can be accomplished or what proof, I don't see. The accounts are here and the vouchers are here.

The Master: Of course, he didn't put in this account all the vouchers or all the items that the books showed, only those as an expert accountant he deemed applicable. I don't think it has very great weight.

Mr. Rosenberger: I am not asking what he deemed applicable. I am asking him if he put in what the books showed were applicable.

Mr. Smith: Isn't that the same thing? Isn't he passing on the books?

The Master: Read the question, please.

448 (The last question propounded here read).

The Master: The objection will be overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Willey: The vouchers which apply to the case in question were gotten out and entered by me on this account. Items which appeared to me to be foreign to the Cambria case, I did not include in any of the items in this account.

Mr. Rosenberger: Going back to the Item No. 134, being the item of $15,000.00 paid to Fred W. Lehmann by order of the United States District Court made November 24, 1917, you may state whether that disbursement was made by you on behalf of the Receiver, Flower, upon presentation of an order by the Court requiring its payment.

Mr. Smith. We object to the introduction of any evidence in support of Item No. 134 on the grounds set forth in numbered paragraphs 1 to 10, inclusive, of our written statement of objections, and in addition thereto, we want to clearly present to the Master that we are objecting to any effort to tax the costs in this court for services rendered in some other court, that other court being the only one which has any right to tax any such costs.

The foregoing objections were, by the Master, overruled, to which ruling the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

Mr. Willey: Yes, the $15,000.00 payment to Mr. Lehmann was made by me on behalf of the Receiver upon presentation of an order by the Court requiring its payment.

449 Q. Where you present testifying as a witness for a long or short period of time?

A. Why, I once said I was three hundred and sixty-five days on the stand, except four hours, and I don't (didn't) get very far away from it. I think the record shows the number of days, hearings we had before the Master. The Master was not always there, however. (p. 413).

On cross-examination by Mr. Smith, Mr. Willey testified as follows:

Q. Mr. Willey, in giving your evidence here did you state you were a witness for three hundred and sixty-five days, less four hours?

A. Well, that was a joke, of course—

Q. How long were you actually a witness?

A. Well, the record shows the time I appeared before the hearings.

Q. I am asking you for your recollection about it.

A. I can't remember that, Mr. Smith.

Q. You are not able to state that?

A. Not definitely, no.

Q. As a matter of fact, you only testified on twenty-three different days under Mr. Trimble's administration of the case, did you not?

A. I should think more than that—

Q. And then during Mr. Mecartney's administration you testified seven more days?

A. That I wouldn't say. The record would have to speak for itself— (pp. 430, 431.)

Mr. Smith: When you testified a few moments ago Mr. Adams didn't begin attending the hearings until after
450 his discharge as receiver, the fact of the matter is the hearings didn't begin until the third of January, 1903, did they?

Mr. Willie: Well then, he began to attend them when they began.

Mr. Smith: In the meantime or during all the time that this litigation was on hand there was much work for Trimble & Braley and for Judge Black in the Bierce case, was there not?

Mr. Willey: There was much work?

Mr. Smith: Much work, yes?

Mr. Willey: Why, I should imagine there was, yes.

Mr. Smith: It took a good deal of time, did it not?

Mr. Willey: I should think so, yes.

Mr. Smith: And that continued all during the time you were connected with the Guardian Trust Company, did it not?

Mr. Willey: Yes, sir.

Mr. Smith: Didn't you perform services in the Bierce case too?

Mr. Willey: I prepared these statements.

Mr. Smith: I am speaking of the Bierce case now?

Mr. Willey: I supposed the Bierce and Cambria cases were all one.

Mr. Smith: Oh, then in speaking of the time Judge Trimble was giving to the Cambria case your answer was on the basis that the Cambria case and the Bierce case were all one piece of litigation?

Mr. Willey: I understood they were, yes.

Mr. Smith: And your answers are based on that assumption?

Mr. Willey: Yes.

Mr. Smith: At this same time and during this period there were certain foreclosure suits that were brought by the Provident Company against the Belt Company and its constituent companies, were there not?

Mr. Willey: Well, I presume so. I don't remember exactly about those.

Mr. Smith: Well, you know there were foreclosures of the Belt mortgages and Terminal mortgages and Consolidated Terminal?

451 Mr. Willey: Yes, sir.

Mr. Smith: And several suits growing out of that or on account of those foreclosures, several foreclosure cases?

Mr. Willey: So I understand.

Mr. Smith: And those were matters that took time and attention also of Trimble & Braley?

Mr. Willey: That I could not say. I wasn't connected with the companies that brought the foreclosure suits against them directly.

Mr. Smith: Well, you were observing the business that Mr. Trimble was doing and the amount of time that he was giving to this litigation and I am asking you if you know about such cases?

Mr. Willey: I don't know what time he gave to those cases. I wasn't connected with them.

Mr. Smith: Those were suits brought by the Provident Life & Trust Company to foreclose the mortgages of those companies and I am asking you—

Mr. Willey: (Interrupting) Whom did they bring suits against?

Mr. Smith: They brought them against companies who had given the mortgages.

Mr. Willey: I wasn't connected with those companies.

Mr. Smith: Wasn't the Trust Company interested in those suits and wasn't Mr. Trimble working on them, Trimble & Braley?

Mr. Willey: I presume they were working on the bonds.

Mr. Smith: Weren't Mr. Trimble and Mr. Braley giving some time and attention to those cases?

Mr. Willey: I could not say. I don't know.

Mr. Smith: You wouldn't say Trimble & Braley were not devoting some of their time to that litigation?

Mr. Willey: I haven't said they were not. I don't know.

Mr. Smith: At the same time and during this period of time, the Guardian Trust Company was foreclosing a
452 mortgage against the Kansas City, Shreveport & Gulf Railway Company too, was it not?

Mr. Willey: There was some litigation of some character that was up.

Mr. Smith: That was being handled by Trimble & Braley, was it not?

Mr. Willey: I presume so, I don't know. I could not tell you about that.

Mr. Smith: They had also brought foreclosure proceedings against the Texarkana & Fort Smith Company for the Guardian Trust Company?

Mr. Willey: That may be. I could not tell you definitely about that.

Mr. Smith: And you know that they were also engaged in prosecuting and defending litigation with reference to the Port Arthur Channel & Dock Company properties?

Mr. Willey: I tell you I had nothing to do with that case. I don't know who was defending it or what arrangements were about it at all.

Mr. Smith: You had filed an intervening petition in that case for your services?

Mr. Willey: My services.

Mr. Smith: Didn't you?

Mr. Willey: I don't think so.

Mr. Smith: You signed a release for the amount that was sued for in your intervening petition, didn't you?

Mr. Willey: Well, I wouldn't remember; possibly it was so, but I don't remember.

453 (On direct examination Mr. Willey had testified as follows: Q. Now, during that period last inquired about I will ask you if you recall, in fact, whether you will ever forget, your experience during the taking of testimony before Judge Douglass, which began in January 1903? A. I have a very vivid recollection of such hearings. I was present at all. p. 413.)

Mr. Smith: That was not indelibly stamped upon your memory as part of this transaction; now you have stated—I am skipping around improperly in this examination, but it is done in an effort to try to speed on. You have stated here that Jennie L. Gott was engaged as stenographer and she spent her time copying these reports that you made to be used as evidence?

Mr. Willey: Yes.

454 Mr. Smith: And you say that all of her time for three or four years was devoted to that?

Mr. Willey: I do.

Mr. Smith: Every day?

Mr. Willey: Whatever that period is that is covered there.

Mr. Smith: And you say this young woman as stenographer was engaged for several years in doing nothing but copying statements you were getting up?

Mr. Rosenberger: I object to that, for the reason the exact period was stated to the witness.

Mr. Smith: This exact period, Mr. Rosenberger, I can't carry it in my mind.

The Master: Forty-eight months; six months half time and forty-two months full time; isn't that right?

Mr. Smith: I haven't that statement with me.

Mr. Rosenberger: Just for a minute: It is full time from June 1, 1901 to December 1, 1904.

Mr. Smith: That was the question I asked you when I was interrupted; I said several years.

Mr. Smith: She didn't do anything else except copy your statements?

Mr. Willey: Not that I know of.

Mr. Smith: Your statements were offered in evidence in the case, weren't they?

Mr. Willey: Yes, sir.

Mr. Smith: The ones that she copied?

Mr. Willey: Yes, sir.

Mr. Smith: You are serious in that answer? You are not joking when you tell about the time she was devoting, every day from June 1st—

Mr. Willey: (Interrupting) All the time I was preparing this evidence, she was putting in her entire time.

Mr. Smith: Now just a moment, I want to get those figures again. I don't want to be mistaken: I will ask you
455 again if your statement is that from December 1, 1900 to June 1, 1901, she was devoting at least one-half of her time to the copying of your tabulations?

Mr. Willey: Yes.

Mr. Smith: And from June 1, 1901 to December 1, 1904, she was devoting all of her time to that service?

Mr. Willey: I don't know anything else she was doing.

Mr. Smith: I am asking you now if you are testifying she did do that thing?

Mr. Willey: Yes.

Mr. Smith: You are positive about that, are you?

Mr. Willey: Yes, sir.

Mr. Smith: Where is Jennie L. Gott?

Mr. Willey: I can't tell you. I haven't the slightest idea.

Mr. Smith: When did you last hear from her?

Mr. Willey. [Of], four, five, six years ago.

Mr. Smith: Was she living here in Kansas City at that time?

Mr. Willey: Yes, sir; she and two or three sisters.

Mr. Smith: You don't know of her having left here or departed this life?

Mr. Willey: Haven't the slightest idea.

Mr. Smith: How many hours a day did she work, what were her office hours?

Mr. Willey: Well, she was down there from about eight thirty to four thirty; sometimes as late as five o'clock.

Mr. Smith: Now this work you did: did you have any assistants; that is, any men to assist you in doing your work?

Mr. Willey: Nobody.

Mr. Smith: None of these men that were working for Judge Black were doing anything of that kind?

Mr. Willey: No, sir.

Mr. Smith: It took your undivided attention then when you were doing that work?

Mr. Willey: Yes.

456 Mr. Smith: And the statements that she was copying were statements that you wrote out?

Mr. Willey: Yes, sir.

Mr. Smith: So that the writing of these statements kept you very fully occupied during that period of time?

Mr. Willey: Yes, sir.

Mr. Smith: You were spending—

Mr. Willey: (Interrupting) Not writing statements, but compiling them; getting information, data, to make them up.

Mr. Smith: During the time that you were getting this evidence, most of the time you were getting this material you were testifying as a witness for Mr. Hagerman, were you not?

Mr. Willey: I have always understood that I was subpoenaed as a witness by Mr. Hagerman.

Mr. Smith: And it was he that was asking for these various statements after you began your evidence?

Mr. Willey: Yes, sir.

Mr. Smith: Were those statements that you were consulting with Mr. Trimble about so constantly?

Mr. Willey: The examination and re-examination brought out these statements.

Mr. Smith: And you were consulting with Mr. Trimble about making up these statements as requested by Mr. Hagerman?

Mr. Willey: When there was questions came up I wanted some decision on, yes.

Mr. Smith: Now: In getting out these vouchers you have spoken of did you get out each of the vouchers, showing payment in some of these claims?

Mr. Willey: Yes, sir.

457 By Mr. Smith:

Q. Outside of the Mecartney items and outside of the salary items all of these vouchers are vouchers that are issued under bills rendered or to settle some claim made by somebody in the business, are they not?

A. I should say so.

Q. They pertain to payments on account of past transactions?

A. I should say so.

Mr. Rosenberger: There are some that apply to judgments rendered against the Trust Company, aren't there?

Mr. Smith: Aren't they past transactions, Mr. Willey?

Mr. Willey: I suppose judgments on something that happened in the past; wouldn't happen on the day that the judgment was rendered, I don't consider.

Mr. Willey: Mr. Lloyd referred to in voucher No. 3249 covering Item No. 428, was one of the directors of the Guardian Trust Company in New York. I was not connected with the Trust Company at the time this voucher was
458 made up. Mr. Prescott was then in charge and in possession, and the voucher was not prepared by me.

Mr. Smith: Item 84, Mr. Willey, is to J. McD. Trimble, $500.00; I will get you to state what does the voucher show it was for?

Mr. Willey: Salary as a general attorney for the month of November, 1902.

Mr. Smith: Is there anything on that voucher that shows what service was rendered?

Mr. Willey: No, sir; salary as general counsel.

Mr. Smith: Mr. Rosenberger, may we have an understanding that vouchers covering items 83 to 107 are similar to that?

Mr. Rosenberger: Yes, sir; absolutely.

The Master: All those items from 83 to what?

Mr. Smith: 83 to 107, inclusive.

Mr. Smith: Mr. Willey, this Item 108 says: "H. S. Mecartney payment on account $5,000.00", what does the voucher show services were rendered for?

Mr. Willey: Services in Kansas City Suburban Belt Suit and other litigation of the Trust Company.

Mr. Smith: And other litigation of the Trust Company; you don't know what that other litigation was, of course?

Mr. Willey: No, I do not.

Mr. Smith: This voucher 960 is accompanied by letter of Mr. Mecartney's, is it not, attached to it?

Mr. Willey: Yes, sir.

Mr. Smith: I want to offer from this letter attached to the voucher this statement—

The Master: (Interrupting) You are offering the whole letter?

Mr. Smith: No, sir; just this statement in the letter, don't want to encumber the record with anything more:

"My prophesies as to an earlier ending of the account-
459 ing case have not come true. However, the Texas case was gotten out of the way much earlier than I anticipated and in a very profitable manner."

The date of that letter being September 18, 1905.

Mr. Smith: Mr. Willey, this Degoijen transaction that Mr. Rosenberger asked you about, he spoke of as being a very intricate transaction. Did not the Degoijen transaction consist of certain false entries on the books of the Trust Company and the Belt Company for the purpose of declaring a false dividend by the Belt Company, for the purpose of giving a false market value to the stock of Belt Company for the benefit of the Trust Company and Mr. Degoijen.

Mr. Rosenberger: That is objected to as an effort to retry the case of Cambria Steel Company, vs. The Kansas City Southern.

Mr. Smith: I am offering to prove these facts by this witness: In 1897 the Belt Company had a large floating indebtedness and was insolvent. In order to bolster up the market for the sale of Belt securities, Mr. Degoijen and Mr. Stilwell had the Belt Company get rid of its debts and declare a dividend. This was arranged by the Trust Company and Mr. Degoijen presenting the Belt Company with some cash and too Mr. Degoijen presented the Belt Company with some securities and then bought some of them back, promising to pay for same at an agreed price. They also arranged that certain notes, aggregating $89,333.33, with some other notes, all owned by the Belt Company, should be taken off of the Belt Company's books as liabilities and be assumed on the Trust Company's books as liabilities of the Trust Company; this being shown on the books of the two companies. A dividend was declared by the Belt Company and paid by the Trust Company and charged to the account of the Belt Company. The Trust Company as a Belt stockholder received part of this dividend. A financial statement was published, showing the Belt Company to be solvent, the notes above referred to not being included in its liabilities.

The statement further showed a surplus from earn-
460 ings and a dividend declared therefrom. In 1899—

The Master: (Interrupting) Pardon me: that is already in that form?

Mr. Smith: I am offering this as part of the testimony of this witness: It is stated in the offer but in a different form. In 1899, after the Gulf Company had gone into the hands of a receiver and when it was anticipated the Trust Company would lose its control over the affairs and over the management of the Belt Company the Trust Company restored said notes as debts of the Belt Company and discharged itself from all liability on account of them; but no consideration was shown for this release by the Trust Company of two companies.

Mr. Crane: If you will allow us to show those facts they will be shown.

Mr. Rosenberger: The offer is objected to, because it is an attempt to reopen the Cambria Steel Company case, so called, being litigation decided by the United States Circuit

Court of Appeals and affirmed by the United States Supreme Court.

The Master: Well, that is the first ground of your offer, as I understand?

Mr. Smith: Yes.

The Master: The Master sustains the objection on the first ground.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

The Master: Now on the second ground, you contend the testimony will be relevant to the Wilcox item of this account?

Mr. Smith: Yes, sir.

The Master: The Master will sustain the objection on both grounds but will permit, at the proper time, the Kansas City Southern Railway Company or the Cambria Steel Company to produce any evidence going to the propriety of this charge of Wilcox as an item of disbursements, to which ruling of the Master, the Kansas City Southern Com-
461 pany and the Cambria Steel Company duly excepted.

Mr. Smith: Mr. Willey, isn't it a fact that you, yourself, were of the opinion that this Degoijen item of $89,333.00 would have to be allowed in favor of the Belt Company?

Mr. Rosenberger: That is objected to for the same reasons.

The Master: The objection is sustained.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Smith: I want to offer to prove by this witness that he, as an expert, as auditor of the Trust Company, was of the opinion that this Degoijen item of $89,333.00 ought to be allowed as a credit.

Mr. Rosenberger: I object to that offer for the same reasons.

The Master: The objection is sustained, on the ground you are trying to open something previously adjudicated by the courts to whom this Master is, properly, compelled to bow.

To which last ruling and action of the Master in sustaining the objection to the offer of proof, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

On redirect examination by Mr. Rosenberger, Mr. Willey testified in substance, as follows:

Mr. Rosenberger: And you have testified here also to the amount of time you were giving and Miss Gott was giving in the Cambria suit and that Judge Trimble was giving to the Cambria suit; when you testified what was the time they were giving to the Cambria case you testified that was the time they were giving to that suit and the Bierce suit combined?

Mr. Willey: It was the Cambria suit.

462 Mr. Willey: In explanation: these things happened so long ago I got confused in thinking the Bierce case was the starting of the Cambria case. I remember now that the Bierce case was a case for the appointment of a receiver for the Guardian Trust Company; that the Cambria case was another thing in itself. But, as I say, things happened so long ago that it appeared to me at that time as though the Cambria case was simply a continuation of the Bierce case, change of title, or something of the kind. But I remember distinctly now that the Bierce case was a case for the appointment of a receiver for the Guardian Trust Company, that took place before Judge Thayer in St. Louis and that there was no time put in by me on the Bierce case, excepting attendance with attorneys before the court in St. Louis and preparing some data for Mr. Chadbourne and Judge Trimble and St. Louis attorneys who were presenting a defense against the application for the receiver.

Mr. Rosenberger: So far as the Bierce case was concerned, that was purely a matter of business liquidation under the receivership of Judge Black and Wash Adams?

Mr. Willey: Yes, sir.

Mr. Rosenberger: Mr. Willey, referring to Mr. Mecartney's employment, to refresh your recollection, I will ask you if you can recall being present at a meeting of the executive committee of the Guardian Trust Company, held on the fourth of November, 1904, and of the following occurring as recited in its minutes:

"Mr. Mecartney, an attorney from Chicago, who accompanied Mr. Shedd to Kansas City at his request, was upon the suggestion of Mr. Shedd, invited to attend the meeting. Mr. Mecartney was here introduced to the members of the Committee, and in general conversation the matter of our litigation with the Kansas City Suburban Belt Railway Company was taken up. Mr. Mecartney stated that he thought he could review the case sufficiently to be able in about two weeks to advise the Committee as to what, 463 in his opinion might be the result of the litigation, and advise as to what action should be taken and also determine as to whether he could take charge of the matter if it was so desired by the Committee.

"Whereupon, on motion of Mr. Bradbury, it was voted, that Mr. Harry S. Mecartney, attorney, be employed by this committee to look into the claims of the Guardian Trust Company versus the Kansas City Suburban Belt Railroad Company with the view of furnishing this committee with his legal opinion in writing as to the amount we can reasonably expect eventually to recover providing no compromise be had."

You recall that occurring?

Mr. Willey: Yes, sir.

Mr. Rosenberger: Then do you recall at the next meeting of the executive committee, held on December 7, 1904, of the following occurring:

"Mr. Mecartney was invited to present his proposition as to employment by this company as counsel in the cases of this Company versus the Kansas City Suburban Belt Railroad and Port Arthur Channel & Dock Company.

"Mr. Mecartney presented his opinion as to the cases in printed form and verbally in a general way his ideas as to the action that should be taken in the matter in question, and offered the following proposition as to employment as counsel."

Here follows a proposition, saying, among other things: "I think that $5,000.00 would be an appropriate and moderate retainer"; do you recall that happening?

Mr. Willey: Yes, sir.

Mr. Rosenberger: And at the same meeting, the following occurred:

"Mr. Mecartney presented his bill for services and expenses in his review of the cases as submitted in his printed record, including a reasonable number of such printed reports, services $2000.00, expenses $277.71. Mr. Me-
464 cartney having withdrawn from the meeting, his proposition as to employment as counsel in the litigation in question and his bill for services and expenses in review of the cases as submitted in his printed report, was the subject of general discussion, and after quite an extended time so devoted to the matter, Mr. Mecartney was again invited to present himself and after discussing the matter with the Committee and making explanations in answer to some questions by various members of the Committee, he stated that in consideration of the proposal to employ him as counsel to carry on the litigation, he would amend his bill for services in the review and report upon the matters in question to read $1500.00 in place of $2000.00, so resulting in said bill for services and expenses being a total sum of $1777.51 instead of $2277.51.

"Whereupon on motion duly made, it was voted that the sum of $1777.51 be paid by Mr. Mecartney in full for such services and expenses.

"On motion duly made, it was voted that the proposition as presented by Mr. Mecartney as to employment as counsel, to carry on and take charge of the litigation of this company against the Kansas City Suburban Belt Railroad Company and the Port Arthur Channel & Dock Company, be accepted, and that he be and is hereby employed as such counsel; and that the sum of $5000.00 be advanced him to apply as retainer on account of expenses in such litigation."

Did that occur?

Mr. Willey: Yes, sir,

Mr. Rosenberger: And was Mr. Mecartney paid a fee of $1500.00 for making a preliminary report on the claims in the Texas case and in this Cambria suit?

Mr. Willey: That is my recollection.

Mr. Rosenberger: We offer in evidence, a stipulation dated February 4, 1905, in Cambria Steel Company v.
465 Guardian Trust Company, et al, reading as follows:

Guardian Trust Company's Exhibit No. 4.

Stipulation

"In the Circuit Court of the United States Within and for the Western Division of the Western District of Missouri.

Cambria Steel Company, Complainant,
No. 2468. vs.
Guardian Trust Company, et al, Defendants.

Receivers of the Kansas City Suburban Belt Railroad Company, Cross-Complainants,
vs.
Guardian Trust Company, et al, Cross-Complainants.

It is agreed by the parties to the above entitled cause that either party to this cause may use as evidence in this cause, all or any part of the testimony heretofore taken at Kansas City, and at Philadelphia, in the cause of Provident Life & Trust Company, Complainant, v. Port Arthur Channel & Dock Company, Defendant, consolidated with the cause of the Barnett & Record Company, Complainant, v. Port Arthur Channel & Dock Company, Defendant, now pending in the Circuit Court of the United States for the Eastern District of Texas. The use of said testimony, however, shall be subject to the right of any party to this cause to object to the same for incompetency, irrelevancy or immateriality, except that in the depositions taken at Philadelphia the copy of the record and minutes of the reorganization committee shall not be objected to because it is a copy, but the Guardian Trust Company shall have the right, if it so desire, to compare such copy with the original; and if such comparison is made and any mistakes in the copy are found, such mistakes shall be corrected. Each party to this cause shall have a right to further examine or cross-examine any witness whose
466 testimony is so used, provided that any cross-examination that may be had of the witnesses so testifying at Kansas City, if the testimony of such witness be offered by the Guardian Trust Co., shall be deemed a part of the defendant's case, and the time consumed therein shall not be deducted from the time allowed the complainant within which to take its testimony.

(Signed) H. S. MECARTNEY,
J. C. ROSENBERGER,
Solicitors for Guardian Trust Company.

Feby. 4th, 1905.

S. W. MOORE,
THOMAS R. MARKS,
Solicitor for the Kansas City Suburban Belt Railroad Company and Its Receivers.

Mr. Rosenberger: I offer as Exhibit 5, the following portion of the stipulation made and entered into between the Guardian Trust Company, of the one part, and Kansas City Southern Railway Company, Kansas City Suburban Belt Railroad Company and E. F. Swinney, its receiver, of the other part, by and through their respective solicitors, dated June 30, 1906, as follows:

(Reading)

Caption of the stipulation being entitled: "In the Cambria Case."

"Stipulation

"It Is Hereby Stipulated, by and between the parties in the above entitled cause, as follows:

I.

(Not offered, as not material)

II.

(Not offered, as not material).

III.

"Any party to this cause shall have the right upon the trial of this case to refer to any part of the record in the four consolidated causes of Provident Life & Trust Company vs. Kansas City Suburban Belt Railroad Company, et al., number 2464, 2465, 2466, 2467, filed September 6, 1900, in the Circuit Court of the United States for the Western Division of the Western District of Missouri; or in the case of
467 Trust Company vs. Kansas City, Pittsburg & Gulf Railroad Company, filed in the same court on or about April 28, 1899."

Mr. Rosenberger: The purpose of the offer is to show that the record in the Provident Life & Trust Company, the four cases and the Cambria suit, are all one and the same record and are made so by stipulation. Mr. Smith is in error in supposing that any testimony was taken in the foreclosure suits. There was not. Our contention is, and it is so found by the Court of Appeals and by the United States Supreme Court,

that the Cambria bill and the foreclosure bills are all part and parcel of the same litigation; and here is the stipulation that shows the parties to the cause so treated it.

Mr. Smith, on behalf of the Kansas City Southern Railway Company and the Cambria Steel Company, thereupon objected to the introduction of the foregoing documents in evidence on the ground that it was an attempt to go into matters which the Master had ruled he had no authority to consider.

The Master: The way it occurs to the Master, is, the question of whether they are all part of the one litigation is inextricably involved in the good faith proposition, because as I remember the contention—I read it hastily—that is part of the finding. The Cambria Company was sort of a stool-pigeon, the whole thing was part of the scheme, as they put it, to despoil the Trust Company. That is what the court holds. Now if the stipulations which were entered into by the parties are to the effect that all testimony in these others could be used in the Cambria case, which would tend to demonstrate the whole litigation was one, that, it would seem to me, would involve the good faith proposition. I can't see how you can distinguish it.

The Master thereupon sustained the objections to the introduction of the foregoing stipulation and exhibit, to which ruling, the Guardian Trust Company and its receiver, duly excepted.

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468 J. C. ROSENBERGER.

J. C. Rosenberger, being duly sworn as a witness on behalf of the Guardian Trust Company, testified in substance, as follows:

My name is J. C. Rosenberger. I am 50 years old. I am a lawyer and have been since 1895. From the year 1897 up to the date of the death of Judge Francis M. Black, in May, 1902, I was associated with Judge Black in his office. I had that association with him the entire time Judge Black was the receiver for the Guardian Trust Company, namely, from November 30, 1900 down to and including some date in May, 1902, when he died. With his death, my knowledge and observation of what was being done in the Cambria litigation ceased until about the month of December, 1904, when I was employed by Mr. Mecartney to assist him in the prosecution

and defense of the Cambria Steel Company litigation, to which the Guardian Trust Company was a party. Mr. Mecartney had been employed by the Trust Company on Dec. 7, 1904, to take charge of its interests in the so-called Cambria Steel Company litigation pending here in Kansas City, and in the Texas case, known as the Port Arthur Channel & Dock Company case. Prior to that appointment, Mr. Mecartney had been employed to investigate the claims of the Guardian Trust Company and those against it in those litigations and had made his report in December, 1904. From the time I got into the case in the middle of December, 1904, until March 27, 1908, I was actively engaged in representing the Guardian Trust Company, as assistant to Mr. Mecartney. On March 27, 1908, Mr. Mecartney was discharged from the Guardian Trust Company and from the other services in connection with those litigations and retired from the case, and with him, I retired.

Throughout the time that I was counsel in the case under Mr. Mecartney, I made expenditures out of my own funds and periodically rendered statements of account to Mr. Mecartney showing my disbursements, and from time to time, Mr. Mecartney paid the amount of my bills. All the bills that I rendered to Mr. Mecartney are set out in statements
469 A to M, inclusive, annexed as exhibits to Mr. Mecartney's statement of account, which, in turn, are annexed to his petition filed in Mecartney v. Guardian Trust Company, in the Circuit Court of Jackson County, Missouri, and which has heretofore been introduced in evidence. Every dollar that is shown to have been paid out on the statements of account rendered by me to Mr. Mecartney, being said exhibits A to M, inclusive, were paid out solely and exclusively in this Cambria Steel Company litigation and were necessarily incurred in the proper representation of the Guardian Trust Company in that litigation. I say that not because any of that expense is open to inquiry here because all those items were adjudicated against the Guardian Trust Company in the Mecartney suit, but for the purpose of making it clear that those items were expended in the Cambria case and not in the Texas litigation or in any other litigation except that dealt with and disposed of by the opinion of the Circuit Court of Appeals in the Cambria case.

The statement and charge in the account here, with respect to Item No. 33, stenographer's fee paid to Brown, Barnett & Adams, is correct; that is to say, those stenographer services were rendered in the Cambria suit before the Special Master.

With respect [ot] Items 34 and 35, being certain items paid to Miss Utter, Clerk of the United States Court for certified copies, those copies were obtained by me for use in this Cambria suit and were paid for as stated in the charge and were offered in evidence, or referred to in the hearings before the Special Master Douglass.

Mr. Smith: We object to any and all evidence in support of Items 33, 34 and 35, on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of our written statement of objections. I further object to Mr. Rosenberger's statement that the copies were offered in evidence, or referred to as indefinite and I think that Mr. Rosenberger ought to amend his statement by stating whether or not they were of-
470 ered in evidence.

Mr. Rosenberger: I will state that the obtaining of those certified copies was absolutely necessary to enable counsel properly to protect the interests of the Guardian Trust Company in that litigation.

The foregoing objections of the Kansas City Southern Railway Company and the Cambria Steel Company to the introduction of the testimony in question were by the Master overruled, to which ruling, said parties duly excepted.

Item No. 36 was a docket fee paid to the Clerk of the State Court in this County in an action at law brought by the Guardian Trust Company against the Kansas City Southern Railway Company to recover an indebtedness due the Guardian Trust Company from the Kansas City, Pittsburg and Gulf Railway Company, being the same debt in litigation in the Cambria Steel Company case.

Mr. Smith: We object to the introduction of any testimony in support of Item No. 36 on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of our written statement of objections, and for the following additional reasons:

(1) The costs covered by said item were incurred by the Trust Company in suits in which it was seeking affirmative relief against the Kansas City Southern Railway Company, and further, such costs are not taxable in this case.

(2) Said suits have been dismissed at the cost of the Guardian Trust Company and judgment rendered against it for said costs, from which judgment no appeal has been taken.

The foregoing objections were by the Master overruled, to which ruling the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

Mr. Rosenberger: The same is true with respect to Items No. 37 and 39 in the account. Item No. 40 was for a
471 certified copy of the bill of complaint in a certain suit filed by the Kansas City Southern Railway Company against its reorganization committee, and that was obtained by me for use as evidence before the Master in the Cambria suit.

Mr. Smith: The Kansas City Southern Railway Company and the Cambria Steel Company object to the introduction of the foregoing evidence in support of Items 37, 39 and 40 on the grounds set forth in paragraphs 1 to 7, inclusive, of their written statements of objections.

Said objections were by the Master overruled, to which ruling said parties duly excepted.

Mr. Rosenberger: Items 41 to 43, inclusive, were expenditures made by me in person in connection with an appeal from an order of injunction described in those items of charge.

Mr. Smith: We object to the introduction of this testimony in support of items 41 to 43, inclusive, on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of our written statement of objections and on the following additional grounds:

(1) So much of such items as were properly taxable as costs have been duly taxed by the judgments of the Court of Appeals and they have been paid by the Southern Company.

(2) Judgment was rendered by the Circuit Court in favor of the Southern Company in said injunction suits and, therefore, there is no ground for contending that they were instituted or prosecuted in bad faith and without reasonable grounds.

(3) The suits in the State court and the appeal from orders of injunction enjoining their prosecution were improvidently instituted and prosecuted, the position taken by the Trust Company in reference to said suits and appeals being directly contrary to the position eventually taken by it on the appeals from the final decree of June 25, 1910, in

the Court of Appeals and the United States Supreme
472 Court.

Items No. 41 and 43 are costs that are taxed for making up a record and for printing the record in the Appeal from the first injunction suit. Those costs have been taxed in that case and have been paid to the Southern Company, with an attorney's fee added thereto taxed by the Court of Appeals and hence cannot be taxed in this case.

The foregoing objections were, by the Master, overruled, to which ruling, the Cambria Steel Company and the Kansas City Southern Railway Company duly excepted.

Mr. Rosenberger: Items 79 and 80 represent certain refunds to the Guardian Trust Company by the Clerk of the United States Circuit Court of Appeals on account of costs adjudged against the Kansas City Southern Railway Company in an injunction appeal, the total amount refunded being $986.76.

Item No. 44 was for a certified copy of the final judgment in a certain suit in which the First National Bank of Kansas City was the plaintiff and the Guardian Trust Company was the defendant, in which the bank had obtained a considerable judgment against the Trust Company on account of a promissory note executed by Suburban Belt Railway Company as maker and endorsed by the Guardian Trust Company. The Belt Company being insolvent, the bank sued the Trust Company as endorser, and recovered final judgment. The copy of that judgment was obtained in order that I, as counsel for the Trust Company, might file a supplemental claim against the Belt Company and the Kansas City Southern Railway Company, to recover from the Southern Company the amount that the Trust Company had paid out on that judgment, and this was done. That certified copy of the judgment was offered in evidence before Special Master Douglass and was allowed by him as a just claim against the Suburban Belt Railway Company and was afterwards allowed by the United States Circuit Court of Appeals as a just claim against the Kansas City Southern Railway Company.

Item No. 45 was for a certified copy of an order which
473 was used on hearings before Special Master Douglass.

Item No. 46 was an amount paid to a Notary by the name of Linton for notarial services in taking the deposition of B. B. Cone of Detroit, Michigan. I took that deposition

and made arrangements with Mr. Linton and paid out that money. That deposition was used in evidence in the Cambria case.

Item No. 47 was an item of the same nature, the costs of depositions taken in New York City by Jennie T. Powers, of Herman Sielscken and others. Those depositions were offered in evidence in the Cambria suit before Judge Douglass and were considered by him.

As to Items 48 and 49, the facts are as treated in the charge.

Item No. 50 was a Notary fee paid to Miles F. Powers in connection with the taking of the depositions already mentioned.

Items 51 and 52 are for certified copies which were used in evidence before Special Master Douglass in the Cambria suit. The Special Master's report referred to in item No. 51 was a report on some subsidiary question that had arisen in some hearing before the Master. It was not the final report because the final report was not made until 1910.

Item No. 53 was an amount paid out for copy of the opinion as stated in the Item to J. D. Jordan, Clerk of the United States Circuit Court of appeals upon the depositions of the first injunction suit sued out by the Southern Company and was for the necessary information of counsel in the representation of the Guardian Trust Company in connection with their appeal.

Mr. Smith: We object to all of the foregoing testimony in support of Items 44, 45, 46, 47, 48, 49, 50, 51, 52 and 53 on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of our written statement of objections. We further object to Mr. Rosenberger's statement that the copy referred to in Item 45 was used on hearings before Special Master Douglass because it might have been used for
474 evidence and without some showing in that regard, it is objectionable. We object to any evidence on Item 47, for the reason that the item on its face, says it is for certified copies of depositions rather than for the original depositions to be used in evidence. We object to the evidence on Items 51 and 52 because those items show on their face that they were for copies of documents without showing what they were or why the copies were used instead of the originals. We object to the testimony on Item 53 on the ground that is does not appear that the copy there re-

ferred to was used in evidence. It is not competent if not offered in evidence and if it was offered in evidence, it was not competent as between party and party.

The foregoing objections were, by the Master, overruled, to which ruling the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

Item No. 54 covers a docket fee in the State Court in another suit by the Guardian Trust Company against the Southern Railway Company on an indebtedness due the Trust Company from the Kansas City, Pittsburg & Gulf Railway Company.

Mr. Smith: We object to the testimony in support of Item No. 54 on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of our written statement of objections and on the following additional grounds.

(1) The costs covered in said item were incurred by the Trust Company in suits in which it was seeking affirmative relief against the Kansas City Southern Railway Company and, therefore, such costs were not taxable in this case.

(2) The case in which said costs were incurred was dismissed at the cost of the Guardian Trust Company and judgment was rendered against it for said costs from which judgment no appeal has been taken.

The foregoing objections were, by the Master, overruled,
to which ruling the Kansas City Southern Railway
475 Company and the Cambria Steel Company duly excepted.

Mr. Rosenberger: The facts as to the disbursement covered in Item No. 55 are correctly stated in the charge. The facts as to Item 56 are correctly stated in that item of the charge and the copy of the report of that foreclousre was, according to my recollection, introduced in evidence before Special Master Douglass. The facts as recited in Item 57 are correct.

A copy of the record referred to in Item 58 was obtained for the purpose of resisting an injunction suit sued out in the Cambria case by supplemental bill filed by Swinney, as Receiver of the Kansas City, Suburban Belt Railway Company, restraining the Guardian Trust Company from further prosecuting certain actions at law in the State Court, which actions were brought by the Guardian Trust Company to collect an indebtedness that was being litigated in the

Federal Court, an injunction which was afterwards granted and reversed by the Court of Appeals.

Item No. 59 was for the copy of the bill of complaint referred to in that item. It was necessary to obtain that copy because the Southern Company had, without notice to the Guardian Trust Company, obtained a restraining order against the Guardian Trust Company to restrain it from prosecuting said court suits and we had to get a copy of the bill of complaint and counsel had to get a copy from the Clerk to be advised of the charges and allegations that the Kansas City Southern were making.

Item No. 60 was an amount paid to Brown, Adams & Brown, court reporters, whom I had employed to take down and transcribe the arguments made at the hearings before Judge McPherson on the application for a temporary injunction by the Kansas City Southern Railway Company to restrain the Guardian Trust Company from further prosecuting said court suits which I have already, in general, described. Those hearings were had in the library in Mr. Moore's office on or about January 29, 1908.

476 Item 61 is the balance that was paid them for the same services.

Item 62 correctly states the facts, so far as they go, and the copies referred to were used in connection with the appeal that was taken by the Guardian Trust Company from the injunction order made by Judge McPherson in this Cambria suit.

Items 63 to 67, inclusive, were for certain orders entered by the Court on application for the same in the Cambria suit which were used on the hearings before judge Philips and upon which was predicated an application made to the court, judge Philips sitting, for an order applied for by the Guardian Trust Company to require the Kansas City Southern Railway Company and the Belt receivers to give additional injunction bonds. It appears on the day the Cambria bill was filed, September 6, 1900, the Court made an order ex parte and without notice to the Trust Company, enjoining the Trust Company from realizing on collateral security which the Trust Company held to secure the indebtedness due to it from the Belt Company, that collateral consisting of the stock of various subsidiary companies and certain bonds which had been pledged with the Trust Company by the Belt Railroad. That injunction was granted on the injunction bond of only $10,000.00. The application made in

the spring of 1908 was the application founded upon the fact that the companies whose stock had been pledged as collateral, as aforesaid, were actually having their property depleted by sales and conveyances and was constantly diminishing in value, making the $10,000.00 injunction bond utterly inadequate and making the collateral security inadequate. The purpose of the application was to require the giving of an additional bond. All this is stated in explanation of why it became necessary to obtain the copies of the orders which are enumerated in these items of charge.

477 The last thing I did while I was connected with the case under Mr. Mecartney was to docket in the United States Court of Appeals an appeal from the order of injunction which had been granted by Judge McPherson in the Cambria suit to restrain the prosecution in the State Court suits. I think that appeal or filing order got to the Clerk on the very day when Mr. Mecartney was discharged, March 27, 1908, and within a few days afterwards, the Clerk at St. Louis requested a deposit of $1070.00 for preparing and printing the record in that case. I turned the request over to counsel who had succeeded us and the voucher here, No. 2311, covering Item No. 68, shows that that amount was paid.

Mr. Smith: We object to the foregoing testimony in support of Items 55 to 68, inclusive, on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of our written statement of objections. We object especially as to Items 68 covering costs of appeal from injunction orders prior to final decree for the following additional reasons:

(1) So much of said item as was properly taxable as costs has been duly taxed by the judgment of the court of appeals and paid by the Southern Company.

(2) Judgment was rendered by the Circuit Court in favor of the Southern Company in said injunction suit and, therefore, there is no ground for contending that the suit was instituted or prosecuted in bad faith and without reasonable grounds.

(3) The suit in the State Court and the appeal from the order of injunction enjoining its prosecution, were improvidently instituted and prosecuted, the position taken by the Trust Company with reference to said suit and appeal being directly contrary to the position eventually taken by it on the appeals from the final decree of June 25, 1910 in the Court of Appeals in the United States Supreme Court.

The foregoing objections were by the Master overruled, to which ruling, the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

478 On Tuesday, February 5, 1924, at 9:30 o'clock A. M. hearings before the Master were [reumed], and Mr. Rosenberger resumed the stand on behalf of the Guardian Trust Company and further testified in substance, as follows:

During my association with Judge Black and during the period of his receivership of the Guardian Trust Company and while in his office, the activities of Judge Trimble in connection with this litigaton, were under my observation. I won't say all of them were but I would be present and see Judge Trimble conferring with Judge Black most extensively in connection with the Cambria litigation. At that time I had no direct connection with the litigation. Judge Black talked with me about issues that were involved and had me look up some authorities for him. It was in that connection I would talk to Judge Trimble about it. There were weeks when Judge Trimble and Judge Black would be in almost daily conferences about the policies to be pursued and the legal questions involved in this accounting suit, the Cambria case. I was called in to these conferences and I very well recall the amount of time and care and attention that was given by both Judge Black and Judge Trimble to the preparation of the pleadings of the Guardian Trust Company in the case. I especially recall an answer that was filed in the Provident Case by the Guardian Trust Company and about which there was a very acute controversy in court before Judge Thayer. I know a vast amount of time was taken in the preparation of that answer. The solicitors for the Provident Company, headed by Mr. Hagerman, filed exceptions to that answer and those exceptions came on for hearing. Judge Trimble was present and represented the Trust Company. The exceptions were sustained by Judge Thayer but upon the express condition that a stipulation should be entered into by the Southern Company that the decree of foreclosure in the Provident case should not bar or prejudice or in any wise affect the rights of the Guardian Trust Company in respect to its in-
479 debtedness referred to in that answer and being the same indebtedness involved in this Cambria case.

The charge made by Item 82 is for three-fourths of the allowance which was made by Judge Thayer to Trimble & Braley for their services to the receiver. Based on my own personal observation while in Judge Black's office and in association with him and with Judge Trimble, my judgment is

that three-fourths of Judge Trimble's time is a very conservative estimate as to the amount of time he was putting in on this Cambria suit.

Mr. Smith: I object to that statement because it is a matter of impossibility that Mr. Rosenberger should know the amount of time that Mr. Trimble was devoting to that litigation. We further object to the testimony on all of the grounds heretofore urged against the introduction of voucher No. 146, covering Item No. 82, and make the same offer of proof in support thereof made in support of objections to Voucher 146.

The foregoing objections were by the Master overruled, and said offer of proof denied, to which rulings, the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

Mr. Rosenberger: I personally incurred the bill covered by Item No. 110 and made that disbursement to Mr. Amram, an attorney at Philadelphia. In the course of my representation of the Guardian Trust Company, it became necessary for me to ascertain what demands had been made by the Kansas City Southern Railway Company in a certain bill of complaint which it had filed in Philadelphia against its reorganization committee. In order to obtain that information, I requested Mr. Amram to obtain for me a certified copy of the court records in that suit and paid him for his services in doing that.

Item 112 covers a certain fee paid C. O. Tichenor, with the consent of Mr. Mecartney. I requested Mr. Tichenor
480 to review the [the] questions of law in the Cambria litigation insofar as they touched the liability of the Kansas City Southern Railway Company for the floating indebtedness of the Kansas City Suburban Belt Railway Company in this Cambria case and he prepared in his usual lucid and terse manner, an opinion which was of an enormous aid to us. I have no recollection as to the amount paid to Mr. Tichenor but I do know that that was involved in the litigation between Mr. Mecartney and the Guardian Trust Company. I get the amount of the item from the petition in Mr. Mecartney's suit and the judgment in that suit awarding it against the Trust Company.

Item No. 113 is for a fee paid to Sullivan & Cromwell, New York City. I incurred that expense and it was exclusively in the Cambria case. They assisted me in taking some depositions there in New York.

Item No. 115 is a fee paid to C. H. Aldrich, then a lawyer of Chicago, for a written opinion. I did not incur that expense and had nothing to do with the disbursement, but I did see the opinion and it related exclusively to the Cambria debt.

Item No. 118 is for a fee paid to James C. Jones, of St. Louis, for consultation and advice in the Cambria suit. I incurred this indebtedness with Mr. Mecartney's permission. We were both present at the consultation with Mr. Jones. Both of us went to St. Louis to see him and the consultation related solely to this Cambria case.

Mr. Smith: We object to all of the foregoing testimony in support of Items 110, 112, 113, 115 and 118, on the grounds set forth in numbered paragraphs 1 to 7, inclusive, and 9 and 10 of our written statement of objections. We object further to testimony in support of Item 112, being the amount paid to C. O. Tichenor for the following reasons:

(1) The services rendered by Mr. Tichenor were rendered not to aid in this litigation but to assist counsel
481 for the Trust Company in retaining the confidence of the Trust Company in himself.

(2) It appears from the opinion of Judge Johnson that only $250.00 was paid Mr. Tichenor (Mecartney record, page 1435).

We object to the testimony in support of Item 115 covering the amount paid to Mr. Aldrich on the same additional grounds made to the introduction of testimony in support of Item 112.

The foregoing objections were by the Master overruled, to which ruling the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

Mr. Rosenberger: At the time of Mr. Mecartney's discharge on March 27, 1908, the firm of Gates & English were immediately employed to succeed him and they remained in charge of the litigation until Judge Van Valkenburgh appointed Henry C. Flower, Receiver of the Guardian Trust Company, in August, 1916, and upon that appointment of receiver being made, Mr. Flower engaged me to take charge of the Trust Company's interest in the Cambria case, my employment being in connection with that of Mr. Justin D. Bowersock who was also attorney for Mr. Flower, as Receiver, and I have had charge ever since. I know of my own knowledge, the history of the litigation and from neces-

sary knowledge acquired as counsel in the case succeeding Gates & English, know what their services were, and the nature of them, where they appeared and what they did. It is all shown as a matter of record. Aside from what the record shows, I have no knowledge. I have some personal knowledge as to Items 124 and 126 being total fees of $2500.00 charged by Mr. Haff. While Mr. Haff was preparing the brief on appeal, he conferred with me about it obtaining from me the benefit of such general information as I had from my former connection with the case. I know that he prepared a brief and my recollection is that it was a separate brief signed by himself alone and not joined in by Gates & English.

482 Item No. 134 covers a fee of $15,000.00 paid to Fred W. Lehmann. I personally negotiated with Mr. Lehmann for a settlement of his claim for fees. After the Court, in August, 1916, appointed Mr. Flower, Receiver, Mr. Lehmann visited Kansas City to take up with Mr. Flower, as Receiver, the question of a settlement of the balance due him for very valuable services rendered by him in the United States Supreme Court. We met at luncheon at the Muehlbach Hotel and discussed the matter. The up-shot of the conference was that he indicated the amount that he thought he ought to have and I agreed to recommend to Mr. Flower that he be allowed by the Court in the Guardian Trust Company receivership case, a fee of $15,000.00 in full of all claims for services in the Cambria suit. An application was made to the Court for instructions by Mr. Flower as to what he should do and upon a hearing before Judge Van Valkenburgh, he authorized the Receiver to pay the sum of $15,000.00 to Mr. Lehmann and it was paid to him under that order of court.

I come now to Item No. 135 covering the amount paid in satisfaction of the final judgment rendered against the Guardian Trust Company in the suit brought against the Trust Company in the State Court, affirmed in 274 Mo. 224. The only features of that suit and judgment on which I am going to give any testimony is as to the extent of my knowledge of the services rendered by Mr. Mecartney in the so-called Texas case, also called the Port Arthur Channel & Dock Company case referred to in Mr. Mecartney's petition in that suit, and my opinion as to the value of those services.

Mr. Crane: Then we want to make the objection that, inasmuch as the Master has heretofore ruled that he would not retry the Mecartney case, meaning thereby the case reported in 274 Mo. 224, he cannot, and should not, try a portion of it

and hear evidence as to the reasonable value of a portion of the services included in that judgment without hearing also evidence as to the reasonable value of the remaining portion of the services also involved. In other words, the same objection that was made at the time the same testimony was sought to be elicited from Mr. Clifford Histed.

The Master: The Master sustains the objection; but, in order that if the Federal Court—subject to whose rulings the Master is—disagree with him it might not send the case back for re-reference the testimony excluded may be stated for the purpose of being put in the record.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted, and still excepts.

Mr. Rosenberger: Immediately upon my employment in December, 1904, by Mr. Mecartney, I proceeded to make myself familiar with the issues involved in the Cambria litigation so far as would enable me to proceed with the case, particularly to proceed with the evidence before the Special Master Judge Douglass. Among other things I did in that connection was to examine the pleadings and evidence taken in the Port Arthur Channel & Dock Company case. In that case, the litigation had commenced by filing, on September 10, 1900, a creditor's bill in the Federal Court in Texas by a concern named The Barnett & Record Company. That was four days after the filing of this Cambria bill in Kansas City. Upon that bill, a receiver had been appointed for the Port Arthur Channel & Dock Company, the theory of that Barnett bill, as in the Cambria bill, was, and it was alleged, that the Guardian Trust Company and its officers dominated and controlled the corporate policies of the Port Arthur & Channel & Dock Company and thereby had been enabled to despoil the Dock Company of its money and property. At the time the bill was filed, the Dock Company was indebted to the Trust Company in the sum of about $21,000.00 and upon that bill, the Guardian Trust Company filed, in due season, an answer in the nature of a cross bill, seeking to recover from the Dock Company, the amount of that indebtedness. About the same time the Barnett & Record suit was filed or on the same day, the Provident Life & Trust Company, as Trustee in the corporate mortgage of the Dock Company, filed a bill to foreclose that mortgage just as was done here in Kansas City by the same company in the suits against the Belt Railroad and its constituent com-

panies. That Texas foreclosure suit ripened into a decree of foreclosure and the property was conveyed to a successor company known as the Port Arthur Canal & Dock Company. The suit resulted in a deficiency decree being rendered in favor of the Provident Company, as Trustee for the bond holders for which it was acting. Thereupon the Provident Company filed a cross bill in the Barnett & Record suit asserting a demand against the Guardian Trust Company of about one and one-half millions of dollars, predicated on the alleged fact that the Trust Company had subscribed for the capital stock of the Texas Company, the Dock Company, and had failed to pay its subscription. The situation at the time that Mr. Mecartney and I got into the case in 1904 was that the Trust Company had filed a demurrer to the bill of the Provident Company and that demurrer had been overruled by Judge Bryant. Some testimony had been taken in the case, less than two thousand pages of it. None of that testimony had been taken either by Mr. Mecartney or myself. Mr. Mecartney employed Mr. Clifford Histed to assist him in that Texas litigation. Primarily he was to look into the case and give his opinion upon it. Before Mr. Mecartney's employment, in fact, before his formal retainer in either the Texas case or the Cambria case, Mr. Mecartney had looked into that Texas case, as well as the Cambria case, having been employed so to do by the Executive Committee of the Trust Company, and had given the Executive Committee of the Trust Company, a report on the case. As I recall it, he had not as yet seen the evidence in the case. The entire period of time during which any services whatever were rendered by Mr. Mecartney in that Texas case and comprehended within Item 136, was from the time of his retainer on
485 Dec. 7, 1904 until the Texas case was settled, on March 30, 1905, and during that time nothing was done except to so far look into it as to see what ought to be done with it. Mr. Mecartney conferred with me about it. He got a report on the case from Mr. Histed. He gave me a copy of that report. Both of us were of the opinion that the Guardian Trust Company was entitled to recover its $21,000.00 and the Provident Company was not entitled to recover the million and a half dollars. There was nothing done in that Texas case except to look into it and settle it and that was done. No proceedings in Court whatever, no hearings before Masters. In my judgment, $3500.00 would be a liberal fee for what was done in that Texas case. Aside from services rendered in the Texas case by Mr. Mecartney and myself during the period from December, 1904 to March 27, 1908, all of the services rendered were in the Cambria case unless it

be the Texas litigation may be considered as part of the Cambria suit.

Mr. Smith: We object to all of the foregoing testimony in support of Items 124, 126, 134, 135 and 136, on the grounds set forth in numbered paragraphs 1 to 10, inclusive, of our written statement of objections, and as to Items 135 and 136, we urge in addition, the specific objections made to the introduction of vouchers 1203 and 3371 heretofore introduced in evidence in support of Items 135 and 136, respectively, and make the same offer of proof in support of said objections as was made in support of said vouchers.

The foregoing objections were by the Master overruled, and said offer of proof denied, to which rulings, the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

Mr. Rosenberger: Items 138 to 165 are grouped under the column headed "Cash paid for printing briefs, etc." Some of these briefs and other documents were printed at my own personal request, that is, I ordered them printed. Some of them were printed in Chicago at the instance of Mr.
486 Mecartney, but whether printed at his instance or at mine, those briefs are the briefs in the Cambria case and in no other litigation. Items 166 to 179, inclusive, under the same heading, are for briefs printed after March 27, 1908, the date of Mr. Mecartney's and my discharge from the case. As to these, the vouchers will speak for themselves. I can say, however, that I have actually seen the briefs and they are as described in those items and I had them in my office. All those briefs were briefs on appeal in this Cambria suit. They were part of the records turned over to me so I could discharge my duties as counsel in the case and those briefs were used in the Cambria case.

Items No. 180 to 199, inclusive, cover payments to expert accountants named in those items who were employed directly by me, I incurred that expense and the work they did was exclusively in the Cambria case.

Mr. Smith: We object to the foregoing testimony in support of Items 138 to 199, inclusive, on the grounds set forth in numbered paragraphs 1 to 8, inclusive, of our written statement of objections. In objecting to Items 182 and 183, covering $500.00 paid to Frank B. Wilcox, we ask that such party be produced for cross-examination. In support of our objections to the testimony in support of items 182 and 183, we ask leave to introduce evidence to establish the facts

thus stated by Mr. Mecartney on page 646 of the record in his case in the State Court:

"Mr. Rosenberger telephoned me on Sunday at my home in Hinsdale that Mr. Wilcox, whom the other side had called, was on the stand, and by making a search of the records could work out that whole Degoijen item as an expert accountant, and Mr. Rosenberger wanted authority to make a contract with him and pay him $450.00 therefor. The draft came in the next day, or the day after, for $446.66, with a letter that he had contracted wih Mr. Wilcox; that Wilcox had thought that ½ of 1% of the Degoijen item was
487 reasonable, and that he had made that contract; and I sent back a letter directing that that would not do; that I didn't believe in making a contract on that basis, but if Mr. Wilcox should make it a round figure of $450.00, and that was the contract (page 646 of Mecartney record).

The foregoing objections were by the Master overruled, and said offer of proof was denied, to which ruling the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

Mr. Rosenberger: Items 200 to 202, inclusive, refer to premiums on certain appeal bonds.

Mr. Smith: We object to any testimony in support of Items 200 to 202, inclusive, on the grounds set forth in numbered paragraphs 1 to 7, of our written statement of objections and for the following additional reasons:

(1) Said items cover premiums on appeal bonds on appeals taken by the Trust Company, which fact is conclusive evidence that there were reasonable grounds for the contentions made by the Southern Company on those issues.

(2) Said appeals were improvidently taken by the Trust Company.

(3) The costs of said appeals were taxed by the Court of Appeals and the District Court has no authority to retax the the same or to tax other costs in addition to those taxed by the Court of Appeals.

Said objections were by the Master overruled, to which rulings, the Kansas City Southern Railway Company and the Cambria Steel Company excepted.

Mr. Rosenberger: I applied for the appeal bonds referred to in Items 200 to 202, inclusive, and the bonds were given and in connection with the proceedings in the Cambria case. The first item, No. 200, was for an appeal bond on the first injunction that was granted in 1905 by Judge Philips. That injunction was granted and a supplemental bill filed by the Kansas City Southern Railway Company in the Provident case to enjoin the prosecution of the Trust
488 Company's state court suits. Items No. 201 to 202 were premiums on appeal bonds in the second injunction, being the one granted in 1908 by Judge McPherson, on a supplemental bill filed in the Cambria case for the same purpose, namely enjoining the state court suits.

Items 211 to 246, inclusive, were for stenographic services incurred by me in connection with my representation of the Guardian Trust Company in the Cambria case and in no other litigation. I recall I was employing R. J. Holmden, John M. Orr, R. C. Pierson, Miss Parlin and other stenographers at that time, to help me in the necessary work of representing the Guardian Trust Company. I have no knowledge of information of Item No. 247 beyond what the voucher shows on its face. I do know, however, that Miss Rawson was present in court, and it is my understanding she was employed by E. C. Wright for some reason to take down the arguments of the attorneys on that occasion.

Items 248 and 249 cover some stenographic services rendered in the United States Circuit Court of Appeals in May and June, 1911. I was not present there at that time but I have seen the transcript of the proceedings taken down by Mr. Levin, the stenographer, in fact, I have a transcript of it here. It appears in the record in the Shedd case and was used in evidence in that case. The proceedings reported were on oral arguments in the United States Circuit Court of Appeals at St. Paul, at the argument of the appeal and also at the argument of the petition filed by certain stockholders of the Trust Company, represented by Mr. Mecartney for leave to intervene in the Court of Appeals, but I claim no personal knowledge or participation in the matter.

Many of the items numbered 251 to 411, inclusive, grouped under the headings of "Miscellaneous Incidental Expenses" were personally incurred and paid by me and charged to and collected from Mr. Mecartney and are shown on my bills annexed to his statement of account which is Exhibit 1
489 to his petition in his suit against the Guardian Trust Company already referred to. All of these expenses

were incurred in the Cambria Steel Company litigation. By that I mean the accounting suit and cross suit by the Trust Company to recover its debt from the Kansas City Southern Railway Company and from the Belt Company. Among these items there appear certain items of Mr. Mecartney's for expenses of trips to Kansas City. I have looked up my files and correspondence in connection with these items and my memory, as refreshed by these files and correspondence, is that Mr. Mecartney was in Kansas City on those dates on business and touching the prosecution of these Cambria suits and the defense by the Trust Company of the claims that were being asserted against it by the Southern Company, either in its own name or the name of others. His home was in Chicago and it was necessary for him to be in Kansas City frequently in connection with that business, both to conduct proceedings in court, necessary consultations with me and for appearances before the Special Master. Some of those visits were quite protracted. I recall particularly at the time of the oral arguments before Judge Douglass in 1906 that he was here throughout those arguments and participated in them. I do not know of any other business he was transacting except in connection with the suit pending before Judge Douglass. If there was any, I do not know of it, and I think I am in a position to know.

Some of these items may not be fully explained in the items of charge, take for example Item 253, Dec. 21, 1904 "To express on two packages, Chicago to Kansas City." That was for some records sent to me in the Cambria suit by Mr. Mecartney. The same is true of Item 254, concerning telegrams that are mentioned in here as being exchanged between Mr. Mecartney and myself. Those telegrams related to this Cambria suit and to nothing else.

Item 259 covers expressage on a trunk of records from Chicago to Kansas City. I know that the record was shipped back and forth between Mr. Mecartney and myself from
Chicago here. Even at that time, as early as Jan-
490 uary, 1905, the record had reached such a bulk as to require a trunk for its transportation. I know I went out and bought a trunk and charged it to Mr. Mecartney and he paid for it.

Item 270 relates to expenses of Mr. Brown, an attorney of Chicago, to Kansas City, assisting Mr. Mecartney, March 12 to 29, 1905. Mr. Brown was a very able and accomplished lawyer in Mr. Mercartney's office and came down here and helped draw some of the pleadings in this case. He helped

him in work incident to preparing an answer to the ancillary bill filed by the Receivers.

Item 272 was for drayage on that trunk full of records in the Cambria suit. Item 276 was for drayage on law books. These books were used in the argument in connection with this law suit. Item 278 was for an amount paid to a lock smith for opening a desk containing some papers. It was a desk over at the Guardian Trust Company that had papers in it relating to this suit. There was nobody at the Guardian Trust Company at the time in charge of its business except Mr. Hastings and we couldn't get into that desk and had to hire a lock smith to get the desk opened. The papers in it were papers material in the Cambria case.

Items 287 and 288 cover amounts paid by Mr. Mecartney to Barnard & Miller, printers, for printing reports on litigation. I know that such reports were furnished to the Guardian Trust Company, one of them was furnished to me in view of the litigation. Item 296 was for a trunk that contained this record. By that time, we had to get an additional trunk, the records had outgrown the original trunk we had. Item 305 was for $10.35 cable charges for a cablegram to Kuhn & Company. My recollection is that was an inquiry we made by cable to Kuhn & Company who were bankers in London and sustained an intimate relation to the Trust Company and the Suburban Belt Company as to facts in connection with
491 the $89,000.00 item which was in controversy between the Trust Company and the other parties to the litigation and the item which has always been known as the Degoijen item and pertaining exclusively to this Cambria suit. Item No. 314, under date of Nov. 13, 1905, is for $75.00 paid as a witness fee. I incurred that expense by employing H. P. Wright as an expert witness to give testimony in regard to the questions on stocks of various companies that were concerned, his testimony being given in the Cambria case.

Items 317 and 318 are charges on account of railroad fare and expenses of myself to Chicago, Aurora and Hinsdale, Illinois, all in connection with trips occasioned exclusively by the Cambria litigation.

I believe I have already stated that all telegrams passing between Mr. Mecartney and myself related exclusively to the Cambria case and all expenses where express was paid on trunks, that was expressage paid on trunks containing records in the Cambria suit. The same is true in respect to

all items in relation to drayage unless it may be for law books used on arguments in the Cambria case.

Item No. 349, dated May 8, 1906, was for $10.00 paid to the Wulser Contracting Company for a cabinet for records. That appears in my statements A to M inclusive, annexed to the Mecartney petition. It was for a cabinet of shelving which was made necessary by the enormous size of this record and in order to use it all, we had to get a cabinet for it, which I still have.

Item 359 covers the expense of a trip of Mecartney to Philadelphia and New York. I know about that trip. It was in connection with this Cambria suit exclusively.

Item No. 390, Dec. 19, 1907, is expressage on papers to Judge McPherson. Those were some papers that were sent to Judge McPherson by me in connection with his consideration of the injunction case which was then under argument or submission to him. It was decided by him along
492 early in 1908 by the granting of an injunction which was afterwards reversed by the Court of Appeals.

Item 392, under date of Jan. 8, 1908, is for $10.00 paid for a book case for Judge Douglass for the Master's records. I bought that book case for the Special Master because it was necessary for him to have it in order for him to be able to refer to the record at all. This was on account of its huge size.

Item 398, dated Jan. 8, 1908, was for a trip made in November, 1907, by myself to St. Louis, that is the trip that Mr. Mecartney and myself made to St. Louis to consult with J. C. Jones about further proceedings in the Cambria case.

I want to repeat that all items appearing on bills designated as Exhibits A to M, inclusive, to the Mecartney petition, I personally incurred those expenses and made the disbursements stated therein, and they were all for necessary expenses in the Cambria case. I know of no items on the account which appear in Mr. Mecartney's expense bill attached to his petition in the State Court suit and which appear on his own books, which were not incurred in the necessary defense or prosecution of the Trust Company's claims and those which were asserted against it. No items of disbursement mentioned in the account that were made after March 30, 1905 had anything to do with that Texas case. I refer to items paid out either by Mr. Mecartney or myself, in fact, I don't know of any disbursements made in connec-

tion with the Texas case at all either before or after March 30, 1905, the reason being that the period covered by those services was so comparatively short and also because there were no appearances in court, nothing occurred to give rise to expense. Whatever expense there was, was incurred by Mr. Mecartney in his employment of Mr. Histed which he paid.

Mr. Smith: We object to all of the foregoing testimony in support of Items 211 to 411, inclusive, on the grounds set forth in numbered paragraphs 1 to 7, inclusive, of our
493 written statement of objections. This objection was, by the Master, overruled, to which ruling, the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

On cross examination by Mr. Smith, Mr. Rosenberger testified in substance, as follows:

At the time Mr. Mecartney and I left the Cambria case in March, 1908, the case, so far as the hearing before Special Master Douglas was concerned, had been fully reported and submitted. It had been argued orally and briefs had been furnished.

Mr. Smith: Mr. Rosenberger, I will ask you to examine page 1435 of the opinion of Judge Johnson in the Mecartney case and to advise me if you do not think I am correct in my statement about the Tichenor Item No. 112, and if you won't correct that Item accordingly.

Mr. Rosenberger: Yes, your statement would be correct as to the amount of that charge being $250.00 instead of $500.00 but Judge Johnson in that opinion, relieves Mr. Mecartney entirely of any bad faith in charging $500.00 to the Trust Company. Judge Johnson said that had been done by oversight.

Mr. Smith: Mr. Rosenberger in stating that Mr. Mecartney had no other work for the Trust Company outside of the Texas case and the Belt case, I want to call your attention to the following letter or report of Mr. Mecartney's, about October 23, 1905, appearing on page 314 and following the Mecartney record;

"Your acting president has requested me to make a report of matters under my charge in time for the coming annual meeting.

"You understand that no regular counsel was elected by the directors or executive committee for the past year, and when the matter was brought up late in the fall, the writer suggested that there was no absolute occasion for such a salaried official; but that matters could be referred from time to time, as they arose, to counsel and he be paid
494 for work as actually done. This suggestion was adopted; and the writer believes it a far better plan than the salary plan and conduces more toward prompt disposition of business and is more economical in the end.

"Quite a number of matters, law suits and claims, independently of the Belt and Dock Company litigations, have been investigated and disposed of, and some half dozen legal opinions rendered upon matters of vital import. The total amounts paid the writer thus for, together with bills presented at the end of this fiscal year have been less than $2,-100."

"I was at first reluctant to attempt to serve the company as to its general matters, fearing that the Belt litigation was enough for me to undertake. But with the help of competent assistants, I have been able to take care of them with, as I hope, reasonable promptness.

"As to matters pending and disposed of, I report:

1. The bill of Trimble & Braley for over $22,000."

And then goes on and discusses that.

2. The claims vs. The Northern Connecting Company.

"These claims of the Guardian Trust Company, aggregating about $66,000 had been presented in an intervening petition which the trust company had filed in the foreclosure proceedings on said railroad. It was asserted that the same were preferential claims. Testimony had been taken and the matter was pending on a reference to Judge Douglass. The master, last spring, made an exceedingly long and exhaustive report of about 100 typewritten pages, in which these claims were rejected, except as to the amount of $1161.50, which he allowed the Trust Company.

"Other parties offered objections to his report, but he has never finally disposed of them. After investigating the matter, the writer concluded, and so reported to the then president, that there was no prospect of having the report overruled and we did not prosecute the matter further.

"3. The Mo. Railway Construction Co. Debenture Bonds, amount $53,433.17.

495 "The writer went east in the summer time and retained counsel there to make inquiries and collect data in regard to the assets of this concern. I, in the meantime, pursued my inquiries in Chicago and finally got track of the books and I have been promised that they will be at my disposal for inspection within a very few days. If they do not turn up, I shall at once take proceedings in court and examine under oath the parties who were last in control of the company and who should know of its affairs."

"The Texas suit at Beaumont in which the Channel and Dock Company, set up a claim of stock liability for $1,500,000.00 against the Guardian Trust, and in which the Guardian Trust Company claimed about $30,000 as due from the Dock Company, was compromised about the first of April last, as heretofore reported.

" 'The Benedict Zinc Case' in New York, was, as has likewise been reported, finally decided against the Trust Company and the judgment was satisfied.

"The Quincy 'Zinc' Case at Kansas City was compromised. The First National Bank Case at Kansas City was finally decided against the Trust Company and the judgment was paid. The amount, about $35,000, with interest, is a valid claim against the Kansas City Southern Company and the latter has been sued in the State Court therefor.

"5. The Intervention Petitions in the Foreclosure Case of the Pittsburg and Gulf, involving claims for the services of counsel, rendered such Trust Company, as Trustee in the mortgages on the Texas and Louisiana part of the old Gulf System, were investigated and reported upon adversely by me last spring, and as a part of the terms of settlement of the Texas litigation they were [itemissed] as to such items.

"6. As to the claim of $22,000 of Coupons vs. the Gulf Road: I investigated this claim last spring. My associate, Mr. Histed, made me an exhaustive seven page report thereon, and after considering the [the] matter thoroughly
496 with him, I concluded that there was no prospect of recovery and I orally reported the same to the president and executive committee, expecting later to follow it up with a formal report, for which this report is now tendered.

"7. Other Claims. Set up by way of intervention in various proceedings, which are worthy of note are involved in the

Belt accounting case and need not be here commented upon; and with the exception of those so involved the 'slate' has been practically cleared.

"8. The Bierce case. This is the case, as is well known, in which the receiver for the Guardian Trust Company was appointed.

"Since the discharge of the receiver in 1902, practically nothing has been done therein, but the case still stands upon the docket undisposed of, and as one in which no final hearing has been had." Do you remember now, Mr. Mecartney, that he did have other business with the Trust Company at the time he was employed?

Mr. Rosenberger: I don't recall saying anything to the contrary in my testimony. Unquestionably he had other employment from the Guardian Trust Company. My testimony is that none of these items charged to this account had anything to do with those other cases. He did have other employment by the Guardian Trust Company and was paid fees therefor separately and charged those fees separately. Mr. Mecartney was employed by the Trust Company after his employment in the Belt case, to represent the Trust Company in a very animated law suit between it and Trimble & Braley and he defended that suit all the way to the Supreme Court. He charged the Trust Company a fee for that. He was not paid and he brought suit for the fee in this Mecartney suit, but confined the allegations touching it to the second count of his petition and recovered it. What he recovered for his services in the Trimble & Braley suit is not included in the count we are investigating. There were a variety of other matters just as Mr. Mecartney states in that letter but he billed the company separately for those items.

497 Mr. Smith: Mr. Rosenberger, there were three suits brought in the state court, were there not?

Mr. Rosenberger: That is my recollection.

Mr. Smith: And in each of those three cases, or so called cases, the claim was made the Kansas City Southern was liable for the debts of the Belt Company by a consolidation arrangement that had been made?

Mr. Rosenberger: Yes, in the third one it was liable for the debts of the Pittsburg & Gulf.

Mr. Smith: In the Pittsburg & Gulf?

Mr. Rosenberger: That was a question that had to do with the accounting case.

Mr. Smith: It did?

Mr. Rosenberger: I think it was absolutely part and parcel of it, with the accounting case.

Mr. Smith: With the accounting case; you brought your suit in the state court to enforce this liability independent of litigation in the federal court?

Mr. Rosenberger: Yes; the independent suits all involved the same as in the Federal Court.

Mr. Smith: But the pleadings filed in the Cambria case didn't have anything to do with those cases in the state court at that time?

Mr. Rosenberger: I think they were all necessarily involved; the Court of Appeals so treated it.

Mr. Smith: Do you mean to say, Mr. Rosenberger, that the suits in the state court called for an accounting also?

Mr. Rosenberger: No; no, but they sought to recover the same debt that was in litigation in the Federal Court. The subject matter of the litigation was exactly the same.

Mr. Smith: But at that time, at the time those suits were filed, nobody had filed an answer in the state court asking for an accounting, had they?

498 Mr. Rosenberger: Had they done that at the time those suits were filed?

Mr. Smith: No; I mean did they in those suits?

Mr. Rosenberger: My recollection is when the answers ultimately came in they asserted the courts had no jurisdiction, because the subject matter of the controversy was involved in the Federal Court. And my recollection is those pleas were overruled.

Mr. Smith: Now did they demand an accounting?

Mr. Rosenberger: That is my recollection.

Mr. Smith: But they never had any accounting in the state court?

Mr. Rosenberger: No; and no testimony was taken in the state court.

Mr. Smith: Now the third of those cases was one brought against the Kansas City Southern on the claim it was liable for the debts of the Pittsburg & Gulf?

Mr. Rosenberger: Yes; and that case is still pending.

Mr. Smith: Now the services for bringing of that suit are charged in this first count of the petition?

Mr. Rosenberger: Yes; they all grew out of that reorganization plan. Nothing was ever done in that case that I know of.

Mr. Smith: But the Belt Company was not involved in that case at all, was it, in the Pittsburg & Gulf case?

Mr. Rosenberger: No.

Mr. Smith: And the Cambria wasn't involved in it?

Mr. Rosenberger: Well now, to be sure you make clear what you mean by "it", in the third suit filed?

Mr. Smith: Yes.

Mr. Rosenberger: The last suit filed?

Mr. Smith: Yes.

Mr. Rosenberger: No, neither in the Cambria suit nor the Belt line.

Mr. Smith: Nor the receivers of the Belt Company in this third suit, the one on account of the Pittsburg & Gulf claim?

Mr. Rosenberger: Not otherwise than it was the re-
499 sult of the same plan of reorganization.

Mr. Smith: Now Mr. Mecartney also participated somewheres along the line in the Filrst National Bank case, did he not?

Mr. Rosenberger: Yes.

Mr. Smith: As counsel, I mean, in that case and in the subsequent development of it?

Mr. Rosenberger: He did after the case got in the Supreme Court, but you should understand that the First National Bank's claim was just as much a part and parcel of the Guardian Trust Company's claim against the Belt Company as any other item involved in its indebtedness due from the Belt Company and claimed to be due from the Southern Company; and, in fact, was brought into the Cambria accounting case by a supplemental pleading.

The Master: Before the Master?

Mr. Rosenberger: Before the Master; seeking to charge the Southern Company and the Belt Company with that indebtedness.

Mr. Smith: But what I am getting at is, Mr. Rosenberger, that had nothing to do with the accounting branch of the case and had solely to do with the question of the liability of the Kansas City Southern for debts of the Belt Company?

Mr. Rosenberger: Oh yes, it had to do with the accounting part of the case most decidedly, as much as any other part of the things afterwards recovered by the Trust Company. Now I know what you are getting at and I think my answer will satisfy you. Mr. Mecartney appeared for the Guardian Trust Company in the Supreme Court in the suit between the First National Bank and the Guardian Trust Company, and charged and collected a fee for it. It has nothing to do with the account the Master is investigating here. After it had been established that the Guardian Trust Company was liable on the note which was the subject matter of that suit between the bank and the Trust Company, the Trust Company asserted as a liability against the Belt Company and the
500 Southern Company that amount which it had paid out in satisfaction of the bank's judgment.

The Master: By a supplemental pleading?

Mr. Rosenberger: By a supplemental pleading, and evidence was introduced before the Master on that point.

Mr. Smith: But, Mr. Rosenberger, what I am getting at is this: this litigation took on the aspect of two branches; there was the accounting branch, in which was considered the question of whether the Belt Company was indebted to the Trust Company, or vice versa; and there was the other branch, to-wit: if the Belt Company was liable to the Trust Company, was the Southern Company liable for its debt?

Mr. Rosenberger: I think that is a fair statement.

Mr. Smith: Two distinct branches of the problem.

Mr. Rosenberger: I wouldn't say they were distinct.

Mr. Smith: Well, they were separate propositions involved?

Mr. Rosenberger: They were separate propositions, yes.

Mr. Smith: Mr. Rosenberger, you testified in the Mecartney case, did you not?

Mr. Rosenberger: Yes.

Mr. Smith: I will ask you if you made these answers to these questions—now I am not doing this to contradict, you understand, but just to get it in in the right way?

Mr. Smith (reading): "Q. What was the nature of that litigation? A. I, of course, at that time was not familiar with the nature of that—litigation and to look a long time and a most energetic and industrious amount of study to become familiar with it. I assume by your question you want to know what the subject matter of that litigation was and the conditions involved therein. Q. Yes, sir. A. The litigation was two-fold. It involved first, the establishment of the guardian Trust Company of a very large indebtedness due it from the Kansas City Suburban Belt Railroad Com-
501 pany, and in that connection, and in the proceedings then pending, to establish such indebtedness, it involved the successful defense of the Trust Company against certain claims and charges of the Kansas City Suburban Belt Railroad Company; claims and charges which the Belt Company claimed not only offset the debts due from the Belt Company to the Trust Company but in a proper accounting, as it claimed, would leave a large balance due to the Belt Company. The other branch of the litigation was the establishment of any claim which might be out by the Trust Company against the Belt Company as a debt against the Kansas City Southern Railway Company, which had become the successor of the Belt Company. Do you desire to have me go into further detail as to the issues involved?"

Mr. Rosenberger: Speaking generally, the answer that I made in the testimony to which you called my attention as a summarization of the pleadings, issues in the Cambria suit, is correct; but it doesn't go far enough. If I had gone farther and stated the facts more amply I would have stated that involved in the accounting suit necessarily is the claim that was always set up in the Cambria suit, that the Cambria case was just merely a fictitious suit brought by the Cambria Steel Company as a mere tool or stool pigeon for the Kansas City Southern and its reorganization committee. That claim was always in the case and the whole litigation from the very day it commenced in 1900 was fostered and prompted by the Kansas City Southern Railway Company and its promoters.

Mr. Smith: Mr. Rosenberger, we can agree, can we not, that the judgment in the First National Bank case was affirmed by the Supreme Court of Missouri on March 16, 1905, that being the date stated in the opinion?

Mr. Rosenberger: If you are sure if that is the date, why, we can certainly agree on it, if you have looked it up and know right.

502 Mr. Smith: Mr. Rosenberger, you have stated with reference to the printing of briefs, Items 138 to 165, that some of them were printed in Chicago; of course, you don't know all of the briefs that Mr. Mecartney had printed, do you, in Chicago, and included in this bill? You wouldn't attempt to say?

Mr. Rosenberger: I think he always sent me a copy of of them as soon as they were printed.

Mr. Smith: Well, didn't he print other things besides briefs?

Mr. Rosenberger: In those items?

Mr. Smith: Well, I don't know; I am just asking you if he didn't do it; wasn't he given to printing pamphlets?

Mr. Rosenberger: No phamphlets that are enumerated in this account. Of course, he got out a pamphlet since the case was decided about the peace in Europe, and things of that kind; but no items of that kind in this.

Mr. Smith: Well, he printed his reports, did he not, to the Trust Company concerning the business of that company.

Mr. Rosenberger: Fequently he would make his reports as to the status of the Belt Litigation in printed form.

Mr. Smith: And other matters; did he not, for instance, this matter I read about the various items he had, that was a printed report, wasn't it?

Mr. Rosenberger: I wouldn't say from memory whether printed or not.

Mr. Smith: But he did print those reports generally?

Mr. Rosenberger: I wouldn't say generally; sometimes they were in typewritten form; sometimes printed; great many stockholders of the Guardian Trust Company interested and in order to avoid multiplying them otherwise he would sometimes have them printed.

Mr. Smith: You can't tell from your recollection of what he sent to you what were the briefs in this matter and what printed briefs and what were reports?

503 Mr. Rosenberger: Yes, I don't remember his sending anything extraneous.

Mr. Smith: Mr. Rosenberger, I would like to ask you regarding Item 284, referring to the payment of $25.00 to McDonald for copy of Knott letter?

Mr. Rosenberger: I have a recollection about that, Mr. McDonald was a reporter for the Star, as I recall it. Mr. Knott was president of the Kansas City Southern at that time. Mr. Knott took his pen in hand and wrote a communication to the Star about a matter which I considered contained important items relating to this Cambria suit and I wanted the original of that letter and I asked Mr. McDonald to get that original; published in the newspaper, but I wanted the original and I think I gave him that money for his time and trouble in getting it. Whether it was introduced in evidence in the case—in the Cambria case—I don't now recall. But I know that it was in connection with this Cambria case and also the reorganization affairs of the Kansas City Southern.

504 Q. Why, Mr. Rosenberger, you, yourself, were associated with the Star for a long time, were you not? A. Yes, sir. Q. Couldn't you have gotten it yourself by asking for it? A. Perhaps I could, but I spent my days in the Belt case. I didn't have much time to be chasing around for this. Q. Why did you have to pay him $25.00 to get a letter of that kind? A. I have given you the reason. I needed somebody who was connected with the paper, to get it; didn't have time to do it myself. Besides all that, I want to remind you that that item was charged up by Mr. Mecartney in his suit against the Guardian Trust Company and was allowed as a just item. As counsel know, I make the objection that it is for the purpose of reopening the case. (p. 570).

The circumstances regarding the Frank B. Wilcox items, No. 182 and 183, are as follows: Included in the indebtedness of the Guardian Trust Company which it was seeking to charge against the Belt Company primarily, and the Southern Company, as its successor, was an item of approximately $89,000.00 known as the Degoijen item. There were entries on the books of the Kansas City Suburban Belt Railway Company and on the books of the Trust Company touching that item. The transaction was a complicated one.

The officer of the Trust Company who had to do with making the entries on its books and the corresponding entries on the books of the Belt Company was at the time the transaction occurred, Frank B. Wilcox. The disbursements were made in March and April, 1905. Wilcox had for years ceased to have any connection whatever with the Belt Company or with the Trust Company. He did not even live in Kansas City. It was believed by me and by the officers of the Trust Company
505 that Wilcox would be able probaby to fully explain that transaction, he having been personally involved in it. We finally located him in some other city, I don't know just where, and at my request, Mr. Mecartney got in touch with him and told him that I needed some testimony on that subject and asked him to come to Kansas City to see me. Wilcox came to Kansas City and we discussed that item and he told me he would be unable, after a lapse of so many years to throw much light upon it unless he could have an opportunity to examine the books; and he declined to examine the books and give any testimony on the subject unless he was paid a reasonable compensation for so doing. I agreed to compensate him and he immediately occupied himself with examining the books of the Railroad Company and the Trust Company and went through the transaction thoroughly. He then had an extended conference with me and explained the transaction fully. Mr. Moore called him as a witness on other subjects. I cross examined him and elicited from him the facts as to which his memory had been refreshed by the examining of the books. After he had given his testimony, I paid him the amounts shown in Items 182 and 183. It is my recollection that Item No. 182 was paid by a draft for $450.00 which I gave him on Mr. Mecartney. Mr. Mecartney paid the draft.

Mr. Smith: Mr. Rosenberger, isn't it the fact about this Degoijen transaction, what I stated the other day, that it was a part of a series of false entries on the books of the Guardian Trust Company and Belt Company by which a false dividend was declared to give a false value to the stock of the Belt Company?

Mr. Rosenberger: I never so regarded it.

Mr. Smith: Didn't this Degoijen transaction consist of the transfer of the notes that were owed by the Belt Company as debt to the Trust Company, as one of its debts to the Trust Company, the Trust Company assuming that indebtedness and thereby making, permitting and inducing the

Belt Company to make a statement of its earnings and assets that excluded that liability?

506 Mr. Rosenberger: All of the facts in connection with that Degoijen item are developed fully in the record in the Cambria case. You asked me what the facts were, but I was counsel in the case. All I had to do was to elicit that evidence.

Mr. Smith: You have stated here you were of the opinion it was an honest transaction?

Mr. Rosenberger: Absolutely.

On Thursday, February 7, 1924, at 9:30 o'clock A. M. hearings before the Master were resumed and Mr. Rosenberger further testified on cross examination by Mr. Smith, in substance, as follows:

Mr. Smith: Mr. Rosenberger, in each of the injunction cases on which appeals were taken in the Court of Appeals, the first of those injunctions went up solely on the pleadings, did it not, no evidence taken?

Mr. Rosenberger: I think that is true with respect to both of the injunction appeals. I don't know of any evidence being taken on either one of them.

Mr. Smith: Mr. Rosenberger, in the Mecartney case, just in order to expedite this question, I will ask you if this question was asked you and this answer was made—that is in the Mecartney case in the state court: (Reading)

"Q. Now at that stage of the case, the amended pleadings having been filed, you could have raised by demurrer all the questions as to the general validity of this accounting, could you not?"

"A. Not with any hope of success, and for several reasons which I will give you. In the first place, before we came into the case, and without criticising counsel, because the best counsel can make mistakes, there had been a great mistake made, there was not only the Judge Black and Trimble & Braley stipulation, but in the answer filed before we came into the case they had expressly invited an accounting, and signified their willingness to an accounting, and in answer to

507 that question all the testimony taken before we came into the case had been taken."

Now that is all I wanted to cover in the question. Did you make that answer to that question? That is from page 774 of that record?

Mr. Rosenberger: That is the case before the Master, in that case?

Mr. Smith: Yes, that is the case before Judge Douglass where it refers to that case?

Mr. Rosenberger: I find from an examination of the question and answer that you have not read my answer in full.

Mr. Smith: No; I said that was all I cared to ask, to cover by my question. I just wanted to get that fact.

Mr. Rosenberger: Inasmuch as the remainder of my answer explains the answer I think, it is clear to me, you should read my answer, my whole answer.

Mr. Smith: Well, that is all right, Mr. Rosenberger. I just asked that much because that was all I wanted.

The Master: That is not all.

Mr. Rosenberger: No, sir. (Reading) "Now if we had stopped at the close of all the evidence at the stage of the case wherein we had promises from the Master that he would immediately go to work and get out his report, and that the matter would be terminated at a short date, for us to then stop in view of what had taken place in the past and file demurrers, and consume all that time in attacking pleadings, I think we would have been justly criticised if we had done that." That was my complete answer made at that time, but that does not go into all of the reasons that we had for not filing demurrers.

Mr. Smith: That isn't the point I have in mind, Mr. Rosenberger. All I have asked is, did you make that answer to that question?

Mr. Rosenberger: Yes; and I claim the right to elaborate that answer by stating, in addition, that stipulation to which I called attention in that testimony expressly provided the accounting should be expedited by the complainants, who, at that time, and who almost up to the close of the taking of testimony, were putting in their proof and instead
508 of expediting the thing were shoveling in testimony for months and months and years; kept on doing it, and that was the abuse that we complained of. Instead of expediting the accounting, as they had pretended they were going to do, why, they got Judge Trimble to sign that stipulation and the accounting was drawn out for years and years and for ten years after that time the case was still open before the Special Master.

Mr. H. S. Mecartney, who was the plaintiff in this case in which the Mecartney judgment was obtained, had his law office at all times in Chicago; that is where he practiced law. His home was a suburban home at Hinsdale, Illinois, near Chicago. That was true at the time he was employed in this case, and Hinsdale continued his home throughout all of his connection with it; and his home is in Hinsdale yet, and his law office is in Chicago yet, so far as I know.

509 On redirect examination, Mr. Rosenberger testified, in substance, as follows:

Some reference has been made here to the intervention involving about $132,000.00 which was filed in the Kansas City, Pittsburg & Gulf case, and to which Mr. Mecartney and I gave attention. That intervention was strictly involved in the Cambria suit and was part of it. It appears that not long before the filing of the Cambria bill and before the Kansas City Southern Railway Company had obtained control of the management of the Kansas City Suburban Belt Railroad Company, the latter company had assigned to the Guardian Trust Company as collateral security for the Belt Company's debt to the Trust Company, a bill of about $130,000.00 which the Gulf Company was owing the Belt Company for switching charges. The Gulf Company was the principal tenant line of the Belt Company which furnished terminal facilities to the Gulf Company and rendered switching services to it here at Kansas City. The value of that collateral, of course, depended upon the ability to collect that bill from the Gulf Company which shortly afterwards went into the hands of Receivers, and in order to protect the collateral of the Trust Company in respect to these switching charges, the Trust Company filed an intervention in the Gulf receivership case. Practically no attention was given by either Mr. Mecartney or myself to that intervention. The Gulf Company went into the hands of receivers April 1, 1899, and it was not until 1904 that Mr. Mecartney and I were employed. Furthermore, from the papers and the documents of the Trust Company and of the Railroad Company
510 which came into our hands, it appeared that Trimble & Braley and Wash Adams had given practically no attention to that matter. The Trust Company had employed special counsel to look after that claim and other claims, that special counsel being the firm of Wolman, Solomon & Cooper. Whatever work was done on that Pittsburg & Gulf claim was done by Mr. Solomon. Mr. Solomon was paid fees by the Trust Company for his work in that case. That matter had escaped my attention when the bill that is before the Master

was filed and I omitted to direct Mr. Willey's attention to it when I asked him to file a statement, but I shall ask leave to file a supplemental account here, including in this claim, the money paid to Mr. Solomon for his services in protecting the Trust Company's collateral in this Belt Company debt, in fact, there were other matters which for a considerable period of time, were not charged to Mr. Solomon and to whom on account of his services, expenses were incurred and paid by the Trust Company which do not now appear in this account.

Mr. Smith: Mr. Rosenberger, I am not familiar with the facts with reference to that claim, but I have the impression, and I will ask you if I am correct in it, that that intervention was filed in the Pittsburg & Gulf foreclosure case, wasn't it?

Mr. Rosenberger: You are correct in that; necessarily had to be in order to obtain a preferential character to the claim, but, as I have stated, the claim was part of the collateral of the Trust Company's for the Belt Company's indebtedness and was part of the collateral which the Cambria Company and the Southern Company sought to re-claim and sought to prevent us from realizing on.

Mr. Smith: Now the fees that were paid or earned my Mr. Solomon, or his firm, would include services in connection with the intervention in the Pittsburg & Gulf foreclosure case?

Mr. Rosenberger: On behalf of the Trust Company in connection with the Trust Company's collateral to this Belt debt herein adjudicated in this case.

511 Mr. Smith: That intervention has never been decided as to what either—was that intervention ever decided in the Pittsburg & Gulf foreclosure case.

Mr. Rosenberger: I am not advised of its ever having been determined. Naturally after the United States Court of Appeals held we were entitled to recover our debt from the Southern Company, why, the intervention ceased to be of importance to the Trust Company.

Mr. Smith: But your statement that Wollman, Solomon and Cooper represented the Trust Company in that matter and were paid fees would, as I have stated before, present the question as to their fees in that foreclosure case—the Pittsburg & Gulf foreclosure case—as well as this case?

Mr. Rosenberger: It had nothing to do with the foreclosure.

Mr. Smith: But it was filed in that case, wasn't it, intervention filed in that case?

Mr. Rosenberger: Yes, it was filed in that case, as I say, to protect the collateral to the Guardian Trust Company and this is the same indebtedness we have in this case.

512 Q. But that was before this suit was ever filed?

The Master: Which suit?

Mr. Smith: Before this Cambria suit was ever filed?

A. No, not that I am advised.
Q. Wasn't intervention filed in the state Trust Company's case prior to the filing of the bill?
A. Possibly so, but if it was filed little or nothing was done with it until after the Cambria bill was filed. (p. 584.)

Mr. H. B. Leavens, called for further cross-examination by Mr. Smith, testified in substance, as follows:

Mr. Smith: Mr. Leavens, I will get you to state if you yesterday received from me a telephone request to see whether the Guardian Trust Company had an account with Mr. Mecartney showing the payment of any fees in addition to those stated in the account that is filed in this case?

Mr. Leavens: You did.

Mr. Smith: What record have you here, or, rather, did you find any evidence of payments to him?

Mr. Leavens: I did.

Mr. Smith: This account, Mr. Leavens, shows the following payments to Mr. Mecartney:

513 Mr. Smith: "December 8, 1904, $5,000.00?"

Mr. Leavens: Yes, sir; retainer.

Mr. Smith: Yes; "September 27, 1905, $5,000.00?

Mr. Leavens: Yes.

Mr. Smith: "February 13, 1906, $5,000.00?"

Mr. Leavens: February 3rd, $5,000.00.

Mr. Smith: Yes, sir; "August 15, 1906, $5,000.00?

Mr. Leavens: Yes.

Mr. Smith: "July 31, 1907, $7,500.00"?

Mr. Leavens: Yes.

Mr. Smith: What other payments were made to him?

Mr. Rosenberger: Wait a minute, just a minute; I would like to have that question made more definite; you mean by "other payments" payments not mentioned in the account here before the Master?

Mr. Smith: I have said—exclusive of the judgments, I can add that if you like.

Mr. Smith: What payments, what other payments were made to him prior to January 1, 1918, if any?

Mr. Leavens: "June 21, 1905, advanced for investigation of Missouri Railway Construction Company, $500.00; December 4, 1905, to funds advanced legal expenses $300.00". That is all the account shows.

Mr. Smith: What are the limits of that account, when does it begin and when does it end?

Mr. Leavens: Begins December 8, 1904, and ends July 31, 1907.

514 Mr. Smith: Is there another ledger after that, with reference to payments?

Mr. Leavens: I haven't looked for one.

Mr. Smith: I want to say this, if the Master please, that we may make this prima facie showing as best we can. We have no right to go through the Trust Company's books and if there is any other payment made to Mr. Mecartney for any other services here we have done our best to get it and we demand, if there is any other claim for any other figure, we ask the Master direct that showing be made by the Trust Company's books.

Mr. Rosenberger: What possible relevancy would it have if any such payments were made after they paid that Mecartney judgment? Why, if it were a claim that some charge was being made for it in that account, it would be different. (p. 588.)

The Master: Mr. Leavens, were you requested by Mr. Smith to examine the books of the Guardian Trust Company to see what payments were made to Mr. Mecartney other than those included in this amount before the Master?

Mr. Leavens: I understood his request to be to find if I could an account in which these items mentioned in this statement are incorporated and see if there were any other items that were in that account and not included.

Mr. Smith: Mr. Leavens, didn't I do this: didn't I state, ask you if you had a copy of this account and you said you didn't have one before you and then I said to you I would like to have your testimony whether or not there were ony other payments made to Mr. Mecartney other than those stated in the account, and I got the Trust Company's statement of account and telephoned to you stating those that were paid?

A. That is it exactly. (p. 590.)

Mr. Rosenberger: Q. And what is the last payment made to Mecartney shown by that book?

515 A. July 31, 1907—

Mr. Rosenberger: Now to accommodate these gentlemen will you please look at the ledgers containing entries subsequent to December 31, 1907, and see whether any other payments were made to Mr. Mecartney and come back and report to the Master?

Mr. Leavens: I will do my best in that direction.

Mr. Rosenberger: I am sorry they require it. I know you won't find anything, but then you go ahead and try and find it; anyway they want to be satisfied about it.

Mr. Smith: I am perfectly willing to accept your statement that is all that were made, is that your statement?

Mr. Rosenberger: Mr. Smith, absolutely the last dollar he got out of the Guardian Trust Company by voluntary payment was that item of December 31, 1907.

Mr. Crane: On December 31st?

Mr. Rosenberger: Yes.

The Master: July 31st, $300.00?

A. July 31st, $500.00.

The Witness: July 31st, $7500.00.

Mr. Rosenberger: Everything that was paid to him subsequently was paid in satisfaction of final judgments of the courts, the first judgment being suit in the state court, affirmed by the Supreme Court of Missouri; and the next judgment being that in the Federal Court for services rendered subsequently on appeal in this Cambria suit.

Mr. Crane: We will take that statement. Mr. Leavens does not need to look any farther. If he says there is nothing further, well take that statement. (pp. 591, 592.)

516 To sustain the issues on their part, the Kansas City Southern Railway Company and the Cambria Steel Company thereupon offered the following oral and documentary evidence, to-wit:

HARRY A. JETMORE, being duly called and sworn as a witness on behalf of the Kansas City Southern Railway Company and the Cambria Steel Company, testified in substance as follows:

I was the official reporter who took the testimony in the Cambria litigation from the beginning to end. In taking that testimony, I made four copies, one original that
517 went to the Court for the Master, one copy furnished the Guardian Trust Company and two copies to the Kansas City Southern or the Suburban Belt. My bills and vouchers in Mr. Leavens office or Mr. Flower's office, these were made by me from the transcripts. I have checked over these bills and vouchers and have made a statement of how much was carbon copy and how much was original on each of those vouchers. The Kansas City Southern Railway Company's Exhibit "B" is a statement that I prepared after going over the Trust Company's vouchers with my bills attached thereto. The statement shows the item number on the Trust Company's bill, the voucher number, the date of the voucher, the date of my bill, and I have subdivided the amount of the bill showing the bill for the original, for the carbon and the total bill making three columns of it. The statement merely covers charges made by me to the Trust Company and the amounts they paid me. I made no charge against them for the original of any testimony that was taken on behalf of the complainants in that litigation. When they took the testimony, the original was charged to them. It was only the original of this testimony that was furnished to the Master. The Suburban Belt started the taking of testimony. When they would take their testimony, they paid for the original copy and their carbons and the Guardian Trust Company paid for their one copy. When the Guardian Trust Company took their testimony, then the Guardian Trust Company paid for the original and their carbon copy and the Suburban Belt Railroad paid for their two carbon copies. This statement shows that the Trust Company paid for the original copy $2725.77, and for their carbon copy of the record, $3748.95, making a total of $6774.72.

The Kansas City Southern Railway Company's Exhibit "B", being the statement referred to in the testimony of wit-

ness, was thereupon offered in evidence by the Southern Company and is in words and figures as follows:

518 Kansas City Southern Railway Company's Exhibit "B"

Guardian Trust Company Vouchers
Issued
To H. A. Jetmore

Item No.	Voucher No.	Voucher Date	Bill Date	Original	Carbon	Total Bill
4	317	7-14-03	5-25-03	$	$ 487.75	$ 487.75
5	448	12- 1-03	11-25-03		168.90	168.90
6	510	2-16-04	2- 8-04		77.16	77.16
7	621	7- 1-04	6-30-04		296.87	296.87
8	689	8- 1-04	8- 1-04		36.17	36.17
9	719	10-27-04	10-25-04		43.16	43.16
10	831	3- 1-05	2-28-05		96.00	96.00
11	[illegible]05	3-30-05	3-26-05		209.17	209.17
12	867	4-30-05	4-17-05		132.50	132.50
13	890	5-15-05	5-10-05		123.92	123.92
14	912	7- 1-05	6-30-05		515.50	515.50
15	923	7-11-05	7-10-05		137.75	137.75
16	940	8-14-05	8-11-05		172.08	172.08
17	944	8-25-05	8-25-05	352.25		352.25
18	953	9-12-05	9- 8-05	3.50	50.50	54.00
19	968	10- 4-05	10- 3-05	182.75	411.58	594.33
20	1000	11-14-05	11-13-05	147.50	221.08	368.58
21	1023	12-19-05	12-18-05	177.00	169.88	346.88
22	1031	1- 9-06	1- 4-06	.50	212.08	212.58
23	1035	1-23-06	1-20-06	249.25	92.75	342.00
24	1040	2-13-06	2-12-06	46.50	146.55	193.05
25	1048	2-21-06	2-20-06	157.50	2.08	159.58
26	1075	3-24-06	3-22-06	180.50		180.50
27	1079	3-27-06	3- 9-06	300.00	15.58	315.58
28	1080	3-29-06	3-29-06	208.60		208.60
29	1097	4-26-06	4-21-06	527.67	87.11	614.78
30	1171	9- 5-06	8-20-06	177.25	37.00	214.25
519	Exhibit "B" Cont'd					
31	2032	4- 1-07	2-28-07	$ 10.00	$ 5.83	$ 15.83
32	2236	8-28-09	8-31-07	5.00		5.00

On cross-examination by Mr. Rosenberger, Mr. Jetmore testified in substance, as follows:

Mr. Rosenberger: Now, Mr. Jetmore, I am going to ask you touching the amount of time and work that counsel were giving before Special Master Douglass, particularly Judge Trimble and Wash Adams. During the time from the beginning of the testimony which you reported down to December 1904, I wish you would give the Master some ideas as to

how often the testimony was taken and what it involved, the amount of time the lawyers were giving to that case.

Mr. Jetmore: My impression is the bulk of the evidence was taken after December, 1904.

Mr. Rosenberger: Don't you recall sixteen volumes of testimony had been taken before Mr. Mecartney and I got into the case?

Mr. Jetmore: I expect you are right.

Mr. Rosenberger: You remember that Mr. Willey was on the stand?

Mr. Jetmore: He was on the stand covering a period of about a year, not all the time, of course. We had a great many recesses, of course. We had a great many hearings. He spent a great deal of time and did a great deal of work there. Judge Trimble and Wash Adams were appearing for the Trust Company.

Mr. Rosenberger: To refresh your recollection, I will hand you a list of sessions compiled from the record before Judge Douglass as Special Master and ask you to state whether you don't find there were one hundred and three sessions before Judge Douglass from the time the testimony began on January 15, 1903 to December 20, 1904 when Mr. Mecartney and I were employed.

Mr. Jetmore: I have looked at this statement and find it to be a statement I prepared myself. It was taken from the record. There seem to be one hundred and three sessions down to December, 1904. This statement has the fol-
520 lowing foot note at the end of it which is my memorandum:

"The above list does not include any of the sessions covering testimony of the witness F. B. Wilcox, who was on the stand for a period of two weeks, during which examination the sessions commenced at nine thirty in the morning and continued without interruption until ten at night; nor does said list include any of the examination of witnesses J. H. Cochran and George E. Wall. These sessions are estimated at about sixty in addition to above listed." Now someone has interlined here: "nor does said list include any of the sessions covering the cross examination of the witness Johnson." Then here is another foot note: "January 15, 1903 to January 29, 1903, two weeks spent by attorneys for complaints with counsel for Trust Company in ex-

amination of Trust Company's vouchers from 9:00 A. M. to 6:00 P. M. every day at office of the Trust Company."

A good many of the sessions held prior to December, 1904, were held in the night time. Judge Trimble and Judge Adams were both representing the Guardian Trust Company, and I think they appeared at every session. The accounts examined at that time were complicated and ran into millions of dollars. I think the Trust Company's account was $600,000.00. It involved the disposition by the Trust Company of stocks and bonds issued by the various railroad and subsidiary companies that were parties to the suit. It even involved the accounts of the various construction companies which had built sections of the railroad, such as the Missouri Railway Construction Company and of the real estate companies that took titles to the land.

521 Q. Don't you recall, Mr. Jetmore, that from the very beginning of the taking of any testimony that it was agreed and understood that the advancements by the Guardian Trust Company for either stenographic fees or Master's fees were to be divided, one-third to be paid by the Guardian Trust Company and two-thirds by the complainants in the case, namely: The Cambria Company and the Belt receivers?

A. No, Mr. Rosenberger, I can't remember it that way and my bills would indicate that I did not. Of course—

Q. (Interrupting) Leaving the phraseology of your bills out of consideration? A. Yes.

Q. Don't you recall that the orders that were made by the court making provisional allowances to Judge Douglass that the Guardian was always charged with a third of that and the complainants in the suit with two-thirds?

A. No; and I don't think I ever saw one of those orders or knew what allowance was to Judge Douglass—

Q. The costs were all divided one-third and two-thirds?

A. No, I think not. I had quite a wrangle over the question of stenographer's fees.

Q. But what that agreement was at the time you wouldn't be able to state?

A. The final agreement was according to my bills.

Q. What final agreement?

A. Or final order, whatever it was. I made my bills according to that agreement, or that stipulation, whatever it was. And so my bills—I am not talking about Judge Douglass' bills, or any of the bills in connection with it; just talking about the stenographic bills; can't go any farther than

that because I never gave it any attention; wasn't any of my business—

522 On redirect examination, Mr. Jetmore testified as follows:

Q. Now let me ask you about the order you spoke of, or stipulation; if such a document existed, or such an order was made, and it cannot be found I would like to have your recollection as to the provisions of it. Did that contain any provision that carbon copies were to be taxed as costs?

A. If here was such an order or a stipulation—which I am satisfied there was—it provided that the transcript should be paid for and that each party should pay for their own as I rendered bills. That is all.

Q. That is, each party should pay?

A. For the original taken by them.

Q. Of evidence introduced by them?

A. And the other party should pay when it came to theirs. (pp. 598, 600, 610.)

On redirect examination by Mr. Smith, Mr. Jetmore testified in substance, as follows:

Mr. Smith: Yes; and now with reference to these meetings: weren't there a great many of those meetings where you would go there and on one side or the other the lawyers would be engaged and the thing would be put off until some other day and no testimony taken?

523 Mr. Jetmore: Yes, or very small amount of testimony taken.

Mr. Smith: And you would cover that in your transcript of the evidence when you came to make it up, you would show each day they were in session?

Mr. Jetmore: It showed each day they were in session, according to this transcript; my transcript showed what was done exactly. If they did anything it showed.

Mr. Smith: But it shows in the record?

Mr. Jetmore: Shows in the record the length of the session; that is, where there was no testimony taken it shows adjournment; and where there was a session shows the length of it, transcript of what took place.

Mr. Smith: Wasn't Judge Douglass on the bench part of this time as Circuit Judge in the state court?

Mr. Jetmore: There at the last part, before it was finished, finally finished, Judge Douglass did go on the bench.

The hearing before Judge Douglass did not cover the Port Arthur Channel & Dock litigation in Texas; it covered, as I remember, eleven companies. It dealt with the Trust Company's relations with the Kansas City Suburban Belt Railway Company, the Kansas City and Independence Air Line, the Central Improvement Company, the Second Street Improvement Company, the Union Terminal Company, the Missouri, Kansas and Texas Belt Company, Missouri Elevator and Terminal Company, the Fairmount Amusement Company, the Consolidated Terminal Company, the Kansas City Fruit Auction Company and perhaps the Kansas City Northern Connecting Company. There were some others. I think it did not cover the Port Arthur Channel & Dock Company.

Mr. H. C. SPAULDING, called as a witness on behalf of the Kansas City Southern Railway Company and the Cambria Steel Company, having first been duly sworn, testified, in substance, as follows:

My name is H. C. Spaulding. I am Deputy Clerk of
524 the United States District Court.

Mr. Smith: If the Master please, we desire to make an offer of proof in this case on the question of good faith and reasonable grounds for filing and prosecution of these claims, and I want to offer this document in support of that. I offer in evidence the petition filed by Charles E. Grannis and B. J. Hickman, on April 1, 1899, in the case of Grannis, et al, vs. Kansas City, Pittsburg and Gulf Railroad Company and the Missouri, Kansas & Texas Trust Company, predecessor of the Guardian Trust Company.

Mr. Rosenberger: I object to it as having no relevancy at all. The petition was filed long bfeore the commencement of the Cambria suit, for one thing; in the second place, it is part of the files of the United States Court here and I question very much the right of the party to offer the original file in a suit of this kind, because the files belong to the court. If it were proper at all it would have to be offered in the form of a certified copy, because those files cannot be allowed to go out of the possession of the clerk, under the rules which have been in force by this court for many years. In the third place, being part of the files of the court in related litigation they are before the court and the Master

anyway for whatever they may be worth, without[formerly] being offered in evidence.

Mr. Crane: They are not in this case at all.

Mr. Rosenberger: I know, but that doesn't make any difference. The court can take judicial notice of its own files.

Mr. Smith: I want to state, if the Master please, this is contained in the transcript on removal of that Grannis case to the Federal Court and it bears the file mark of April 20, 1899, this court. Now on the question of the offering of the original, I want to say this: that the stipulation that was prepared by Mr. Rosenberger at the outset contains the provision that in the offering of any document from any court it may be referred to and that we shall incorporate it thereafter, or it may be accomplished in that way.

525 The Master: The objection will be sustained, on the broad ground that the District Court and the United States Circuit Court of Appeals have, in the opinion of the Master, foreclosed us considering the question of good faith.

Mr. Smith: I may understand you are not excluding it because we are offering the original and have not been to the expense of securing a certified copy.

The Master: No.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, at the time duly excepted.

The petition so offered in evidence, marked Kansas City Southern Railway Company's Exhibit 1, is in words and figures as follows:

"State of Missouri
County of Jackson—ss.

In the Circuit Court of said County at Kansas City.

To ..... Term, 1899.

Charles E. Grannis, B. J. Hickman, J. J. Cairnes, & Kansas City, Suburban Belt Railroad Company, Plaintiffs,

vs.

Kansas City, Pittsburg & Gulf Railroad Company, (a corporation), and Missouri, Kansas & Texas Trust Company, (a corporation) and State Trust Company of New York, Defendants.

Plaintiffs for their cause of action state as follows:

That they are citizens of Jackson County, State of Missouri, and stockholders in the Kansas City, Pittsburg & Gulf Railroad Company, co-defendant corporation, and bring this suit on their own behalf as well as on behalf of other stockholders or creditors or bondholders who may choose to become plaintiffs herein and to contribute to the expenses of the litigation.

That they are owners of stock in said Kansas City, Pittsburg & Gulf Railroad Company (co-defendant herein), as follows, respectively, to-wit:

526 Charles E. Grannis, four hundred shares of the par value of One Hundred Dollars each.

B. J. Hickman, seven hundred and forty shares of the par value of One Hundred Dollars each.

J. J. Cairnes, three hundred and sixteen shares of the par value of One Hundred Dollars each.

That the Kansas City, Suburban Belt Railroad Company is a corporation duly organized under the laws of Missouri, and is a creditor of the defendant railroad in the sum of twenty thousand dollars and more, and said indebtedness is long past due and unpaid.

That heretofore, to-wit, on or about November 6th, 1889, The Kansas City, Nevada & Ft. Smith Railroad Company under said name and style was by virtue of the laws of the State of Missouri, duly created and incorporated as a railroad corporation with all the privileges and powers of said corporation.

That the capital stock of said corporation was three millions, five hundred thousand dollars, composed of thirty-five thousand shares at the par value of one hundred dollars per share.

That thereafter and on or about January 27th, 1893, pursuant to the laws of the State of Missouri, applicable thereto, the name of said Kansas City, Nevada & Ft. Smith Railroad Company was changed to that of the Kansas City, Pittsburg & Gulf Railroad Company, and that said last named railroad, (the defendant herein), succeeded to and became possessed of all the rights, privileges, and franchises of the said Kansas City, Nevada & Ft. Smith Railroad Company.

That thereafter, by successive changes therein and pursuant to the laws of the State of Missouri, applicable thereto, the capital stock of said Kansas City, Pittsburg & Gulf Railroad Company, the aforesaid defendant was increased until it became and now is the sum of Twenty Three Millons of Dollars, being composed of two hundred and thirty thousand shares of stock of the par value of one hundred
527 dollars each.

That the said defendant, the Kansas City, Pittsburg & Gulf Railroad Company has its principal office and place of business at Kansas City, Jackson County, Missouri, where its President, Vice-President, General Manager and other chief officers reside.

That the said defendant railroad, by virtue of the charter and privileges aforesaid is now and for a long time has been the owner of and is engeged in running and operating its line of railroad from said Kansas City, Missouri, aforesaid, to Mena, in the State of Arkansas, being a distance of three hundred and seventy nine and nine-tenths miles.

That the said railroad property so owned by defendant as aforesaid, includes right of way, main track, side track, switches, railway stations, depots and land appurtenant thereto; also locomotives, passenger and freight cars, rolling stock and various other kinds and classes of property incident to a railroad and connected with its management and operation.

That defendant railroad herein is now and has been for a long time engaged in conducting and operating, (in connection with its own line above mentioned) the Texarkana & Ft. Smith Railway Company, a railroad extending from Mena, Arkansas, south a distance of one hundred and thirty miles to the Arkansas and Louisiana State line.

That the defendant railroad is now and has also for a long time been engaged in conducting and operating (in connection with its own line, and in connection with that of the Texarkana & Ft. Smith Railroad Company), the Kansas City, Shreveport & Gulf Railway Company, a railroad incorporated under the laws of the State of Louisiana and extending a distance of two hundred and twenty miles, from the termination of said Texarkana & Ft. Smith Railway Company on the Arkansas and Louisiana State line to a point on the Louisiana and Texas State line, and said defendant rail-
528 road has, through its connection with the Texarkana & Ft. Smith Railway Company at the last named place,

a through line from Kansas City, Missouri, to Port Arthur Texas, a distance of 784 miles.

That the defendant herein is the owner of the locomotives, cars, rolling stock and rolling stock equipment, used by it on the aforesaid line of the Texarkana & Ft. Smith Railway Company and on the line of the Kansas City, Shreveport & Gulf Railway Company.

Plaintiffs for their cause of action further state that its aforesaid road, extending from Kansas City, in the State of Missouri to the town of Mena, in the State of Arkansas, (a distance of three hundred and seventy-nine and nine tenths miles), is subject to a bonded indebtedness, duly incurred by the defendant, in the sum of Twenty-five thousand dollars ($25,000) per mile of main line, yard and terminal track and has deposited with the Missouri, Kansas & Texas Trust Company of Missouri and the State Realty Company of New York the bonds and stock of the Texarkana & Ft. Smith Railway Company of Twenty-five Thousand Dollars ($25,000) first mortgage bonds of said last mentioned railroad companies upon each mile of main line yard and terminal tracks, and in turn, has issued its, the Kansas City, Pittsburg & Gulf Railroad Company's bonds in the sum of Twenty five Thousand Dollars ($25,000) per mile of main line, yard and terminal track of said railroad companies, extending from Mena, Arkansas, to Port Arthur, Texas, making an aggregated bonded indebtedness upon the railroad extending from Kansas City to Port Arthur, Texas, in the sum of Twenty-three Million Dollars ($23,000,000) all issued by said Kansas City, Pittsburg & Gulf Railroad Company.

That said indebtedness is evidenced by twenty three thousand negotiable bonds, payable to bearer, in the denomination of one thousand dollars each, all bearing date April 3rd, 1893, and being payable on April 21st, 1923, with five per centum interest coupons attached thereto, payable on the first day of April and October of each year respectively.

529 That said bonds and bonded indebtedness is secured by a mortgage in the nature of a deed of trust bearing date April 1st, 1893.

That by the terms of said instrument last referred to, all the property of the defendant then owned by it or to be thereafter acquired and including its right of way, tracks,

rolling stock and equipment was conveyed to the Missouri, Kansas & Texas Trust Company, (a corporation duly organized under the laws of the State of Missouri, having its principal office at Kansas City, in said State and joined as co-defendant herein), and to the State Trust Company, (a corporation organized under the laws of the State of New York), to secure and protect the payment of all of the bonds above mentioned as well as the interest coupons attached thereto, as the same should become due and payable.

That the Kansas City, Pittsburg & Gulf Railroad Company, because of the inadequacy of its resources and its consequent inability to meet the payment of said interest coupons falling due on April 1st, 1899, last past, amounting in the aggregate to the sum of Five Hundred and Seventy-five Thousand Dollars, has made default in the payment of the same; that although, as plaintiffs are informed and believe, said defendant has made diligent effort to do so, it has been unable to borrow money to meet the aforesaid matured coupons, and is also unable to fix a time in the future when it can pay said coupons.

Your petitioner further states that there is outstanding and due from said Kansas City, Pittsburg & Gulf Railroad Company, (co-defendant herein), to various creditors, a floating indebtedness of five hundred and seventy-five thousand dollars, the payment of which it is now unable to meet.

That said defendant owes for rolling stock and equipment purposes, the sum of Two Millions of Dollars, that there is due each month on said indebtedness the sum of Forty Thousand Dollars, which, as plaintiffs are informed and believe, the said defendant will be unable to pay as the same falls due, if it is required at the same time to meet its outstanding
530 coupon and floating indebtedness hereinbefore mentioned.

Plaintiffs further state that said defendant, the Kansas City, Pittsburg & Gulf Railroad Company also owes various state, county and city taxes, aggregating the sum of nineteen thousand dollars, or thereabouts; that said taxes constitute a lien (which can be summarily enforced), on the property of said defendant and have not been paid because of its financial straits and embarrassments.

Plaintiffs state that the said Kansas City, Pittsburg & Gulf Railroad Company has not sufficient resources to meet its aforesaid matured and its maturing indebtedness, and that said corporation is insolvent.

That said plaintiffs apprehend that its creditors whose demands have matured will institute in courts of competent jurisdiction attachment suits or other legal proceedings to enforce the collection of their demands.

That said proceedings will result in a multiplicity of suits against the said defendant railroad, in the breaking up and disrupting of its business as a railroad and common carrier, and in the waste and destruction of its assets, to the great prejudice and wrong, not only of said railroad corporation, but of its creditors and stockholders, including plaintiffs herein.

Plaintiffs further state that as they are informed and believe, that if the property of said defendant railroad is held together and is carefully used in the transportation of passengers and property it will produce an income sufficient to pay all operating expenses and necessary repairs, leaving each year a surplus, sufficient to pay off and discharge the interest coupons, floating indebtedness, equipment charges and other indebtedness hereinbefore mentioned, and ultimately to protect to the stockholders, the value of their stock, or a great part thereof.

531 Plaintiffs state that the assets and property of said Kansas City, Pittsburg & Gulf Railroad Company constitute a trust fund for the benefit of the creditors and stockholders of said corporation, that there is no adequate remedy at law to prevent the disruption of its business and the destruction of its assets as hereinbefore stated, and to prevent the wrongs and injuries threatened as aforesaid, and for the preservation and protection of the rights of the plaintiffs as said stockholders aforesaid.

Wherefore, by reason of the premises, plaintiffs pray that the court will fully administer as a trust fund, all and singular the property, rights and franchises belonging to said railroad company, including said line of railway, with all its appurtenances, and will marshall all its assets and ascertain the several liens and priorities existing thereon, and enforce and decree the rights, liens and equities of each and all the stockholders (including plaintiffs herein) and creditors thereof, as the same may be fully ascertained and decreed by the court upon the respective interventions and applications of each and every creditor and stockholder.

That for the purpose of enforcing the rights and equities of the creditors of said railroad defendant, as well as of pro-

tecting the rights, interests and property of said corporation as far as possible, the performance of the duties which said defendant railroad corporation owes to the public as a common carrier, and as the carrier of the public mail, as well as to preserve the unity of the business and property of said railway company as the same has heretofore been maintained and operated and of preventing disruption thereof by separate executions, attachments or sequestration, that this court forthwith appoint one or more persons as Receivers of all and singular the property, rights, assets and franchises of every nature and wherever situated, held, owned, or controlled by said defendant railroad company, with full authority to maintain and operate the same under the direction of the court and that all of the officers, managers,
532 superintendents, agents, and employes of the said railroad company be required forthwith to deliver up to such Receivers the possession of all and singular each and every part of said property, wherever situated, and also of all books of account, vouchers and papers in any way relating to the business or operation of said railroad, and for an injunction restraining each and every one of the officers, directors, managers, superintendents, agents and employes of the said railroad company from in any way interfering with the possession or control of such receiver or receivers over said property and for such other and further relief as to the court may seem proper, and as may be necessary to fully protect the rights of your orators, and of all the creditors and stockholders of said railroad corporation.

C. A. BRALEY
EDWIN SILVERS
JOHN A. EATON,
Attorneys for Plaintiffs."

Mr. Smith: I next offer in evidence on that same issue, the good faith question, the opinion of Judge Thayer appointing a receiver in the Bierce case, filed in case number 2483, W. W. Bierce, et al, vs. Guardian Trust Company, on November 30, 1900.

Mr. Rosenberger: That is objected to, for the reason that it is an attempt to re-open the issues which have already been adjudicated finally in this Cambria Steel Company case.

The Master: The objection will be sustained.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

The opinion of Judge Thayer in the Bierce case so offered in evidence, and being Kansas City Southern Company's Exhibit 2, is in words and figures as follows:

533 "In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

W. W. Bierce, et al., Complainants,
No. 2483 vs. In Equity.
The Guardian Trust Company, Defendant.

Mr. Frank Hagerman, Mr. L. C. Krauthoff and Mr. Max Pam for the complainants.

Mr. J. E. McKeighan, Mr. J. McD. Trimble and Mr. T. L. Chadbourne, Jr., appeared for the defendants.

Memorandum On Motion To Appoint A Receiver

Thayer, Circuit Judge.

The subject matter now before the court is a motion which was made on the filing of the complaint to appoint a receiver for the Guardian Trust Company, a Missouri corporation. The bill on which the application is based makes a great variety of allegations and is very voluminous. The affidavits and accompanying exhibits that have been filed by the respective parties either to support or overthrow the allegations of the complaint are also very numerous and lengthy. Owing to this fact and the complicated character of some of the transactions that have been investigated, and the limited time at the disposal of the court—it will only be possible to state in a very general way for the information of counsel the conclusions that have been reached on the strength of which the accompanying order is based.

1. The bill of complaint as viewed by the court for the purpose of the present motion, is a bill filed by minority stockholders to correct abuses of administration and to obtain the appointment of a receiver because of the mismanagement of the company's affairs and various ultra vires acts heretofore committed by the directors and managers who were in active control of the corporation. These acts, it is claimed, in substance, have led to a dissipation of the company's assets and brought it to the verge of insolvency. The

bill also charges in substance, that acts of a similar nature are now in contemplation and will be committed in the future by those who are at present in control of the company
534 if such action is not stayed by judicial process. Counsel will understand that the order made herein is not based upon the theory that the bill is one filed by the complainants to cancel and rescind their stock subscriptions on the ground of fraud, or upon the theory that the complainants are in a position at this time to maintain such a bill, although no decisive opinion need be expressed upon that point. Neither is the order herein based upon the theory that between November 4, 1899, and January 4, 1900, a valid resolution was adopted or that an agreement was entered into to go into liquidation, which resolution or agreement had the effect of impressing all the assets of the company with a trust as of that date which may now be administered by a court of equity at the instance of the complainants. Counsel will understand that the court rejects for the present each of said theories and does not predicate its action thereon.

In passing, however, it may be said, that such action as was taken by the Executive Committee of the company or its Board of Directors, or other persons interested in the company, at meetings or interviews between the dates last aforesaid, is of importance, in that it throws much light on the actual condition of the company at that time and at the present moment. After reading all the affidavits and the records of the company relative to what transpired at said meeting or interviews between the dates aforesaid—the court concludes that it was the unanimous opinion of all persons then connected with the company who were conversant with its affairs that it was in a precarious condition; that practically all of its capital had been invested in stocks, bonds and notes and in real property which were not readily marketable; that many of its stocks, bonds and notes were worthless; that the value of the residue of its securities, as well as the value of much of its real property, was uncertain; that no considerable portion of it assets could be speedily reduced to money for lack of a market value; and that the company was no longer in a condition to engage actively in the prosecution of the business which it had been organized to transact.
535 In view of this condition of affairs, existing at that time, the court concludes that it was impliedly understood and agreed by the persons then in control of the company, with possibly one or two exceptions, that further active operations should be suspended, at least for the time being;

that the Executive Committee and Board of Directors should thenceforth endeavor to reduce the corporate assets to cash and with the proceeds liquidate the company's debts so far as the proceeds would extend, and that they should not for the present accept new business or embark in any new ventures. The court is satisfied that this policy was in fact pursued in accordance with the implied understanding aforesaid until some time in May, 1900, or for at least four or five months.

2. The real grievance disclosed by the bill and affidavits consists in the fact that the defendant company during a period of years has persistently committed acts which must be regarded as in excess of its corporate powers, and by so doing has not only sustained grievous losses but has lost control of its capital, having been compelled to pledge or hypothecate the bulk of its available assets as security for loans, so that it is not at the present time in a condition to be dealt with safely, or to transact the business which its charter authorizes it to transact, with a reasonable prospect of success.

The proof shows with reasonable certainty that the officers and directors of the defendant company have made a practice of organizing other corporations to engage in various enterprises of a highly speculative character; that funds of the company to a large amount have been invested in the stocks and bonds of such concerns which had at the time no market value; that money in considerable sums has been loaned to such companies, sometimes upon their stock as collateral, and no other occasions without any security; that some of these enterprises have proved absolute failures; and that the money invested therein has been wholly lost, while other of such enterprises are in a precarious condition and the outcome thereof is doubtful and uncertain. The fact that
536 officers directors and employees of the trust company have generally served as officers and directors of such subsidiary companies and have held stock therein, leads the court to conclude that the moneys of the trust company would not have been used to purchase the stock and bonds of such concerns and to supply them with capital, except on the theory that they were mere adjuncts of the trust company and that the enterprises which it thus attempted to foster by the means aforesaid were its own adventures.

Moreover, in some cases, if not in all, there appears to have been such identity in the personal of the governing bodies of these corporations and the governing body of the trust company that it is impossible to believe that the interests of

either were fairly considered or properly guarded in any of the transactions and dealings which occurred between them.

In addition to the acts aforesaid, the proof shows that the defendant company has made large investments in real property apparently without a shadow of authority under its charter. Some of these investments may have been and probably were, profitable, but other investments of that kind will doubtless occasion a loss, and in any event such unauthorized investments have resulted in looking up much of the company's available means and have impaired its usefulness.

Furthermore, the court entertains no doubt that the defendant company has paid one, and probably several dividends out of its general funds that were not earned, such payments being made for the purpose of allaying suspicion as to the condition of the company and creating a false impression that it was in a prosperous condition.

Under the Missouri Statute relating to trust companies the primary function of a trust company, as the name implies, is to execute trusts of all kinds and descriptions according to the rules which govern ordinary trustees, and to act as agent for the management, conservation and control of all property, real or personal, which may at any time be committed to its custody, whether the owner be a natural or artificial person. When properly conducted such companies perform important and necessary functions in the business world which cannot as well be performed either by private individuals or co-partnerships. They have authority to receive money in trust from their customers and to accumulate it by loaning the same upon real estate or good collateral security. They also have power to issue debentures, provided they are secured by a pledge of mortgages or other securities which the company owns. But it was never intended that a trust company should go into the market as a borrower of money in large sums on its own notes to be employed in speculative ventures, as the defendant company appears to have done. The law contemplates that the business of such companies shall consist of loaning its own money or that of its customers on safe securities—not that it shall consist in borrowing money on its own notes in aid of doubtful enterprises, thereby imperiling its own solvency and disabling it from serving the public faithfully in its capacity as a trustee. Insofar as such companies are authorized to buy and sell stocks, bonds and other negotiable securities the power is limited by fair intendment by the language of the act to transactions in 'investment securities', which term

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must be understood to mean such securities as persons of ordinary prudence and capacity would purchase for the purpose of investment. Securities of the latter kind would ordinarily be those whose value can be ascertained with reasonable certainty and is not wholly dependent upon contingencies. It is doubtless true that when acting in the capacity of agent for another and pursuant to his instructions, a trust company can buy or sell for such other persons any kind of stocks or other negotiable securities as the customer may direct, but when making an investment of its own funds, or funds held in trust, or committed to it for accumulation and investment in its discretion, the law by necessary inference places restrictions upon the class of securities that may be bought or taken in pledge as collateral. As at present
538 advised, the court is of the opinion that the act creating trust companies does not authorize the acquisition of securities by such companies either as an investment or as collateral for loans, unless they have an ascertainable market value and may be properly termed 'investment securities'. If the value of a stock is purely hypothetical and speculative, a trust company should not acquire it for either of the purposes last indicated. Owing to the functions which trust companies are intended to perform, the public has a vital interest in their solvency and in confining them strictly to the transaction of such business as the act authorizes. It was never intended that such companies should engage in the business of promoting hazardous and highly speculative enterprises, either by the acquisition of large blocks of stocks or bonds, or by loaning large sums of money, to companies or corporations engaged in such enterprises. It is well known that by so doing a trust company speedily becomes the real power behind such enterprises and often times finds that its own solvency depends upon the success or failure of subsidiary companies in whose securities it has made large and improvident investments. Several notable examples might be cited in this circuit where a line of policy such as has apparently been pursued by the defendant company has led to wide-spread disaster and great public distress and inconvenience.

In accordance with these views the court is constrained to conclude that the bill and affidavits disclose many ultra vires acts committed by the defendant company during the past five years; and that these acts have not only led to the dissipation of its assets and to its present embarrassment, but have rendered it unsafe for the company to continue the further transaction of its customary business until it has realized upon some of its assets and liquidated its present indebtedness.

3. With reference to the two suggestions made on the argument of the motion that the bill of complaint does not set out specifically the commission of any such ultra
539 vires acts as are heretofore mentioned, and if it does, that they are past transactions of the company of which the complainants were duly advised before they became stockholders, and for that reason cannot be heard at this time to complain—the court entertains the following views: First. That the ultra vires acts referred to above are generally alleged in the fourth and fifth paragraphs of the bill and are made sufficiently specific by the affidavits now on file which have been produced both by the defendant company and by the complainants. But if this position is not tenable, in view of the present status of the litigation and the time already devoted to it and to an investigation of the company's affairs, the court would deem it its duty to permit any defect in the existing allegations of the bill to be remedied by amendment; and second, as respects the suggestion that the complainants bought their stock with knowledge of the past acts of the company and are not entitled to complain, the court entertains the view that while the complainants did know of the character of many of the trust company's investments, yet they were doubtless mistaken as to their value, and the court is unable to say that the complainants were acquainted with all of the facts and circumstances which rendered the investments unauthorized and wrongful. It is not deemed probable, and it is not proven, that the complainants had such knowledge in details of all the precedent acts of the company at the time they purchased its stock as should now preclude them from making complaint or exercising the ordinary rights of shareholders. They were not themselves concerned in any of the unauthorized acts of the company which are now called in question and most likely bought without investigating the transactions in detail.

4. For the reasons thus briefly outlined the court has reached the conclusion that it is its duty under the law for the adequate protection of all interests to place the assets of the trust company in the custody of a competent re-
540 ceiver until a final decree shall be rendered, or until some arrangement shall be made among the shareholders which will enable the company to resume its business with adequate capital and conduct it on proper lines. Pending the receivership stockholders will be allowed to convene and elect directors and the receiver will be instructed in the managament and disposition of the assets of the company to conform to such requests preferred by the directors

in meeting duly assembled as commend themselves to his judgment as being steps proper to be taken in the interest of creditors and the majority of the shareholders."

Mr. Smith: May I go back to the preceding piece of evidence, simply to identify this document, the petition in the Grannis case which I offered, is contained in the files of this court, in the District Court, in case number 2335, Charles E. Grannis, et al., vs. Kansas City, Pittsburg & Gulf Railroad Company, et al.

Mr. Rosenberger: We make objection to all of these documents that are now being offered in the examination of this witness as encumbering the record and creating an unnecessary expense in this inquiry.

The Master: Your objections have been sustained.

Mr. Rosenberger: I merely do that as an additional ground of objection.

The Master: Yes.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Smith: I offer in the same connection the opinion of Judge Thayer, filed on October 1, 1901, in the same Bierce case.

The Master: Hadn't you better give the number of that case?

Mr. Smith: Yes, Number 2483; on the application of the Guardian Trust Company to file certain answers by petition in the Provident Life & Trust Company cases.

541 Mr. Rosenberger: I object to that as absolutely outside the issues in this case under the order appointing the Special Master; and for all the reasons heretofore given.

The Master: The objection is sustained.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

The opinion of Judge Thayer so offered in evidence, being Kansas City Southern Railway Company's Exhibit 3 is in words and figures as follows:

"In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

W. W. Bierce, et al., Complainants,

vs.

The Guardian Trust Company, Defendant.

Memoranda.

Thayer, Circuit Judge.

The Provident Life & Trust Company of Philadelphia, as trustee, in four mortgages on certain terminal railroad properties in Kansas City, Missouri, has filed four suits in this court to foreclose the same, being cases Nos. 2464, 2465, 2466 and 2467. The mortgaged terminal properties belong to a corporation known as the Kansas City Suburban Belt Railroad Company, hereafter referred to as the Suburban Belt Company, the same having been acquired by the latter company from the various companies which originally owned them. The bulk of the bonds secured by the mortgages on the terminal properties aforesaid, are now held by the Mercantile Trust Company of New York as pledges, to secure the bonds of the Kansas City Southern Railway Company. Prior to the hypothecation of the bonds with the Mercantile Trust Company, the Kansas City Southern Railway Company had acquired the same by an exchange of its own securities, such as bonds and stock, both common and preferred, in accordance with a plan which had bene formulated to reorganize the Kansas City, Pittsburg & Gulf Rail-
542 road under and in pursuance of which plan of reorganization the Kansas City Southern Railway Company came into existence. This plan of reorganization, without going into too much detail, contemplated that the Kansas City Southern Railway Company, hereafter referred to for brevity as the Southern Railway Company, when organized, should acquire not only the railroad of the Kansas City, Pittsburg & Gulf Railroad Company, but also the various terminal properties above mentioned then owned and operated by the Suburban Belt Company, and that they should become an integral part of its road. The reorganization scheme aforesaid has been carried into execution so far that the Southern Railway Company has been duly organized for about eighteen months and has issued a large amount of its own bonds and stock both common and preferred. It purchased the Kansas City, Pittsburg & Gulf Railroad, which it was organized to purchase, and has operated it continuously since the purchase. As owner of all the stock of the Suburb-

an Belt Company, and as owner of a great majority of the bonds previously issued by that company and its constituent companies, which are secured by the mortgages on the terminal properties aforesaid, it took possession of the terminal properties shortly after its organization and has continued to operate them for about eighteen months.

In the actions which have been brought by the Provident Life & Trust Company, as trustee, to foreclose the mortgages on the several terminal properties, which actions were commenced on September 6, 1900, it was alleged by the complainant in certain supplemental bills filed in those cases, that the Guardian Trust Company, one of the original trustees in the terminal mortgages, had been removed as trustee in the mode provided by the several mortgages and that it desired to make the Guardian Trust Company a defendant in the several foreclosure suits for the purpose of having this fact established by judicial decree. The latter company was accordingly made a defendant to those suits, and on November 5, 1900, it filed an answer. Recently the receiver of the
543 Guardian Trust Company, who was appointed by this court in the above entitled case (Bierce vs. Guardian Trust Company) on November 30, 1900, has prepared a supplemental answer which he desires to file in the several foreclosure cases. On the presentation of the proposed supplemental answer attorneys representing the Provident Life & Trust Company appeared and objected to its being filed, and in that connection requested the court to direct its receiver to withdraw his opposition to the suits for the foreclosure of the underlying mortgages on the terminal property.

For the purpose of determining whether the receiver ought to engage as an active litigant in the defense of the foreclosure cases and make the proposed defenses or suffer decrees to be entered therein with such reservations as will protect the interests committed to his charge, the defenses which the receiver desires to interpose have been examined and an informal discussion has taken place concerning their merits. This discussion was not had with a view of deciding as upon demurrer or exception to the answer whether the defenses are good and sufficient in point of law, but for the single purpose of ascertaining, in view of all of the existing circumstances, what directions ought to be given by the court to its receiver relative to interposing them. The receiver's interest in preventing the entry of decrees in the foreclosure cases consists of the fact that as receiver of the Guardian Trust Company he has a large unsecured claim against the

Suburban Belt Company, the collection of which, as he fears, may be prejudiced if its equity of redemption in the terminal properties is foreclosed. This claim has not as yet been reduced to a judgment and is disputed, but it must be assumed for present purposes that the Suburban Belt Company is indebted in a very considerable sum to the Guardian Trust Company.

After examining the proposed answers and listening to the discussion which has taken place, the court is satisfied that the mortgages on the terminal properties have never
544 been paid or otherwise cancelled or discharged. The reorganization plan clearly contemplated that the bonds of the various terminal roads should not be immediately paid or cancelled but that the lien of the mortgages on such properties should be preserved and continued in force to secure the payment of the mortgage bonds until such time as actions were brought to foreclose the liens in the ordinary manner. Until such foreclosure proceedings were inaugurated, the bonds of the terminal companies which were to become the property of the Southern Railway Company by an exchange of its own securities were to be pledged, as they were subsequently pledged, to secure the bonds of the latter company. The court has no reason to doubt, therefore, that the mortgages on the terminal properties secure a valid existing indebtedness to the amount of the bonds and that a large amount of interest which has accumulated on the indebtedness is now in arrear.

It is suggested in behalf of the receiver that in view of the allegations contained in the original and in the proposed supplemental answer to the bill of foreclosure, the reorganization scheme as formulated and carried out resulted merely in the consolidation of the Suburban Belt Company with the Kansas City, Pittsburg & Gulf Railroad Company, under the name of the Kansas City & Southern Railway Company, and that the latter company is liable for all the debts, both secured and unsecured, of the constituent companies. No sufficient reason, however, is shown injecting such an issue into the foreclosure suits, nor is it regarded as a proper issue to be tried and determined in those actions. If the theory in question is sound, it should be tried and determined in an action brought for that purpose after the receiver's demand is reduced to a judgment. Until then the issue is important and can be left undetermined without harm to anybody.

Another suggestion is, that by virtue of the reorganization scheme the stockholders of the Suburban Belt Company have

participated in a disposition of its property and have derived an advantage therefrom in fraud of the rights of its general creditors. Concerning this suggestion, it may be said that by the exchange of their stock for the stock of the Southern Rail-
way Company, an exchange which was long since ef-
545 fected, the stockholders of the Suburban Belt Company have already derived all the benefit and advantage which the reorganization scheme was intended to afford them. To the extent that the stockholders may have derived a benefit or advantage in the course of that transaction in fraud of the rights of creditors, they can doubtless be called to account in a proper proceeding when the claim of the Guardian Trust Company is reduced to judgment. It is probable, however, if not certain, that the Trust Company, as a shareholder in the Suburban Belt Company, shared largely in this advantage, whatever it may have been, and is not in a position to complain. At all events, an accounting as respects the profits, if any, that were realized by the stockholders in that transaction, cannot be tolerated in the pending actions to foreclose the terminal mortgages. The stockholders of the Suburban Belt Company cannot be charged as constructive trustees of a part of the company's assets in the foreclosure suits because they are not parties thereto and because the claim of the Trust Company is not yet definitely ascertained. Moreover, such a controversy is not germane to suits to foreclose valid existing mortgages on the terminal properties.

The principal allegation made by and in behalf of the receiver, and the one on which he principally relies, is, in substance, that the several foreclosure suits now pending were brought by collusion between the complainant and the Suburban Belt Company for the sinister purpose of foreclosing the equity of redemption in the terminal properties and by that means placing it beyond the reach of the general creditors of the Suburban Belt Company.

It was admitted at the hearing that the mortgages on the terminal properties were executed originally in good faith to secure a valid indebtedness contracted by the several companies which executed the mortgages, and as before stated, there appears to be no reason to doubt that these mortgages secure present subsisting debts. Under these circumstances
it is somewhat difficult to perceive in what way the
546 foreclosure suits can operate as a fraud upon anyone. Every foreclosure suit necessarily has the effect of destroying the equity of redemption in the mortgaged property and of placing it beyond the reach of the mortgagor's unse-

cured creditors unless they elect to buy the equity at the foreclosure sale. The most that can fairly be said of the answer which the receiver seeks to interpose is, that it shows that these foreclosure suits are merely isolated steps taken in the execution of a reorganization scheme that was substantially executed more than a year since, which scheme is detrimental to the interests of unsecured creditors of the Suburban Belt Company. But, as already suggested, it is most probable, if not certain, that the Guardian Trust Company, prior to the appointment of the receiver, was one of the active participants in the reorganization scheme and derived large benefits therefrom which it retains and proposes to retain.

The court does not desire its receiver to embark in unnecessary and futile litigation but merely to take such action as is deemed necessary to fully protect the interests committed to his charge. It is the opinion of the court, in view of all the circumstances above mentioned, that it is unnecessary to interpose such defenses to the foreclosure suits as the receiver proposes to interpose and that the interests committed to his charge can be fully guarded and protected in other ways. The receiver will accordingly be directed to withhold filing the supplemental answer which he proposes to file and to withdraw the answer already on file in the several foreclosure suits, in the event that the complainant will enter into a stipulation with the receiver to the effect that in the decree of foreclosure which shall hereafter be entered in the respective cases a provision shall be inserted to the effect that the foreclosure sale under the decree shall not bar the right of the Guardian Trust Company, or its receiver, to insist in any action now pending hereafter brought to which it may be a party, that it has a lien, claim or demand against the mortgaged property which is superior at law or in equity to
547 the lien of the mortgage which is undergoing foreclosure, and that the mortgaged property may be taken and subjected to the payment of any such superior lien, claim or demand when duly established, in any court of competent jurisdiction, from the possession of the purchaser or purchasers at said foreclosure sale, or his or their successors or assigns.

The receiver will, as a matter of course, be permitted to interpose an answer denying that the Guardian Trust Company was lawfully removed as trustee and denying the existence of a mortgage indebtedness, or the amount thereof, or that a default has accrued under the mortgage, provided he is satisfied for any reason that such defenses should be interposed."

Mr. Smith: I offer in evidence, in support of our objections, certain items in the account of the final decree in the Provident Life & Trust Company foreclosure cases filed November 6, 1901, and the order confirming the sale and fixing the form of deed in the same cases, filed January 3, 1902. I am just offering these for the purpose of showing those foreclosure cases went to final judgment.

Mr. Rosenberger: Subject to all of the objections which I have made to the competency and relevancy of these vouchers, I can stipulate that the Provident foreclosure cases all ripened into final decree of sale, entered November 6, 1901, and a confirmation of that sale, entered January 3, 1902, and a conveyance of all property mentioned in the foreclosure bills to the Kansas City Southern Railway Company.

Mr. Smith: This goes to the items which have to do with the attorney fees rendered in reference to the Provident cases, particularly the Trimble & Braley items, and the judgment in the Trimble & Braley case. It is claimed here that Mr. Trimble received $4500.00 for filing answers in those cases and it is our contention that since those cases have gone to final judgment and been disposed of, you cannot tax the costs of this case for costs incurred in those cases.

548 Mr. Rosenberger: Even though services were rendered for the Guardian Trust Company in connection with this Cambria debt?

Mr. Smith: Even though some services were rendered for the Guardian Trust Company.

I want to offer certain parts of the argument made by Mr. Mecartney before Judge McPherson in the Cambria case. This is on the good faith issue.

Mr. Rosenberger: That is objected to for the reasons heretofore given. This is an attempt merely to reagitate issues already determined by the Appellate Courts. I further object to mere fractions of the record. If he is offering the entire document, that is one thing; to offer mere snatches of something here and of something somewhere else, I object to as incompetent.

The foregoing objections were, by the Master, sustained, to which ruling the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

Mr. Smith: I want to get it in the record. Mr. Mecartney in arguing to the court the question of the intervening petition of the Southern Company and the Trust Company's answer thereto, used the following language: "It is not an affirmative claim on our part of a personal liability—we could not get a judgment on it. But as the pleadings stand, we are not seeking a personal judgment against the Southern Company. In that case, the Southern Company is a mere intervenor."

"The next suggestion is, this Cambria Steel Company case was the ordinary judgment—in most respects, most features, was an ordinary judgment creditors' bill that is usually filed simultaneously with the bill to foreclose a railroad. The foreclosure bill is filed and receivers appointed under the powers in the mortgage. Those receivers, however, have merely restrictive duties. Such cases as that usually prompt the commencement of creditors' bills, attachments and one thing and another, so it is usually the practice to get some creditor to file a creditors' bill and have receiv-
549 ers appointed, which avoids conflicts of jurisdiction between the United States Court and the foreign jurisdiction of a state court. So the two generally move along together—as your Honor knows from experience—the foreclosure proceeding is consummated, those receivers discharged in the foreclosure suit and general receivers continue on to wind it up."

Mr. Smith: I offer in evidence the Mandate filed in this case in the District Court on June 21, 1909, being the mandate reversing the judgment of the second injunction and included in this the statement of the costs taxed in favor of the appellant; also the certificate of the Clerk of the United States Circuit Court of Appeals, stating the amount of costs taxed in the appeal of the Central Improvement Company vs. Cambria Steel Company, No. 3489, filed in the District Court on April 30, 1917; also the certificate of the Clerk of the Court of Appeals in case No. 3490, in said court, entitled, Guardian Trust Company vs. Cambria Steel Company, showing the costs taxed in said court, being filed in the District Court, on April 30, 1917, the last two documents being the certificates of the Clerk of the Court of Appeals as to costs taxed on appeal from the second injunction. I also offer in evidence the mandate of the Supreme Court of the United States on appeal from the final decree of June 25, 1910 in this cause, this mandate being the affirmance of the decree of the court of appeals and remanding the case to the District Court. I

want to include in that offer, the statement of costs contained on the mandate.

The documentary evidence offered on this page is hereinafter covered by an agreement of counsel.

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550 HARRY D. FORD, called as a witness on behalf of the Kansas City Southern Railway Company and the Cambria Steel Company, having first been duly sworn, testified in substance as follows:

My name is Harry Ford. I am Clerk in the legal department of the Kansas City Southern Railway Company. I made a check of the dates on which evidence was taken and the hours at which the taking began from the transcript of the evidence in the Cambria Steel Company cases between January 15, 1903 and December 20, 1904, and as to the number of pages of the exhibits attached by S. B. Willey, as a witness. I have prepared a statement as a result of that check. The testimony was taken on forty-three days from January 15, 1903 to December 20, 1904. On fifty-five days there were appearances and nothing done but postponing the hearings to another date. Mr. Willey testified as a witness on twenty-five days between January 15, 1903 and December 20, 1904. After December 20, 1904, Mr. Willey testified on one five or six days. One Thousand three hundred and nine pages of the record were covered by Mr. Willey's exhibits. Of that number, there were four hundred sixty-six pages of printed forms of vouchers and attachments, leaving a balance of eight hundred forty-three pages of other exhibits.

Mr. Smith: I offer in evidence this statement as compiled by Mr. Ford showing the number of hearings and ask that it be marked Exhibit "C".

Mr. Rosenberger: I object to that as having no probative value, as the witness is not shown to have any qualifications to examine a record of this sort in a case of this kind; don't know what he is talking about.

The Master: The objection will be overruled.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted.

Said statement last above received in evidence by the Master, is here marked by the Reporter: "K. C. So. Ry.

Co.'s Ex. "C" G. P. 2/6/24", and the same is in words
551 and figures as follows, to-wit:

Kansas City Southern Railway Company's Exhibit "C"

"For the period from Jan. 15, 1903 to December 20, 1904.

1 day Reading of the pleadings.

1 day Request for certain information to be furnished by Mr. Willey.

1 day Vouchers offered by Mr. Lucas.

1 day Request that night sessions be discontinued.

1 day Order of the Master.

43 days Testimony taken.

55 days Postponements, no evidence taken or hearings had."

Mr. Smith: What is the statement represented by Exhibit "D"?

Mr. Ford: A statement of pages covered by exhibits offered by Mr. Willey.

Mr. Smith: What is the statement represented by Exhibit "E"?

Mr. Ford: A statement showing when Mr. Willey appeared as a witness, as shown in the numbered volumes of the record.

Mr. Smith thereupon offered in evidence Kansas Southern Railway Company's exhibits "D" and "E" in words and figures as follows:

Kansas City Southern Railway Company's Exhibit "D"

"Statement Of Pages Covered By Exhibits Offered
By Mr. Willey
Record Volume No. 1,

January 30, 1903, 10 A. M.
Testimony page 5 to 276.

Exhibit	Pages	
1	10-18	9 pages
2	21-23	3 "
3	26-29	4 "
4	34-36	3 "
5	38-137	100 "

5A	138–138	1	"
6	141–163	23	"
7	168–183	14	"
8	183–191	9	"
9	193–195	3	"
10	197–203	7	"
11	206–211	6	"
11B	215–215	1	"
12	219–267	49	"
13	268–270	3	"

Volume 2

Exhibit	Pages	
1A	34	1 page

Volumes 11 & 12

	14	5677–5684	8 pages	printed
	15	5694–5705	12 "	
	16	5707–5710	4 "	
	17	5712–5712	1 "	
	18	5715–5721	7 "	
2 P. M.	19	(6109–6113	5 "	statement
		(6114–6134	20 "	vouchers
	20	5736–5736	1 "	"
	21	5737–5737	1 "	"
	22	5740–5740	1 "	"
	23	5741–5741	1 "	"
	24	5747–5747	1 "	"
	25	5750–5750	1 "	"
	26	5754–5782	29 "	
	26½	5795–5800	6 "	
A. M.	27	5803–5803	1 "	
	28	5807–5807	1 "	
	29	5810–5811	2 "	voucher and bill
	30	5812–5812	1 "	printed
	31	" "	1 "	"
	32	5813–5813	1 "	"
	33	5814–5814	1 "	
	34	5816–5816	1 "	
	35	5819–5819	1 "	voucher
	36	5820–5820	1 "	printed
	37	5823–5823	1 "	voucher
	38	5824–5825	2 "	voucher and letter
	39	5826–5826	1 "	printed
	40	5827–5827	1 "	"
	41	5858–5859	2 "	voucher and bill
	42	4405–4405	(Vol. 8) 1 page	voucher
	43	5872–5883	12 pages	
	44	(Same as Ex. 42)		(List of stockholders)
2:00 P. M.	45	5892–5892	1 "	(not in our copy
	46	(See 5896)		(of record.
	47	6155–6160	6 "	statement
	47A	6161–6199	39 "	vouchers and bills

	48	5904-5906	3	"	
	49	5916-5916	1	"	voucher
	50	5922-5929	8	"	
	51	5930-5982	53	"	
	52	5984-6035	51	"	
	53	6039-6039	1	"	
	54	6040-6047	7	"	
	55	6048-6097	49	"	
Oct. 6, 1903, 9:30 AM	19A	(6260-6266	6	"	statement
		(6265-6611	347	"	vouchers and bills
		(6615-6629	14	"	" " "
		(6633-6645	14	"	" " "
	56	6647-6650	4	"	
	57	6651-6654	4	"	
	58	6655-6658	4	"	
	59	6659-6659	1	"	

553

	Exhibit	Pages			
	60	6660-6661	2	pages	
	61	6662-6665	4	"	
	62	6666-6667	2	"	
	63	6668-6669	2	"	
	64	6670-6671	2	"	
	65	6672-6676	5	"	
	66	6677-6677	1	"	
			760		

Volume 13

Jan. 4, 1904, 2 P. M.	67	6762-6788	27	pages	
	68	6791-6798	8	"	
	69	6800-6803	4	"	
	70	6807-6810	4	"	
Jan. 15, 1904, 9:30 AM	70½	6863-6933	71	"	
	71	6935-6939	5	"	
	72	6940-6942	2	"	
	73	6942-6948	5	"	
	73½	6947-6951	5	"	
	73¾	6966-6997	32	"	
Jan. 27, 1904, 2 P. M.	74	7063-7064	2	"	voucher
	74½	7069-7069	1	"	
	75	7071-7071	1	"	
	76	7073-7075	3	"	
	77	7077-7077	1	"	
	78	7084-7087	4	"	
	79	7088-7089	2	"	
			177		

Volume 47

May 18, 1905 10 A. M.	80	28159(Vol. 37-19496-19555	60	pages	(15 page stmt. credited for 4
May 22, 1905 2:30 PM	81	28170-28185	16	"	pages each stmt.)
	82	28199-½)			

	83 ")			5 vouchers and attachments not shown in our copy of record.
	84 ")			
	85 ")			
	86 ")			
May 24, 1905 10 AM	87 28217-28218	1	"	
	88 28218-28220	2	"	
June 12, 1905, 2 P. M.	89 28288-28288	1	"	
	90 28289-28289	1	"	
	91 28318-28318	1	"	
	92 28318-28318	1	"	
June 14, 1905, 2 PM	93 28332-28332	1	"	
	94 28333-28334	1	"	
		85		

Volume 55

Nov. 7, 1905 10 AM	95 33543-33544	2	"	
	96 33549-33551	3	"	
	97 33551-33551	1	"	
	98 33558-33590	33	"	
	99 33596-33606	11	"	
	100 33619-½			This exhibit is not in our copy of the record, but is shown on pages 174 and 175 of MK&T Trust Co. stock and bond Ledger No. 1.
	101 33636-33637	2	"	
		52	"	
554				1309 pages including vouchers

There were 466 pages of printed forms, vouchers and attachments, which deducted from the total of 1309, leaves a balance of 843 pages of exhibits.

Kansas City Southern Railway Company's Exhibit "E"

Volume 1.

January 30, 1903	10:00 AM	pages 5	—	276

Volume 2.

March 6, 1903	7:30 PM	pages 277	—	314
March 14, 1903	2:00 PM	" 315	—	345
March 21, 1903	2:00 PM	" 347	—	376
March 25, 1903	1:30 PM	" 377	—	408
March 26, 1903	1:30 PM	" 408	—	417
March 30, 1903	1:30 PM	" 417	—	446
March 31, 1903	7:30 PM	" 446	—	465
April 1, 1903	7:30 PM	" 465	—	492
April 3, 1903	7:30 PM	" 493	—	501
April 16, 1903	7:30 PM	" 501	—	504

Volume 11

Sept. 21, 1903	9:00 AM	pages	5676	—	5721
Sept. 21, 1903	2:00 PM	"	5722	—	5793
Sept. 22, 1903	9:30 AM	"	5801	—	5889
Sept. 22, 1903	2:00 PM	"	5889	—	5902
Sept. 24, 1903	9:30 AM	"	5902	—	6098
Sept. 26, 1903	9:30 AM	"	6098	—	6106
Oct. 1, 1903	9:30 AM	"	6106	—	6215

Volume 12

Oct. 6, 1903	9:30 AM	pages	6216	—	6677

Volume 13.

Nov. 17, 1903	1:30 PM	page	6683	—	6735
Jan. 4, 1904	2:00 PM	"	6737	—	6813
Jan. 6, 1904	9:30 AM	"	6813	—	6842
Jan. 15, 1904	9:30 AM	"	6843	—	6954
Jan. 15, 1904	2:00 PM	"	6954	—	7017
Jan. 16, 1904	10:30 AM	"	7017	—	7029
Jan. 19, 1904	2:00 PM	"	7029	—	7057
Jan. 27, 1904	2:00 PM	"	7058	—	7095
Jan. 28, 1904	2:00 PM	"	7095	—	7112

Volume 47

May 18, 1905	10:00 AM	pages	28158	—	28167
May 22, 1905	2:30 PM	"	28168	—	28200
May 24, 1905	10:00 AM	"	28201	—	28234
June 12, 1905	2:00 PM	"	28285	—	28329
June 14, 1905	2:00 PM	"	28330	—	28360

Volume 55.

Nov. 7, 1905	10:00 AM	pages	33523	—	33639."

On cross-examination by Mr. Rosenberger, Mr. Ford testified in substance, as follows:

Mr. Rosenberger: I understand you, Mr. Ford, that when Mr. Smith asked you to make this search he furnished you with what somebody in his office had prepared, an abstract of the testimony and proceedings before Special Mas-
555 Douglass?

Mr. Ford: Yes, sir.

Mr. Smith: Mr. Rosenberger, may I correct that; it wasn't "somebody" in my office. That abstract was prepared by Mr. Marks originally.

Mr. Rosenberg: By one of the counsel for the Southern Company?

Mr. Smith: Yes, sir.

Mr. Rosenberger: That abstract didn't purport to be a copy of all of the proceedings and testimony, did it?

Mr. Ford: I didn't know.

Mr. Rosenberger: You don't know whether it did or not?

Mr. Ford: No, sir.

Mr. Rosenberger: And with that abstract before you if that abstract made reference to the fact in a certain volume and page there was testimony from Mr. Willey, why, you then went to the original transcript in the case in the United States Clerk's office to see whether it was there at that page?

Mr. Ford: No, sir.

Mr. Rosenberger: In other words, what I am getting at is, if the abstract furnished you said in a certain volume and page, Mr. Willey had given some testimony, didn't you go to the Master's transcript to see whether it was at that book and page?

Mr. Ford: It was in our copy.

Mr. Rosenberger: Oh, in your copy?

Mr. Ford: Our office copy.

Mr. Rosenberger: In your office copy?

Mr. Ford: Yes, sir.

Mr. Rosenberger: You didn't go to the Master's transcript for that purpose?

Mr. Ford: No.

Mr. Rosenberger: Now if the abstract that was furnished you, didn't give a page reference to Willey's testimony, did you go through the whole forty-nine or fifty volumes
556 of that testimony to see whether he testified anywhere else?

Mr. Ford: I took it from the front of the record, from the testimony itself.

Mr. Rosenberger: Only from the front of the record?

Mr. Ford: We checked it over, the abstract that I checked with the index in the front of the record.

Mr. Rosenberger: You only checked the index?

Mr. Ford: Yes.

Mr. Rosenberger: And if you didn't find it on the index, you didn't look any farther?

Mr. Ford: No, sir.

Mr. Rosenberger: You didn't look inside of the transcript?

Mr. Ford: I didn't check the pages where it was shown in the index.

Mr. Rosenberger: You didn't?

Mr. Ford: No, sir.

Mr. Rosenberger: And if it was shown there you didn't check any farther?

Mr. Ford: Yes, sir.

Mr. Rosenberger: Now there are how many volumes of that typewritten transcript, great many volumes of that typewritten transcript, are there not?

Mr. Ford: Yes, sir.

Mr. Rosenberger: How many?

Mr. Ford: Fifty-six to my knowledge.

Mr. Rosenberger: Fifty-six volumes?

Mr. Ford: Yes, sir.

Mr. Rosenberger: How many pages in all?

Mr. Ford: I could not say.

Mr. Rosenberger: You didn't notice to see the last page of the fifty-six volumes?

Mr. Ford: No, sir.

Mr. Rosenberger: And those fifty-six volumes are ex-
557 clusive of any testimony that was brought into that record by way of testimony in the Port Arthur Channel & Dock Company case?

Mr. Ford: I don't know.

Mr. Rosenberger: You don't know?

Mr. Ford: No, sir.

Mr. Rosenberger: Now I believe you said you are not an attorney?

Mr. Ford: No, sir.

Mr. Rosenberger: How old are you, Harry?

Mr. Ford: Twenty-three.

Mr. Rosenberger: I believe you said you had never studied law at all, sir?

Mr. Ford: No, sir.

Mr. Rosenberger: When you say that there were forty-three days on which testimony was taken, by testimony you mean that somebody is asking questions and somebody answers them?

Mr. Ford: Yes, sir.

Mr. Rosenberger: You didn't mean by that days of sessions before the Master where there were protracted arguments between counsel?

Mr. Ford: No, sir.

Mr. Rosenberger: Did you notice the number of sessions during the period about which Mr. Smith asked you, namely; from January 1, 1903 to December 20, 1904, at which there were night sessions before the Master?

Mr. Ford: I noticed, but I didn't make a statement.

Mr. Rosenberger: You noticed what?

Mr. Ford: There were night sessions.

The Master: Were the night sessions included, Mr. Ford? Did you include the night sessions?

Mr. Ford: Yes, sir.

Mr. Rosenberger: But when there was a night session you just included it as part of the days you speak of as forty-three days on which testimony was taken, whether it was night sessions or not?

Mr. Ford: May I ask you to read that question?

558 Mr. Rosenberger: What I mean, Harry, is this: if there was a session all day long and then a night session did you just treat it as one day of testimony?

Mr. Ford: Yes, sir.

Mr. Rosenberger: Then you made in addition to that, a statement as to the number of days which you found as days upon which no testimony was taken; I believe you said fifty-

five days on which the parties and witnesses appeared and adjournment was taken?

Mr. Ford: Yes, sir.

Mr. Rosenberger: Do you know how long a time was consumed on those days even though no testimony was taken?

Mr. Ford: No, sir.

Mr. Rosenberger: You noticed in that abstract that was given you that during that period up to December 20, 1904, there was a witness named H. B. Johnson on the stand for a long period of time, didn't you?

Mr. Ford: There was H. B. Johnson, but I could not say as to what period he was on the stand.

Mr. Rosenberger: Do you know Mr. Johnson?

Mr. Ford: No, sir.

Mr. Rosenberger: Did you know whether or not he was a former auditor of the Kansas City Southern, assistant to Mr. McCarty here and he testified as a witness in that case?

Mr. Ford: No, sir.

Mr. Rosenberger: You didn't examine the voluminous exhibits in the testimony that he gave and offered, did you?

Mr. Ford: No, sir.

Mr. Rosenberger: Now on those days during that period while Johnson was testifying did you find any note in the record as to how many days Mr. Willey was present during Mr. Johnson's testimony, while that testimony was going on?

Mr. Ford: No, sir.

559 Mr. Rosenberger: But you have not undertaken to testify as to the number of days when Willey was present and in attendance on hearings and at which he was not actually giving testimony himself?

Mr. Ford: No.

Mr. Rosenberger: How many volumes of testimony were taken before the Special Master prior to December 20, 1904?

Mr. Ford: I don't know.

Mr. Rosenberger: You don't know there were sixteen big typewritten volumes of testimony, besides exhibits, offered before the Master prior to December 20, 1904?

Mr. Ford: I knew there were some, but I didn't know how many.

On redirect examination by Mr. Smith, Mr. Ford testified, in substance, as follows:

Mr. Smith: You examined each volume of the testimony from number 1 and including one down to the end or down to December 20, 1904, did you not?

Mr. Ford: Yes, sir.

Mr. Smith: Now I will ask you to state whether or not at the front or at the beginning of each of those volumes of testimony there was an index showing the list of witnesses who testified in that volume?

Mr. Ford: Yes, sir.

Mr. Smith: How many witnesses were there that testified in that case, excluding Mr. Hastings, who was only there for a page or two at the very beginning; how many witnesses who testified in the case between January 15, 1903 and December 20, 1904?

Mr. Ford: Excluding Mr. Hastings?

Mr. Smith: Excluding Mr. Hastings.

Mr. Ford: Two.

Mr. Smith: Mr. Willey and Mr.—

Mr. Ford: Johnson.

Mr. Smith: So that is all of the testimony taken to December 20, 1904, except the page or two of Mr. Hastings' at
560 the beginning, consists of the testimony of Mr. Willey and Mr. Johnson and exhibits and vouchers filed?

Mr. Ford: Yes, sir.

Mr. Smith: Does it show where Mr. Willey's testimony begins, have you got the page here?

Mr. Ford: Yes, sir.

Mr. Smith: On what page does it begin?

Mr. Ford: Page 5.

Mr. Smith: Now these postponements that are spoken of in your tabulation, in making that list of postponements did you only count as a postponement those days on which they

met and adjourned without there being any showing or anything done at all?

Mr. Ford: Yes, sir.

Mr. Smith: Now Mr. Rosenberger has asked you if you know how many night sessions they had; does your list show the hour when the hearing began on each day of that forty-one days or forty-three days, whatever it is?

Mr. Ford: Only as far as Mr. Willey is concerned.

Mr. Smith: That is while he was testifying?

Mr. Ford: Yes, sir.

Mr. Smith: It shows the hours when the hearings began?

Mr. Ford: Yes, sir.

Mr. Smith: Each day there was a hearing and testimony taken of Mr. Willey?

Mr. Ford: Yes, sir.

Mr. Smith: I want to offer in evidence or have an understanding that so much of the proceedings in this case as are contained in the record in the Supreme Court of the United States in the Cambria case may be deemed a part of these proceedings so that they are before the Master and the Court. I offer the record in that case.

The Master: It will be admitted.

561 Mr. Smith: As to items 41, 42 and 43, it is agreed that on the appeal from the first injunction granted in the Provident Life & Trust Company cases, number 2464 et seq., in the District Court of the United States or Circuit Court the order of injunction was reversed by the Court of Appeals and the cause was remanded with the mandate of said court, on which mandate was a statement of the costs taxed in the Court of Appeals as follows:

Clerk,	$25.65;
Printing Record,	500.65;
Attorney,	20.00;
Total	$546.30

This mandate is dated May 31, 1906. The judgment in the Court of Appeals being in case Number 2329 in that court. There was added to the costs taxed in the Court of Appeals $339.70, costs taxed in the District Court for making the

transcript on said appeal, making a total of costs of account of said appeal $936.00. On April 23, 1907, the Kansas City Southern Railway Company paid to the clerk of the District Court or Circuit Court—whichever it may have been at that time—said sum of $936.00. The books of the clerk of the District Court or Circuit Court show that this sum of $936.00 was paid to the Guardian Trust Company, but Mr. Rosenberger states, as a fact, that the money was paid to the counsel for the Guardian Trust Company at that time.

As to Item 68; a supplemental bill was filed by the Kansas City Southern Railway Company in the Cambria case and an injunction was granted thereon, restraining the prosecution of certain cases in the state court. The Guardian Trust Company appealed from that order of injunction and the order of injunction was reversed by the Court of Appeals on June 21, 1909, and the cause remanded to the District Court. The mandate of the Court of Appeals shows that the costs were taxed in that court as follows:

Clerk,	$33.10
Printing Record,	979.50
Do. Addl.	13.85
Attorney	20.00
Total	$1046.45

The number of said case in the Court of Appeals was 2827. There was taxed in the Circuit Court as additional costs on account of said case the following amounts:

562	Costs of District Court,	$ 86.80
	Transcript Gdn. Tr. Co.	432.55
	E. R. Durham	2.00
	Gates, Sea & English, Attorneys	20.00
		$1587.80

On July 22, 1909, the Kansas City Southern Railway Company paid to the clerk of the District Court said sum of $1587.80. The books of the clerk show that there was paid to Gates, Sea & English, on August 4, 1909, $1499.00, which included the $20.00 attorney's fees taxed in the Court of Appeals and $20.00 attorney's fees taxed in the District Court.

Mr. Smith: Will you agree to what I have stated on Items 41, 42, 43 and 68?

Mr. Rosenberger: I will agree to that, but subject to my objection that in respect to items 41, 42 and 43 the amounts disbursed were charged by Mr. Mecartney against the Guardian Trust Company in his petition, in his suit against the company, and were adjudged in his favor; that his account was adjudicated to be correct. And I make the objection that what the Trust Company was adjudged to pay is conclusive here.

Mr. Smith: As to Items 71, 72 and 73, we offer in evidence the certificates of the clerk of the Court of Appeals showing the taxation of costs in that case.

Said certificates of the clerk of the United States Court of Appeals were received in evidence by the Master. Said certificates of the clerk are in words and figures as follows, to-wit:

"United States Circuit Court of Appeals, Eighth Circuit.

Central Improvement Company, et al., Appellants,
No. 3489 vs.
Cambria Steel Company, et al.

Appeal from the District Court of the United States for the Western District of Missouri.

I, John D. Jordan, Clerk of the above named court, do hereby certify that in the above named cause, the following items of costs were taxed in favor of Appellants in the
563 Circuit Court of Appeals and that if a mandate had been issued to the District Court herein, said items would have been entered thereon to be collected in the Court below for Appellants, viz:—

Clerk's costs,	$ 40.50
Cost of Printing Record,	877.90
Attorney's fee,	20.00
	$938.40

United States Circuit Court of Appeals, Eighth Circuit

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said court, at the City of St. Paul, Minnesota, this 22nd day of April, A. D. 1916.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, for the Eighth Circuit.

"United States Circuit Court of Appeals, Eighth Circuit.

Guardian Trust Company, Appellant,
No. 3490 vs.
Cambria Steel Company, et al.

Appeal from the District Court of the United States for the Western District of Missouri.

I, John D. Jordan, Clerk of the above named Court, do hereby certify that in the above named cause, the following items of costs were taxed in favor of Appellant in the Circuit Court of Appeals, and that if a mandate had been issued thereon to be collected in the Court below for Appellant, viz:

Clerk's Costs,	$68.45
Record printed with that in No. 3489,	00.00
Attorney's fee,	20.00
	$88.45

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of St. Paul, Minnesota, this 22nd day of April, A. D. 1916.

United States Circuit Court of Appeals Eighth Circuit

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, for the Eighth Circuit.

Said certificate bears 10c cancelled revenue stamp on its face.

Mr. Smith: We also offer in evidence in reference to those costs the mandate of the Supreme Court of the United States which contains in it the judgment rendered by the
564 Court of Appeals on the appeal from the final decree of June 25, 1910.

Said mandate of the Supreme Court of the United States is received in evidence by the Master.

Said mandate of the Supreme Court of the United States is in words and figures, as follows, to-wit:

"United States of America—ss.

(Seal of the Supreme Court of the United States.)

The President of the United States of America, To the Honorable, the Judge of the District Court of the United States for the Western District of Missouri,—Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Eighth Circuit in causes beaween Central Improvement Company, H. H. Crittenden, Receiver of Central Improvement Company, appellants, and Cambria Steel Company, The Kansas ity Suburban Belt Railroad Compaany, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company and Guardian Trust Company, appellees, No. 3489; and Guardian Trust Company, appellant, and Cambria Steel Company, The Kansas City Suburban Belt Railroad Company, Edward F. Swinney as Receiver of the Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Central Improvement Company, and H. H. Crittenden, as Receiver of Central Improvement Company, appellees, No. 3490, wherein the decree of the said Circuit Court of Appeals, entered in said causes on the 2nd day of December, A. D. 1913, is in the following words, viz.

" 'These causes came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Missouri, and were argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court, in these causes be, and the same is hereby, reversed with costs; and that the Central Improvement Company, H. H. Crittenden, Receiver of Central Improvement Company, in case No. 3489, and the Guardian Trust
565 Company in No. 3490, have and recover against the Cambria Steel Company, The Kansas City Suburban Belt Railroad Company, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, and The Kansas City Southern Railway Company, their costs in this behalf expended in the respective cases to be taxed by the Clerk of this Court.

It is further ordered that these causes be, and the same are hereby remanded to the District Court of the United States for the Western District of Missouri, as the successor of the Circuit Court for said District, with directions to render a decree for the Trust Company in accordance with the views expressed in the opinion of this Court," as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States by virtue of an appeal taken by The Kansas City Southern Railway Company, wherein Guardian Trust Company, Central Improvement Company,

Cambria Steel Company and Kansas City Suburban Belt Railroad Company were made the parties appellees, agreeably to the Act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord, one thousand nine hundred and fifteen, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, it is now ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, affirmed with costs; and that the said Guardian Trust Company, Central Improvement Company, Cambria Steel Company and Kansas City Suburban Belt Railroad Company recover against the said The Kansas City Southern Railway Company, Twenty Dollars for their costs herein expended and have execution therefor.

And It Is Further Ordered, that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Missouri.

566 February 21, 1916.

"You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the thirteenth day of April, in the year of our Lord one thousand Nine hundred and Sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Costs of Guardian Trust Co. et al.

Clerk	)	Paid
Printing Record	)	
Attorney		$20.00
		$20.00

File No. 24,092. Supreme Court of the United States, No. 85.

Mr. Smith: In support of our objections to Items 81 to 107, inclusive, and Item 127, the amounts paid Trimble & Braley, we offer in evidence the items in the account contained on page 108 and following of the record in the Trimble & Braley case, as set forth on pages 9 and 10 of our written objections.

Mr. Rosenberger: Why do you want to offer that when it is in evidence?

Mr. Smith: Is it in evidence?

Mr. Rosenberger: Yes.

Mr. Smith: Very well; let it be understood that these items are covered in the petition which is offered by Mr. Rosenberger in chief.

Mr. Rosenberger: In case in the state court number 2548, in cause of Trimble & Braley vs. The Guardian Trust Company.

Mr. Smith: Now on those same items, 81 to 107, inclusive, and on Item 127; and also Item 109, we offer in evidence the letter and statement of account of Mr. Wash Adams, appearing on pages 514 to 517 of the Trimble & Braley record.

Mr. Rosenberger: No objection.

567 Mr. Smith: I will read those to the Master. I am offering them for the dual purpose of showing such services included the Texas case; and also for the purpose of showing, in view of the other evidence that has been given, that Trimble & Braley were also devoting a considerable part of their time to that litigation.

Said letter and statement of account of Mr. Wash Adams are received in evidence by the Master, the same being in words and figures as follows, to-wit:

Kansas City, Missouri, June 10, 1904.

Guardian Trust Company,
Kansas City, Missouri.

Gentlemen:

I write this to request that you be kind enough to make me a payment on account of fees in the case of Cambria Steel Company et al. vs. Guardian Trust Company et al., E. F. Swinney and Stewart R. Knott, Receivers Suburban Belt Railroad Company vs. Guardian Trust Company, Ancillary Bill of Complaint for accounting, pending in the Federal

Court here and referred to Shannon C. Douglass, Special Master in Chancery, and the case of Provident Life & Trust Company, cross-bill, interventions and cross-bills of Provident Life & Trust Company, and Port Arthur Channel & Dock Company vs. Guardian Trust Company, et al., pending in the Federal Court at Beaumont, Texas. I have been actively engaged in these cases as counsel for the Guardian Trut Company for more than eighteen months, and have thus far received no fee. Some small advances on account of expenses is all I have yet received. I have participated in taking the testimony and am now taking part therein from time to time, prepared and filed pleadings, prepared briefs and argued questions of law arising on pleadings, and made several trips to Texas. The amount involved is large, and the result expected in the case pending in Texas is of vital importance to the Trust Company and stockholders. It is customary, as I am informed, for corporations in process of liquidation, to pay for services as they are rendered. I
568 suggest that a payment of $3,000 in each of the two cases, total retainer of $6,000, on account of fees would be reasonable.

Very truly yours,

WASH ADAMS

(Trimble & Braley Record, page 514).

The Guardian Trust Company
to
Wash Adams, Dr.

To services in suit Cambria Steel Company vs. Guardian Trust Company, et al., in the Circuit Court of the United States for the Western Division of the Western District of Missouri:

E. F. Swinney and Stuart R. Knott, Receivers Suburban Belt Railroad Company vs. Guardian Trust Company, Ancillary Bill of Complaint, referred to Shannon C. Douglass, Special Master, involving more than Four Hundred Thousand Dollars.

And in the suits Provident Life & Trust Company vs. Port Arthur Channel & Dock Company, et al.

And Barnett & Record Company vs. Port Arthur Channel & Dock Company; in Equity Nos. 10 and 11, Consolidated, in the Circuit Court of the United States for the Eastern District of Texas.

Guardian Trust Company vs. Port Arthur Channel & Dock Company, et al, Cross-bill.

Provident Life & Trust Company vs. Guardian Trust Company, et al, Cross-bill.

Port Arthur Channel & Dock Company vs. Guardian Trust Company, et al, Cross-bill; involving more than One Million Dollars.

Analysis of pleadings and preparing for trial.

Attendance at taking of testimony, some 8,000 pages, including exhibits. See Stenographer's statement hereto attached.

Investigating and collating authorities.

Many interviews and efforts at compromise.

Application to make Kansas City Southern Railway Company party to cross-bill of Guardian Trust Company in Federal Court for the Eastern District of Texas.

569 Brief and argument in support thereof.

Written objections filed in Federal Court in Texas to the granting of leave to the Provident Life & Trust Company to file cross-bill.

Written objections filed in the Federal Court in Texas to the granting of leave to the Port Arthur Channel & Dock Company to file Cross-bill.

Brief in support of these objections.

Oral argument before Judge Bryant, at Sherman, Texas, in support thereof.

Reply brief in support thereof.

Exceptions to the ruling on the objections.

Demurrer to the cross-bill of the Provident Life & Trust Company.

Demurrer to the cross-bill of the Port Arthur Channel & Dock Company.

Exceptions to the answer of the Port Arthur Channel & Dock Company.

Exceptions to the answer of the Provident Life & Trust Company.

Exceptions to the answer of the Port Arthur Channel & Dock Company.

Trip to Dallas, Texas, to get Judge McCormack of the United States Circuit Court of Appeals to sit with Judge Bryant at the hearing of these demurrers and exceptions.

Trip to San Antonio, Texas, to confer with Judge C. L. Bates.

Printed brief in support of the demurrers and exceptions.

Trip to Sherman, Texas, and oral argument in support of demurrers and exceptions.

Printed reply brief.

Trip to Beaumont, Texas, to hear decision and save exceptions.

Entry of order and exceptions thereto.

Getting of facts for answers.

Conferring with Associate Counsel and Officers and Employees of the Guardian Trust Company, and examination of records and documents.

Preparing replications to answers of Provident Life & Trust Company and Port Arthur Channel & Dock Company and Port Arthur Canal & Dock Company.

570 Preparing answer to cross-bill of Provident Life & Trust Company.

Preparing answer to cross-bill of Port Arthur Channel & Dock Company.

These answers were very long, involved the plan of reorganization, and required much consideration and study.

Filing answers and replications.

The services extended over a period of eighteen months or more. $10,000.00.

(Trimble & Braley Record 520).

The appellee offered in evidence certain parts of a report of Mr. Mecartney to the Guardian Trust Company dated October 23, 1905, but objection being made to admitting parts only, it then offered the whole and the same was received in evidence by the Master. Said report is as follows:

571 "Annual Report
to
Guardian Trust Company
By Harry S. Mecartney, Special Counsel,
October 23, 1905.

Barnard & Miller, Printers, Chicago.

Kansas City, October 23, 1905.

To the President and Directors, of the Guardian Trust Company.

Gentlemen:

Your acting president has requested me to make a report of matters under my charge in time for the coming annual meeting.

You understand that no regular counsel was elected by the directors or executive committee for the past year, and when the matter was brought up late in the fall, the writer suggested that there was no absolute occasion for such a salaried official; but that matters could be referred from time to time, as they arose, to counsel and he be paid for work as actually done. This suggestion was adopted; and the writer believes it a far better plan than the salary plan and conduces more toward prompt disposition of business and is more economical in the end.

Quite a number of matters, law suits and claims, independently of the Belt and Dock Company litigation, have been investigated and disposed of, and some half dozen legal opinions rendered upon matters of vital import. The total amounts paid the writer thus far, together with bills
572 presented at the end of this fiscal year have been less than $2,100.

I was at first reluctant to attempt to serve the company as to its general matters, fearing that the Belt litigation was enough for me to undertake. But with the help of competent assistants, I have been able to take care of them, with, as I hope, reasonable promptness.

As to matters pending and disposed of, I report:

1. The bill of Trimble & Braley for over $22,000, including interest.

Active and almost constant negotiations for a settlement of this bill extending over a period of eight or nine months resulted in an agreement of compromise between the claim-

ants and a majority of the executive committee on the basis of a payment to Messrs. Trimble & Braley of $9,000 in full settlement. The executive committee passed a resolution, adopting these terms, and against this there was lodged a protest by Mr. Prescott which was filed under the provisions of the order discharging the receiver.

This brought the matter up to the court to affirm or reject the compromise, and after argument it was rejected. In the meantime, Messrs. Trimble and Braley had brought suit in the state court and the matter stands referred to a referee, Mr. Ball, to take evidence.

2. The claims vs. The Northern Connecting Company.

These claims of the Guardian Trust Company, aggregating about $66,000 had been presented in an intervening petition which the trust company had filed in the foreclosure proceedings on said railroad. It was asserted that the same were preferential claims. Testimony had been taken and the matter was pending on a reference to Judge Douglass. The master, last spring, made an exceedingly long and exhaustive report of about 100 typewritten pages, in which these claims were rejected, except as to the amount of $1,161.50, which he allowed the Trust Company.

Other parties offered objections to his report, but he has never finally disposed of them. After investigat-
573 ing the matter the writer concluded, and so reported to the then president, that there was no prospect of having the report overruled and we did not prosecute the matter further.

3. The Missouri Railway Construction Company Debenture Bonds, Amount $53,433.17.

The writer went east in the summer time and retained counsel to make inquiries and collect data in regard to the assets of this concern. I, in the meantime, pursued my inquiries in Chicago and finally got track of the books, and I have been promised that they will be at my disposal for inspection within a very few days. If they do not turn up, I shall at once take procedings in court and examine under oath, the parties who were last in control of the company and who should know of its affairs.

4. The Texas suit at Beaumont, in which the Channel & Dock Company, set up a claim of stock liability for $1,500,000 against the Guardian Trust, and in which the Guardian Trust Company claimed about $30,000 as due from the Dock

Company, was compromised about the first of April last, as heretofore reported.

'The Benedict Zinc Case' in New York, was, as has likewas been reported, finally decided against the Trust Company and the judgment was satisfied.

The Quincy 'Zinc' Case at Kansas City was compromised.

The First National Bank Case at Kansas City was finally decided against the Trust Company and the judgment was paid. The amount, about $35,000, with interest, is a valid claim against the Kansas City Southern Company and the latter has been sued in the State Court therefor.

5. The Intervention Petitions in the Foreclosure Case of the Pittsburg and Gulf, involving claims for the services of counsel, rendered such Trust Company, as Trustee in the mortgages on the Texas and Louisiana part of the old Gulf System, were investigated and reported upon adversely by me last spring, and as a part of the terms of settlement
574 of the Texas litigation they were dismissed as to such items.

6. As to the claim of $22,000 of Coupons vs. The Gulf Road: I investigated this claim last spring. My associate, Mr. Histed, made me an exhaustive seven page report thereon, and after considering the matter thoroughly with him, I concluded that there was no prospect of recovery and I orally reported the same to the president and executive committee, expecting later to follow it up with a formal report, for which this report is now tendered.

7. Other claims. Set up by way of intervention in various proceedings, which are worthy of note are involved in the Belt accounting case and need not be here commented upon; and with the exception of those so involved the 'slate' has been practically cleared.

8. The Bierce Case. This is the case, as is well known, in which the receiver for the Guardian Trust Company was appointed.

Since the discharge of the receiver in 1902, practically nothing has been done therein, but the case still stands upon the docket undisposed of, and as one in which no final hearing has been had.

Lately Mr. Hagerman, counsel for the complainants, has been urging the writer to have the case disposed of.

To this general proposition, he readily assented, but differed radically from Mr. Hagerman in respect to the terms proposed. Those terms were:

1. That a decree be entered finding in effect that the original suit had been well brought but that since then the Trust Company had disposed of what has been called its 'ultra vires' assets, and that, therefore, no further proceedings were need[illegible]d, &c.

2. That the complainant's counsel be allowed by the court, a fee to be paid by the Trust Company, based upon the idea that the suit was brought in the interest of all stockholders and others, and had been for their benefit, &c.

I have lately looked over the bill and answer and Judge
575 Thayer's opinion rendered upon the appointment of the receiver, and examined the principal affidavits upon which the receiver was appointed. I have answered Mr. Hagerman that in my judgment, nothing but an absolute dismissal of the bill at the total costs of complainants would satisfy the demands of the situation.

My examination of the Bierce case records has prompted me to add some suggestions here which I deem to be not only a privilege but a duty. They bear directly upon the question of the disposal of the case and are worthy to be reckoned with at this time.

From the very first and briefest acquaintance with the history of this Trust Company, the writer was struck with the unique and unusual situation of a receiver having been appointed to administer the affairs of a private corporation, which after suffering all the burden of the receivership for several years and of several years more of voluntary practical liquidation, still had assets allowing for all claims against it and due it, equal in value to about three-fourths of its capital stock.

This naturally suggests at once a grave question as to whether the drastic judgment visited upon the company by placing a receiver over its assets was necessary or warranted, and whether the bill yet pending has or ever had any merit whatever.

It takes but little reading of these records to reveal to any unprejudiced mind that there was here committed a grave and terrible mistake.

A company which time has proven to have been thoroughly solvent is placed in the hands of a receiver for the purpose

of ridding itself of what the court and others concerned in the case called 'ultra vires' assets.

Its stock and assets are heavily depressed thereby, many of the assets are sold off at forced sale and at meager prices, and after several years of this expensive 'administration' of its affairs, its remaining assets are turned back to the company for it to pursue a so-called 'liquidation'.

576 The ordinary mind at once inquires why could not the company as easily have sold such assets as the receiver? Or why an order of decree in respect to liquidation by the company, such as was entered at the end of two years could not as well have been entered at the beginning of the two years, and why the heavy expense, and abnormal damage which always attends receiverships and which was as sure to follow as 'the night the day' could not thus have been saved?

When one then considers the fact, well known, that 'a falling out' had taken place between prominent factions in the management of the company, and that members of one of these factions were the complaining parties in the case, and that the public and the newspapers far and wide treated the case as 'fight for control' of the Trust Company, the conviction does not need to be invited that the 'preservation of the interests' of creditors and others was not the sole object in aiming and delivering a receivership blow against the Trust Company by some of its own corporate flesh and blood.

The Bierce Bill, in my judgment, is clearly bad upon its face.

All grievous errors are plain to even ordinary minds; and when one examines Judge Thayer's opinion, the considerations which impelled him to take the false step—an error which I am told he afterwards recognized—seem to plainly reveal themselves.

1. He failed to recognize the distinction between ultra vires investments—such as were beyond the power of the corporation to make—and investments that were simply injudicious. (The former in reality were but a small part of the assets of the company).

2. He did not recognize that if the company had through years of dealing accumulated a large amount of undesirable assets, it of necessity, had been done with the consent, express or tacit, of the stockholders themselves, who evidently had

been willing to profit thereby; and that stockholders, old or new, were not the proper parties to complain thereof.

577 3. He charged the Trust Company with being the sponsor and backer of various so-called 'speculative and subsidiary' companies—simply because some of its officers and agents had organized and officered them.

4. In not offsetting against the recognized sins in management of the Trust Company and the error of its having invested largely in 'speculative' securities, the fact that the company operated in a fast developing community.

Fast development comes pretty near speculation.

It was, in fact, a somewhat speculative community; and if only those trust companies, banks and other similar concerns had been labeled conservative which had no officers who were engaged in development companies and similar enterprises, there would probably have been very few in Kansas City summoned for the christening.

5. In not recognizing that the use of the courts for merely 'factional' purposes, had grown to be a common practice, and a momentous evil, and therefore demanding of the moving parties that they should bring forth a case verified with exceptional accuracy and of such a nature as would leave no suspicions of a double purpose in the move or a purely personal motive behind it; and as would imperatively demand the recording against the company of a judgment of receivership.

It is no doubt true that the Guardian Trust Company had not been managed as a conservative trust company like many that are found in older and more conservative cities, excepting, of course, New York.

But any financial or management sins or errors that had been committed by the trust company's agents did not warrant any one, much less its own stockholders, in soliciting a court to depress its assets by appointing a receiver and entailing heavy loss upon the company by a plea that the claims of others would be imperiled were the company to retain control of its own assets and realize upon them in the ordinary way, and avoid the certain sacrifice.

Judge Thayer was able, but old. It had become customary for courts to be used for private and personal attacks
578 by one corporation upon another and by one faction of a corporation upon another. And, behind the mass of confusing affidavits and the [clanor], he undoubtedly failed

to allow for the probable animus which prompted the filing of the bill and detect the personal interest, which cropped out from between the lines.

The responsibility for throwing one of the large corporations of the community in to the mesh and maze of receivership and the heavy loss thereby occasioned is chargeable more to the complainants and their counsel and to the practice prevalent then, and prevalent now—and which the courts and community are only beginning to recognize—of using public agecies for private and personal purposes.

The consequences of such a proceeding are so damaging and disastrous that parties instituting them must show a clear right, both legal and equitable, as well as a legitimate object therefor, to escape just condemnation at the hands of all the parties interested, and even at the hands of the community itself.

In such cases the party invoking such drastic measures must be right; and he must consider the widespread loss and distress that will be occasioned by the act and the responsibility that attends it. There is no more excuse for such an act ruthlessly committed than there is for a wanton and unnecessary surgical operation.

And when the community begins to demand rigorous honesty and fairness in its public and semi-public affairs such wanton and waste-entailing proceedings as the Bierce case will become few and far between.

It may be considered by some, at first blush, that it is late in the day to make these suggestions in this case; but I think that the Guardian Trust Company owes it to Kansas City and its many people directly interested, and especially to the parties who instigated these proceedings, to take the formal record of an impartial court as to whether or not this bill was rightly brought, and in case it was not, to have the responsibility therefor placed where it belongs. If this be done, it will give an opportunity for complainants and their
579 counsel in the case to formally acknowledge their error and to make such reparation as real men and upright citizens make for grave errors and misdeeds; or else to have a grievous wrong committed permanently recorded against them.

9. The Claims against the Belt Company and Kansas City Southern.

The merits of the Guardian Trust Company's claims against the Belt Railroad were reported upon exhaustively, after the writer's investigation made near the close of last year.

A second printed report of progress was given to the executive committee in May; and a month or two ago, a further report was made. Since the writer and his local counsel, Mr. Rosenberger—who has faithfully assisted him in a thoroughly satisfactory manner and whose only fault has been a too assiduous attention to the work—took hold of the matter at the beginning of the year a series of new claims set up in the case in an intervening petition filed by the Southern Company, to which we drew answers. An exhaustive amended bill was filed of over 100 printed pages, to which we filed answers of over 100 pages; we commenced a new suit against the Southern Company in the state court, which as we expected, was enjoined by Judge Phillips. We have perfected our record for the Court of Appeals and it has been already filed and the case has been set for argument January 11th next.

We have attended the taking of the evidence by the opposition which, in spite of our formal protests and appeals made in open court and various motions, etc., and objections made and filed has more than doubled in volume, making, as I believe, the longest record ever made in the history of an American court, if not in all history.

We have prepared and put in our own evidence, amounting to about 2500 pages, or about one-tenth of the record of the opposition and we have yet to put in but one days' evidence, to be given by Mr. Willey, after which and the usual tedious cross-examinations, we shall close our proof. The matter will then be ready for argument and the master's report:

580 While the evidence has not been concluded within the time prophesied by the writer last winter, he has attempted to follow the plan outlined by him in his report, and we believe it has been followed. My local counsel has given almost all of his time, and I have given the greater part of mine and also used for special investigation and reports the services of several of my Chicago associates.

I having completed a most exhaustive study and brief upon the question of the liability of the Southern Railroad for such claims as we shall ultimately establish against the Belt.

I have looked up and prepared memo briefs on all important questions which we can anticipate will come up before

the master in the accounting case. I prepared a printed brief, almost complete, upon the merits of the accounting case. The brief for the Court of Appeals on the injunction matter is nearly completed. The abstract of the evidence given in the long accounting case has been completed to the extent of over two-thirds of the testimony.

Thus I have endeavored to anticipate issues to be met in the case so far as it is profitable to do the work in advance, and when the evidence is finished, we will be ready for a prompt argument before the Master and to make our appeal for a prompt report.

I need not here repeat to any great extent my suggestions in respect to this accounting case. The claims of the Guardian Trust Company are valid against the Belt, and substantially in full. They now amount to about $525,000, inculding interest, and the annual interest is over $22,000.

The conditions which have surrounded this case, and which are directly responsible for the making of this abnormal record are well known to all local parties actively interested in the Trust Company's affairs. Suffice it to say that I have endeavored to openly and frankly and courageously fight these conditions and I am ready to keep on doing so and to make such moves, radical or otherwise, as may be necessary
581 to bring this disgracefully long record to a close and have an impartial hearing at the close.

The responsibility for it and the cause of it we can not, however, place until the end. Then I propose to earnestly seek to get for the Trust Company, not only its claims, and its interest, and the cost of expert fees and other witness fees, but also a great portion, and I believe the major portion, of any law fees which the company has incurred. The memo brief upon this latter portion I have also already prepared.

It makes no difference on what 'theory' the claims of the Guardian Trust Company have been resisted and this record of bewildering length made in the face of its protest, but I believe if the Trust Company 'stays by' this matter to the end, there will be a reckoning as will do it substantial justice.

[It] believe further that it is the simple duty of the Trust Company to itself and to the community in which it has operated, not to allow this tiring out process to win.

We have suffered much; but the record of it all will be fuel to the flame of righteous indignation which any impartial judge who may ultimately hear the case will not desire to

repress; and I doubt not but that justice, and full justice so far as courts can give it, will ultimately be our portion.

I now, therefore, suggest that notwithstanding we hope that the accounting case is nearing an end, and notwithstanding all efforts will be constantly and assiduously put forth to bring it to an end and to ultimately realize upon its suit against the Southern Company, nevertheless the adverse currents that have set against the company are so steady and possibly so strong that the company should face the proposition of prosecuting its case unto the end or until substantial justice has been accorded it, no matter how long it takes.

In my judgment this record amounts to nothing short of a community scandal on the very face of it and I do not envy
the future reckoning that the parties who have made
582 it will have, if it be within the power of the writer
to bring them to it. So far as he is concerned, he feels it but a professional duty and privilege to lend his efforts to this end, even if it be necessary to move his family to Kansas City for the time being and 'board' with the case.

This company has offered arbitration. It has been refused.

It has made most reasonable offers of compromise. They have been rejected.

It has made objection after objection to the increasing of the record by detailed and immaterial testimony which has amounted to a mere dust-shoveling process.

The opposition have, in spite of this, continued to shovel dust.

A formal promise to close proofs with ten days' evidence made by them early in the year has been expanded in its fulfillment to over 150 days.

All this makes it clear to the writer that the present suit is a mere tiring out game; and I think the challenge should be accepted and the ultimate reckoning both as to responsibility and costs be thoroughly worked out.

Therefore, while I think that the case of the opposition is apt to collapse before many moons, yet I think it but wise and right to face the grim duty of forcing it through to the end, no matter what bends or breaks or how long it may take.

I think that the feeling of most of the members familiar with the history of the case, if not all of them, is this way; and if the company, its directors and stockholders feel convinced absolutely that substantially the whole of this claim of over one-half million dollars with future accruing interest and all costs will be ultimately assured to them, I think we can all face cheerfully the prospect.

For the purpose of inculcating this feeling of confidence to the company's own advantage and justifying in a measure his opinion heretofore given the company as to the ultimate liability of the Kansas City Southern Company, the
583 writer submitted the plan of reorganization of the Belt Company and his briefs and arguments upon this subject, together with the briefs of the opposition, and all points raised by them to the Hon. John G. Johnson, of Philadelphia, the recognized leader of the American bar, and a legal giant, whose opinions almost universally carry conconviction to the bar at large and stand high above even judicial announcements. He had been consulted by some parties interested in this very question, and was hence not at liberty to serve the writer.

At the same time, a duplicate of the same data was handed to Mr. C. O. Tichenor of Kansas City, a gentleman of recognized ability, and who by common consent stands in signal prominence in the community as lawyer and citizen.

His preliminary report is favorable to the Trust Company, and I will transmit his formal report when completed.

To this the writer desires to add that after the most exhaustive study and brief work ever made by him upon any subject, he is clearly convinced that the Southern Company is liable for this debt, not merely upon one ground, or even upon two grounds, but upon three distinct grounds, each of which is independent of the other.

This may seem at first like an extravagant 'find'. But when it is recollected that during the planning of the reorganization everybody expected the floating debts to be paid in full, it is quite natural to find an ample legal basis therefore in the papers and the plan.

So far as the Belt accounting case is concerned, no one connected with the Trust Company, as I believe, doubts the final establishment of the claims against the Belt to the extent of at least by far the greater part thereof. But if at any time the Trust Company officials have any grave doubts on the

subject, I will stand ready at any time to back up my own assurance in respect thereto with adequate corroborative authority.

584

It seems clear as day to me that the best investment this company can make is in backing up this litigation to the end, or until the dragon yields, even if it has to devote the annual interest upon its claims towards doing so; although I do not mean that anything approaching such sum will be needed.

As to the expenses, the arrangement made with the writer by the executive committee at the outset, and made at his suggestion, was that the fee to be ultimately paid was to await the final result of the litigation, and then to be mutually appraised, from which appraisal the writer was to deduct five per cent. In the meantime he was to be allowed for all ordinary outlays and expenses of the litigation paid out through him and he paid such an amount from time to time as would enable him to compensate his assisting counsel and net him a reasonable and moderate payment on account for his own time.

To meet the enormous record of nearly 30,000 pages, made by the opposition and with our evidence practically completed, and we have paid out and incurred an expense on the following estimates:

Expert accountants and witnesses within	$3,000
Printing, traveling expenses, stenographer and miscellaneous	2,500
The Company has paid me on account	10,000

And out of this I have paid the above expenses, excepting a small portion for which bills have not been rendered, and also my own assistants.

When we consider that the record made even since I took hold of the case was about 18,000 pages and the work accomplished as roughly outlined above, a work which I feel entitled to call prodigious, I think the outlays have been prudently made and are as moderate as the circumstances have permitted.

The company must remember, and I desire to emphasize the fact, that practically all these outlays and as I believe the larger share of law fees will be adjudged against the opposition and finally against the Southern Company.

584a

I have become so interested in the case and so earnestly imbued with absolute confidence in the ultimate

triumph of the Trust Company, and so intensely aroused at the imposition so far visited upon it, that nothing would please me better than to advance every dollar of all manner of expense, and await the ultimate outcome for a repayment of this as well as for all fees or compensation whatever, as most telling evidence of the confidence which I feel in that outcome, and as a willingness to back it up to the fullest extent.

I am not, however, financially able to carry such a burden, and as no one has asked me to, and as I am sure the company would not allow me to, I will not enter into a scramble for the privilege.

In reflecting upon the history of the Guardian Trust Company, and especially upon the Bierce and Belt cases, which have borne so heavily upon its resources, and which look to me like two great crimes, one or two valuable lessons are learned therefrom, which bear directly upon present conditions and the future destiny of the company.

First. The disastrous effects of factionalism in corporations, and especially the practice of dragging corporations into court by their own stockholders in order to adjust factional differences or satisfy personal motives, etc., are seen very clearly in the after effects of the Bierce case.

'Fall-outs' in the corporate family are always to be regretted. It is true that in occasional instances radical measures are necessary to preserve the interests of all parties. But these case are the exception. The law provides methods for a company to act, and a wise plan is to let the majority rule, according to the laws and by-laws and let it be held to full responsibility in the premises.

The methods provided by statute for corporate management are, however, many enough and complex enough to give many occasions for law suits, if lawsuits are desired, and enough, in fact, to wreck the most prosperous corporation.

The Guardian Trust Company—it is an open secret—still has factions. It cannot, however, seriously suffer
585 therefrom, if all struggles for stock control and for its corporate management run smoothly within the methods provided by law, and such contests be kept out of court. It would be far better if, in every such case, all questions between rival factions as to stock ownership and power to vote stock, etc. were arbitrated or referred to some mutually chosen counsel whose decision should be accepted

as final. Such are the methods of broadminded men, and all parties interested in the Trust Company would be doing far better by it by submitting to some plan of the nature outlined.

The Trust Company and each of its stockholders will, no doubt, avail themselves of the lesson taught by the Bierce case and the financial tragedy that followed in its wake.

Second. Since the appointment of the receiver over the Trust Company, everybody has apparently acted upon the idea that the company was of necessity, headed towards liquidation and ultimate extinction.

Now, these are prosperous times; and, if history repeats itself, another very serious panic or set-back in the country at large will not be due for eight or nine years hence. It is useless to prophesy; but it is a fact that not even the croakers are looking for bad times, and the country is apparently in the early stages of a great industrial development. This is particularly true of the territory in the West which is directly tributary to Kansas City.

Again, the centralizing process in finance which has been going on for years in the eastern and older cities, is already on the wane; and I believe all thinking men, alive with the times and who can see a little ahead, believe that the Mississipppi Valley and the West, which has of late years become financially independent, is beginning more and more to handle its own development and other enterprises and to keep hold of its own money for home investment.

There are, too several specific openings, so-called, in
586 Kansas City for a trust company at this time, especially one for the guaranteeing of real estate titles.

Under these circumstances, why should the Guardian Trust Company liquidate itself and die?

There is always a definite value accruing to a corporation from the mere fact that it has existed for a number of years.

Are the sixteen years of the existence of the Guardian Trust Company, and all of its experience, its losses, and even its errors, if you please, of no value to it or its stockholders?

Suppose that the company shall do itself and all parties concerned with it the simple duty of placing responsibility for the receivership attack formally in the judicial records of this community;

Suppose that it shall rebuke the wrong heaped upon it by the Belt accounting case, by insisting to the end and upon the payments of the amounts due it and all costs;

Suppose it then make up a little book or statement of its history, outlining faithfully the facts and openly and formally confessing to the community at large its errors;

And suppose then, with strong people and conservative western men placed in its management, it thus openly bids for trust business in Kansas City and the West;

Would any fair-minded man say that it would have no advantage over a mere beginner?

Rugged character is built up partly upon mistakes committed. And a corporation has a character as certainly as has the hired girl. And it involves no mere theorizing or sentimentalism to say that the experience and even the errors in the early management of the Guardian Trust Company could be turned to capital in facing the community for new business.

Great crises being great opportunities. Hard suffering can be turned to account. And if this company should face
587 with resolution and courage the duty of rebuking through the final decree of the courts the men who were the chief factors in inflicting the wanton blow, upon interests which were community interests and extended wide and deep and involved so many people, and in burdening the company with the abnormal Belt case record, and in grossly misusing the public courts to beat off a clear liability,—such services would have to be offset to any alleged early 'speculative' management, and the result, in all candor, ought to be a large net credit to the company at the hands of Kansas City in arranging for its financial regeneration.

Such suggestions as these may seem novel to older minds, but the fact is that all business activities tend to run in ruts, and there is often considerable capital in new methods provided they are natural and based upon evident justice and right.

And I make bold to say that this old and embarrassed Guardian Trust Company has a definite opportunity to so resuscitate itself as to fit it for a large sphere of usefulness in the growing western financial world; and to this end to turn its history, its experience and even its errors to a large account.

A deep interest in the affairs of the company intensified by a feeling that grave wrongs have been heaped upon it, has led the writer to depart from conventionalism and give out such thoughts as seem to definitely bear upon its welfare, uttered in an impartial spirit as he believes, and from a neutral vantage ground.

Respectfully submitted,

HARRY S. MECARTNEY."

Mr. Smith: I also offer in evidence the letter from Mr. Mecartney of March 26, 1908, to the executive committee of the Guardian Trust Company, being Exhibit 39 in the Mecartney record in the state court, pages 460 to 464, inclusive.

Mr. Rosenberger: Wait a minute: I object as a mere attempt to re-open the issues tried in the case of Mecartney against the Guardian Trust Company decided by the state court.

588 Mr. Smith: We are offering this letter on several grounds, one of them is,—

The Master: (Interrupting) You mean for several purposes?

Mr. Smith: For several purposes; one of them is to show the amount of claim for services, the extent of services, claimed by Mr. Mecartney that he had rendered services of large value in matters outside of this Cambria case.

Mr. Rosenberger: It is an offer made to the Guardian Trust Company when they were threatening to discharge him and when he knew they were about to discharge him, to compromise his claims, fees. It was urged in the Mecartney suit against the Guardian Trust Company as an admission and was considered in that case, and the result of that suit the Master is familiar with.

The Master: I am going to admit it. Go ahead and read it. Read what you think is important and then let Mr. Rosenberger read what he thinks is important.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted.

Said letter of Mr. Mecartney's of date March 26, 1908, is in words and figures as follows:

"Kansas City, Mo. March 26th, 1908.

To the Executive Committee
of the Guardian Trust Company:

Dear Sirs:

In response to request of the President in Committee meeting this A. M., I have to say:

As I understand it, I am asked to give the Committee an offer or suggestion as to how much money in the judgment of the writer, is due him as representing the fair value of all fees earned up to date by him and his associates and assistants; and also what amount would satisfy the same and all cash outlays paid and incurred by the writer upon the company's behalf in the so-called Belt-Southern controversy.

589 1. Any agreement to fix a certain sum in full of all such fees, etc., earned and incurred to date would be, according to my view, as expressed to you this A. M., a modification of the terms and conditions, express and implied, of the original and existing retainer or relationship, or a displacement of the same, wholly or pro tanto, as the case may be; since such original retainer contemplated a cause pushed to an ultimate decree or compromise under my personal direction and upon my personal responsibility.

Hence, the amount of fees in such case would largely depend upon this relationship continuing to the end of the 'affair' or until terminated for some legal cause.

2. I may be mistaken; but I think that the end is not far off. And I hesitate to make any proposition at this time which, according to my views, would, even if accepted, bar me from obtaining the benefit of what seems to me to be in reasonable prospect, and the opportunity of placing the greater share of the fee burden upon the Southern Company, upon which event I am willing to take a big chance and to contract with reference thereto.

3. I do not care to attempt an estimate of what is now 'due me' under the original and existing relation or contract —for the simple reason that I consider it impossible to tell and that the same cannot be calculated or figured without a view to results, not yet received.

4. As to my ideas as to what would be due or is to come due in any contingency of future success in whole or in part; I likewise decline to attempt to give them here; for the reason

among others, that they are of but little consequence in view of my original offer and agreement to have the ultimate fees appraised, etc. This, as I have before said, is all the protection the Company needs from any mere estimates of mine, which could not in any event damage it.

5. Under the existing agreement, the only amounts 'due me' are by way of reasonable advances to me in order
590 to support the litigation and to hold up my hands in the fight. My estimates or suggestions on this head are explicitly outlined in my letter to the Committee of March 16th and the one annexed thereto of date February 19th.

6. As to a suggestion of how much I would take in cash in full satisfaction of all claims against the Trust Company for fees and disbursements and liabilities, expended and incurred by me to date, and release the Trust Company therefrom, I make the following proposition, viz:

If paid in cash the sum of $55,000.00, I will sign and execute a receipt in full for all such claims and liabilities, and in addition thereto the fees and disbursements in the cases based upon the Gulf notes and First National Bank claim. This, if accepted, as I understand it, would leave the Committee free to continue my services on an ordinary quantum meruit basis as long as they may desire them, or to terminate the existing relations between us at this time or any other time without any further liability to the Trust Company for disbursements or services prior thereto.

The offer herein made (a) is made solely at the request of the Committee, (b) is made in consideration of immediate cash in hand, and is made (c) upon the express condition that it shall be without prejudice to any claim which I now have or may hereafter have in any negotiation, appraisal or controversy with the Guardian Trust Company concerning the value of my services; nor shall such offer be taken as preventing me from showing that the value of my services is other than or different from the amounts hereinafter stated.

Without attempting to divide or itemize the total figure named, I suggest in brief, the following figuring:

591	You have paid me on account	$ 27,500.00
	Total cash disbursed in full to date	7,559.36
	To apply on fees	$ 19,940.64

1. The suits based upon the 'Gulf' notes of about $30,-
000.00 (including interest) and the First National Bank

claim of about $40,000, are not within the scope of the original retainer, and represent an earned fee of about	$5,000.00	
2. The fees in the first injunction case, which was tacked into the Belt foreclosure suits, and which are taxable in whole or in main upon a dismissal of the Supplemental Bill therein, represents a minimum fee earned as of two years ago of	5,000.00	
(In fact $7500.00 would not be excessive)		
Carried forward	10,000.00	$ 19,940.64
3. The Texas Channel & Dock Co. case which was consummated by an exceptionally favorable settlement three years ago, represents a minimum fee as of that date of	5,000.00	15,000.00
		4,940.64
Add figure above given		55,000.00
Gives		$ 59,940.64

as representing upon this tentative basis all services in the Belt-Southern cases, and for incidental work.

As mere estimates are not vital, as said above, it may be uninteresting for me here to attempt to check up with the estimate of cost and time volunteered at the time of my original retainer.

And especially so, since I have written off and on for the last two years in my reports to the Committee, that all estimates are 'off'— The conditions here having developed far beyond anything that I did or could reasonably have anticipated at the time the case was undertaken.

However, I may be permitted to add in checking up with such estimate, and the circumstances under which it was given, that the cause and general situation has grown to more than three times the proportions which could reasonably have been anticipated on December 5th, 1904, viz:

1. It had been stated by the Master and Mr. Hagerman that the complainants in the cause were about through
592 with their evidence. The length of the record then attained was enough to ordinarily insure against a court allowing much more testimony. One would reasonably have assumed that 1,000 pages or so of evidence would be all that would be allowed, especially since the full ledger entries of the Companies had been put in evidence long before. And the short rule entered later by the Master for the closing of proofs justified the reasonable assumption that but a moderate amount of testimony was then in prospect.

2. The record upon the whole case thus grew to over three times the size which had been in reasonable prospect.

3. The original estimate was made upon a basis of our claims seriously involved being $150,000.00 less than what we ultimately saved and sustained, as we feel sure, upon the pleadings alone. (The statements as to book errors made by the auditor of the Trust Company and by the former counsel based upon the auditor's statement, which I had not time to investigate at the time of the original report, turned out to be erroneous).

4. The intervening petition filed in March, 1905, and the claims thereunder, had never been heard of by me, or by any of our people, and presented an entirely new issue or case.

It was in effect (1) an attack upon all our collateral under the 'after acquired property clause' of the Belt mortgages (the Cent. Imp. matter alone consumed several thousand pages of evidence); and (2) the lodgment of a personal liability claim against the Company of $1,500,000.00 or more.

5. It was not anticipated that we would be put to the trouble of an independent state court suit against the Southern Company as we were entitled to assert our rights against it in the original case by way of cross bill.

(Before we sued in the State Court, I presented a printed form of cross bill to Judge Philips. Mr. Moore opposed the filing of the same unless I struck out practically all the legal grounds on which I relied; and Judge Phillips evidencing a hostile attitude to us, the same was withdrawn, and we
593 were thus forced to a new and independent suit in the state courts.

6. The late arduous efforts in preparing a fight upon an adverse receiver were likewise new.

7. The late injunction of Judge McPherson was not only not in reasonable contemplation in 1904, but I submit was not also at the time it issued—as it is a precedent in its 'extremity'.

8. Several weeks of strenuous and elaborate preparation of data for the use of a special committee in attempting to negotiate a compromise in May and June, 1906. (This would not have been necessary in any such negotiations conducted by the counsel).

9. In addition to the above the bill of complaint was twice amended, as well as the intervening petition causing new an-

swers to be filed—the additional amendments in one case covering nearly seventy pages of printed matter, and involving the drawing of a printed answer of 115 pages; there were also special efforts at briefing up the intervention petitions in the Gulf foreclosure case and the Union Terminal Case—involving the $133,000.00 claim and $38,000.00 U. T. Coupons.

10. There have naturally many services of more or less importance been called for from time to time, not properly falling within the legal 'purview' of the retainer which are impossible to schedule here.

I have as thoroughly considered the matter as has been possible for me to do in the few hours allotted therefor but desiring to avoid any dickering or negotiations, I have named a figure which I feel is the least I can accept in justice to myself; and you may take it as an ultimate minimum offer upon the basis tendered.

Lastly, I have my complete office files at my hotel, which you are privileged to view and which I tender as some evidence of the vast amount of work performed in the case; and Mr. Rosenberger has his complete files at his office, which he will be pleased to display to you upon request.

Very respectfully,

(Signed) HARRY S. MECARTNEY."

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594 Mr. Smith: In this same connection, I offer the prayer in the first count of the petition of Mr. Mecartney's, filed in his case on March 28, 1908.

Mr. Rosenberger: I object to it unless the whole document goes in.

Mr. Smith: All right; I offer the original petition, appearing on pages 62, 63 and 64 of the record in the Mecartney case in the state court; and I want to read the prayer—

The Master: (Interrupting) Wait: do you object to that, Mr. Rosenberger?

Mr. Rosenberger: Yes, I think it is absolutely redundant matter in this record; the case was not tried on that particular petition.

Mr. Smith: You are offering the judgment in the Mecartney case and we are offering here extracts from this record because the question before the Master is, if you are going to

consider that judgment, why, it is proper to consider what issues were tried in that case.

The Master: Well, the objection will be overruled. Go ahead.

To which last action and ruling of the Master, the Guardian Trust Company, by its counsel, at the time duly excepted.

The original petition in the case of Harry S. Mecartney against the Guardian Trust Company, appearing on pages 62, 63 and 64 of the Mecartney record, is in words and figures as follows, to-wit:

"Petition.

Now comes the plaintiff and for his said cause of action against the defendant, states that at the times hereinafter mentioned, he was, and for a long time prior thereto had been, and still is, a licensed attorney-at-law and engaged in active practice of the profession of law in Chicago, and in Kansas City, and at various other places in the United States.

That defendant, Guardian Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of Missouri.

595 That at divers times from the first day of December, 1904, to the 27th day of March, 1908, the plaintiff, as such attorney-at-law, at the special instance and request of the defendant, rendered to the defendant professional services in and about divers legal matters and litigated causes, and did during said times, at the instance and request of the defendant, incur, advance and pay out certain moneys at divers times and in various amounts, for and on behalf of this defendant in connection with the said legal and litigated causes.

That the said professional services were of the reasonable value of Seventy-five Thousand Dollars ($75,000.00).

And that there is now due plaintiff on account of said professional services and said moneys, the sum of Eighty-three Thousand Dollars ($83,000.00).

Wherefore plaintiff prays judgment against the defendant for the sum of $83,000.00, together with interest and costs.

And for further cause of action against the defendant, the plaintiff states that on or about December 1st, 1904, under a special contract in writing, duly executed and accepted by the plaintiff and defendant, the plaintiff was retained and en-

gaged by this defendant to direct and prosecute, as an attorney-at-law, to completion by final judgment or decree, or by compromise or adjustment made under direction of plaintiff; certain controversies between this defendant and the Port Arthur Channel & Dock Company and others, then involved in certain suits then pending in the United States Circuit Court for the Eastern District of Texas, at Beaumont, Texas, in one of which suits the Provident Life & Trust Company was complainant, and in the other of which, suits the Barnett & Record Company was complainant, and to both of which suits the defendant Guardian Trust Company was a party, as was also the said Port Arthur Channel & Dock Company and others, in which suits the defendant asserted claims against said Dock Company and others of about Thirty-five Thousand Dollars ($35,000.00), and said Dock Com-
596 pany asserted claims against this defendant of about One Million, Five Hundred Thousand Dollars ($1,500,000).

And under the terms of said agreement in writing, plaintiff also undertook to direct and prosecute to such completion, on behalf of this defendant, a certain controversy or cause then pending in the United States Circuit Court for the Western Division of the Western District of Missouri, at Kansas City, in which cause the Cambria Steel Company was complainant and the Kansas City Suburban Belt Railway Company was ancillary complainant, and this defendant Guardian Trust Company and others were defendants to such cause; and in which said cause the said Belt Railroad Company claimed an accounting from this defendant as to various transactions amounting to upwards of Two Million Dollars ($2,000,000.00), and sought to set aside certain notes and accounts held by this defendant against it and aggregating upwards of Five Hundred Thousand Dollars ($500,000); and in which said cause was involved the title to a large amount of collateral securities in the way of stocks, bonds and accounts held by this defendant as security for its said notes and accounts.

And that plaintiff did undertake to so direct and prosecute the said causes and controversies in the said court in Texas, as provided in said agreement in writing, and did diligently and effectually prosecute and direct the same until about April 1st, 1905, when the same were, with the consent of this defendant, compromised, settled and adjusted under the direction of this plaintiff.

That the plaintiff did effectually and diligently prosecute and direct said controversy or cause in the said court at Kansas City until the 27th day of March, 1908, upon which date the defendant, without any notice, cause or excuse, terminated said retainer or engagement, and discharged plaintiff from such service and refused and declined to permit plaintiff to continue or pursue with the prosecution or direction of said controversy or cause.

That plaintiff has incurred, advanced and paid out certain moneys at divers times and in various amounts under said engagement and retainer, for and on behalf of this defendant, in connection with said controversies and causes
597 in Texas and at Kansas City, which moneys amount to the sum of Eight Thousand Dollars ($8,000.00).

That the defendant has paid the plaintiff at various times on account of said services rendered by plaintiff to defendant and said moneys so expended, the aggregate sum of Twenty-seven Thousand, Five Hundred Dollars ($27,500.00).

That by reason of the premises, and after allowing credits to the defendant, there is justly due and coming to this plaintiff from said defendant, the sum of Seventy-Two Thousand, Five Hundred Dollars ($72,500.00), for which, together with his costs, plaintiff prays judgment.

C. O. TICHENOR,
R. J. INGRAHAM,
REED, YATES, MASTIN & HARVEY,
Attorneys for Plaintiff."

Mr. Smith: I offer in evidence, the following extract from the testimony of MR. MECARTNEY, for the purpose of showing that the First National Bank case on the Gulf notes, was included in the claim for compensation under the first count of his petition:

"Q. Now, you further speak of the suits based upon the Gulf notes of about $30,000.00 and the First National Bank claim as not within the scope of your original retainer?

"A. Right.

"Q. You are suing in this case for the value of services performed in the Gulf note case as being within the scope of the general Belt litigation, are you not?

"A. I am.

"Q. And the First National Bank claim of about $40,000.00 was included in the Cambria suit by amendment, was it not? A. It was.

"Q. And it was also made a basis of the second of the three state court suits? A. Correct."

598 Mr. Rosenberger: I object to that, for the reason that it appears on the face of the record in the Mecartney suit that any services rendered in the suit of the First National Bank against the Guardian Trust Company no claim was made in the Mecartney suit and this is a mere attempt to re-open the issues in the Mecartney suit, as shown by the record in that case.

The Master: The objection is sustained, if Mr. Rosenberger's statement is correct; assuming your statement is correct, there was included only the services Mr. Mecartney rendered in recovering from the Cambria Company and the Kansas City Southern Railway Company the amount of the judgment which the First National Bank had obtained on the endorsement of those notes, the objection will be sustained.

Mr. Smith: We contend he has no right on any theory to have his services rendered in trying to enforce against the Southern Company the amount of such judgment in the First National Bank case.

The Master: The objection will be sustained. I cannot agree with you about that. The services rendered in arguing the case of First National Bank against the Guardian Trust Company in the Supreme Court ought not to be in this case, ought not to be claimed.

To which last ruling and action of the Master, in sustaining the objection of the Guardian Trust Company to the last offer of an extract from the testimony of Mr. Mecartney in the First National Bank case, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Smith: I want to offer from the memorandum opinion of Judge Frank G. Johnson—

Mr. Rosenberger: (Interrupting) Here again, if anything is to be offered at all from that opinion, I will object to its being received in fragments and I will renew my objection, it is a mere encumbering of the record.

Mr. Smith: Well, I am not going to encumber the
599 record with the whole memorandum opinion. The only thing I wanted from it was to show you that the Texas case was under his consideration.

The Master: Why don't you call my attention to it without reading it?

Mr. Smith: I don't think I am justified in doing that. In the Supreme Court they comment on it and it is here and I just want to show he laid some stress on that fact, that is all. But I am not going to put that whole record in. I want it understood one of our objections to this Mecartney judgment is that the judgment is excessive. In support of our objection on that issue, I want to offer the following evidence from the record in that case.

Mr. Rosenberger: Before you do so, I want to say that any offer for that purpose is objected to, for the reason it has no tendency to show that the Guardian Trust Company did not actually sustain the expense represented by the amount paid in satisfaction of the final judgment in the Mecartney suit in the state court.

The Master: The objection will be sustained, because the Master, while he is willing to hear evidence of some of the service for which the Mecartney judgment was rendered which was entirely outside of the litigation which the Master considers as a part of the so-called Cambria-Kansas City Southern Litigation, he thinks he cannot go into the question of whether the amount, or basis, or estimate put on that service in the judgment was excessive when the Guardian Trust Company only paid it after final judgment, when they were compelled to pay it or stand execution.

Mr. Smith: I want the record to show what I want to offer.

The Master: Is it very long?

Mr. Smith: No.

The Master: Very well; I think that will save a re-reference and I would rather have it go in the record.

600 To which last ruling and action of the Master in sustaining the Guardian Trust Company's objection to the testimony offered of Mr. Mecartney's, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Smith: I am reading from the answer of Mr. Mecartney on page 201 of the record:

"I should have stated that in the fall of 1907, in September, while the matter was under advisement by Judge Douglass, Mr. Rosenberger made a printed brief in detail upon the issues of the intervening petitions, supplementing the printed argument which had been made before that time. He also appeared with me in court at the most crucial moments in the argument of the most important motions, and in the early part of 1908 presented the petition for the increase of bond, himself, in my absence. He also aided in the argument against the granting of the temporary injunction before Judge McPherson, aiding in the arguments therein. He also conferred with me from time to time on my visit to Kansas City and several times at Chicago and at my house at Hinsdale. He took the New York depositions to which I have referred, and took depositions at Detroit. He interrogated witnesses in detail and took nearly all of the evidence that was taken and attended upon the taking of the evidence."

Mr. Smith: Now I want to read from his statements on page 767 and 768, I suppose subject to the same objection and the same ruling, but I want to get it in the record. It is at the bottom of page 767 and top of page 768:

"Q. You stated you paid Mr. Rosenberger $4500.00 on account. I will ask you if that represents the total payment to him, or the total expense you include by reason of his services in the case?

"A. No. I want to make it clear that is a mere fraction of the total amount paid, and agreed to be paid Mr. Rosenberger. The amount which we finally settled on as a total payment was $15,500, and interest on unpaid amounts that run from the time I was discharged.

601 The Referee: How was that, $15,000 in addition to what he had.

A. No, $15,500 including the $4500 and 6 per cent interest from March, 1908."

The Master: You object to that, Mr. Rosenberger?

Mr. Rosenberger: Yes, I didn't think it was material in the Mecartney case and I don't think it is material here, even if it had been in the Mecartney suit, because it is comprehended in that judgment.

The Master: The objection is sustained, on the same ground on which the last objection as to the extract from Mr.

Mecartney's testimony as to the amount he paid Mr. Rosenberger.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted, and still except.

Mr. Smith: I also want to offer in evidence the conclusion of Judge McCune, who was referee before whom the case was tried; it is Number 9 of his conclusions:

"The Referee, therefore, finds in favor of the plaintiff on the first count of his petition, in the sum of $14,860.57, with interest at the rate of six per cent per annum from March 28, 1908;

On the second count of plaintiff's petition the Referee finds in favor of the defendant."

Mr. Rosenberger: I object to that, on the ground it has no probative value whatever, not only for the reasons heretofore given, but because that judgment of Judge McCune's was vacated and set aside by the court which appointed him referee and went entirely out of the case.

The Master: The objection will be sustained.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

602 Mr. Smith: I also want to have Mr. Rosenberger agree that the judgment in the First National Bank case, the case of the First National Bank against the Guardian Trust Company, 187 No. 495, was decided by the Supreme Court of Missouri on March 16, 1905; that is the date as shown by the report.

Mr. Rosenberger: Yes, I am perfectly willing that that judgment may be considered in evidence.

Mr. Smith: May be considered in evidence without including it in the transcript?

Mr. Rosenberger: Yes.

The Master: The final judgment was that date?

Mr. Smith: Yes, that is the date of the opinion of the Supreme Court of Missouri.

I am not sure, if the Master please, whether there has been admitted in evidence the decree of the Federal Court in Texas disposing of the Provident Life & Trust Company case, I know it has got Miss Parlin's mark on it and I read part of it, but I want it understood that that decree is in evidence.

The Master: You mean that entire litigation, the Dock case?

Mr. Smith: Yes.

Mr. Rosenberger: I presented the stipulation.

Mr. Smith: You presented the agreement, rather than stipulation.

Mr. Rosenberger: If there is any distinction, all right.

The Master: I remember that was put in evidence.

Mr. Smith: With reference to Items 182 and 183, and also on the issue of good faith, I want to offer the testimony of Mr. Mecartney on page 648 of the record in his suit in the State Court against Guardian Trust Company showing the circumstances with reference to the employment of Mr. Wilcox.

Said testimony is as follows:

"Mr. Rosenberger telephoned me on Sunday at my home in Hinsdale that Mr. Wilcox, whom the other side had
603 called, was on the stand, and by making a search of the records could work out that whole Degoigen item as an expert accountant, and Mr. Rosenberger wanted authority to make a contract with him and pay him $450.00 therefor. The draft came in the next day or the day after, for $446.66, with a letter that he had contracted with Mr. Wilcox; that Wilcox had thought that ½ of 1% of the Degoigen item was reasonable, and that he had made that contract; and I sent back a letter directing that that would not do; that I didn't believe in making a contract on that basis, but if Mr. Wilcox should make it a round figure of $450.00 and that was the contract (page 646 of Mecartney record).

The Master: It has been excluded too, on the ground that the question of good faith was foreclosed.

Mr. Smith: Oh no, this is also on the items 182 and 183.

The Master: Separate your offer then.

Mr. Smith: I am offering it on two different grounds, first with reference to the right to charge the amount paid Mr. Wilcox as costs in this case; and also on the ground—

The Master: (Interrupting) Wait a minute; let us have one at a time.

Mr. Smith: I am offering this, if it is admissible, on either one of the two grounds. It is admissible—

Mr. Rosenberger: (Interrupting) Well, the objection made at the time and during my own testimony was that the amounts paid to Mr. Wilcox for his expert service were allowed to Mr. Mecartney in his suit against the Trust Company and that that is not now open to inquiry, it having been paid on final judgment. As to its being offered by the Southern Company or Cambria Company in support of its contention that it brought or instigated this litigation in good faith, that I don't think is open to inquiry; and, furthermore, the testimony which is offered has no probative value one way or the other upon that issue, as it is being
604 offered in contradiction of the testimony as to Items 182 and 183, which has no tendency to show these amounts were not paid to Mr. Wilcox, having been included in the judgment in the Mecartney suit. What is the use of wasting time on that?

The Master: The objection will be sustained.

Mr. Smith: On this same issue, these Items 182 and 183, and also on the issue of good faith, I want to offer the following extract from the testimony of Mr. Wilcox appearing in his evidence in chief and before he was cross examined by counsel for the Trust Company.

Mr. Rosenberger: The evidence of Mr. Wilcox to which you refer, is in the Cambria record given before Judge Douglass in the Cambria suit?

Mr. Smith: Yes.

Mr. Rosenberger: I object to it being offered in evidence. If there is anything that is pertinent it can be referred to. How many times does this have to be offered? I offered it once in the Cambria suit, in this case in which the Master is stitting; and now offered again.

The Master: You object also on the ground that the Master has been foreclosed to receive it on the ground of the decisions of the upper courts?

Mr. Rosenberger: Absolutely.

The Master: The objection will be sustained.

To which last action and ruling of the Master in sustaining the last foregoing objections, the Kansas City Southern Railway Company and Cambria Steel Company, at the time by their counsel, duly excepted.

The extract from the testimony of Mr. Wilcox so offered in evidence, is marked "Kansas City Southern Company's Exhibit 5" and is in words and figures, as follows:

"Kansas City Southern Railway Company's Exhibit 5.

Q. Now, I will ask you to look at the books of the Trust Company which have been brought here, and ascertain
605 if in 1897, the Trust Company assumed the payment of certain real estate notes, aggregating approximately $103,000.00, and charged the amount of those notes to the Belt Company in open account?

A. (Witness examines books) Yes, sir.

Q. Now, if you can get the book of the Trust Company showing the assumption of those notes?

A. I have got the book here.

Q. Before you give that, when was it that you and Mr. Rosenberger examined the books of the Trust Company?

A. I examined those books a year or a year and a half ago, on this transaction.

Q. At Mr. Rosenberger's request?

A. No, at Judge Trimble's request.

Mr. Rosenberger: When I said 'my request' I meant, at Mr. Trimble's request.

Q. Did you examine them at Mr. Rosenberger's request.

A. I don't believe I did. I examined them at Mr. Mecartney's request—about a week ago, when I first came, so as to refresh my memory on this.

Q. When did he request you to make this examination?

A. About two weeks ago.

Q. In Chicago?

A. Yes."

Mr. Smith: In this same connection, and for the same purposes, I want to offer the correspondence between Mr. Mecartney and Mr. Harris, President of the Guardian Trust Company, with reference to the use of Mr. Wilcox as a witness in this case, being Exhibits 107 and 108 in the record in the Mecartney case, pages 1203 and 1204.

The Guardian Trust Company objects to the offer in evidence of said exhibits 107 and 108 in the record in the Mecartney case, for the reason that the Master has been foreclosed from receiving it on account of the decisions of
606 the upper courts.

The Master: The objection is sustained.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Said Exhibits 107 and 108, marked Kansas City Southern Railway Company's Exhibit 6, are in words and figures as follows:

"Kansas City Southern Railway Company's Exhibit 6.

Exhibit No. 107.

Feb. 17, 1905.

Mr. H. H. Harris, Pres.,
Champaign, Ill.

Dear Sir:

Your phone message received. As to the status of the litigation, there is nothing new. Everything this week, as Mr. Rosenberger reports. 'is running smoothly'.

Mr. Wilcox gave a version in writing several years ago which we have only discovered lately, explaining the De-Goijen item of $89,000, and explaining the item in our favor. We felt somewhat hopeful of this item now, but it is a dangerous item and our hopes of saving it are not yet firm.

As Mr. Wilcox explained the stock profit is decidedly in our favor.

We have not put Mr. Wilcox on the stand yet. The other side are going to use him for some purposes. He professes to be neutral.

As I reported to you, the Southern Road, has agreed by stipulation to come into the Belt case and if they do, they will save the additional suit at law which at one time we contemplated. They are under stipulation to come in in a week or ten days longer, I have forgotten the exact date.

Truly,

H. S. MECARTNEY.

607 Exhibit No. 108

Champaign, Ill., Feb. 18, 1905.

H. S. Mecartney, Esq.,
Chicago, Ill.

Dear Sir:

Your letter of the 17th received. I had quite a talk with Mr. Wilcox when in Kansas City. He had not then gone onto the stand, but intended going on Thursday at 2 o'clock P. M. He is out of employment, and made overtures to me, also to your attorney, stating he knew a great deal about it and would like very much to be in a position to assist us. I suppose if the other parties would make him a good proposition he would be for them, so I have very little faith whatever in his sincerity. I don't believe it would be the right thing to do to let him go through those books and get evidence to go against us. In these two particular cases, if it stops there, I do not know as there is any objection, but I do oppose him delving into those books.

In regard the Southern Road, the only thing about it that I see is that we might lose our opportunity by time limitation. I do not know when that would expire, or whether it would work in this case, as a suit would have to be brought within a statutory time and for that reason, I have been a little anxious to have that matter attended to so as not to lose our standing in the case. You say that the stipulated time by our agreement will expire within a week or ten days, so if they do not do as they agreed, the only thing for you to do would be to proceed on the lines which we have heretofore talked. Of course, if they will come in and make themselves a party to the suit all right, but I do not wish to lose our standing by limitation.

Yours respectfully,

H. H. HARRIS, President."

Mr. Smith: Now in order to keep our record straight on that matter that was referred to in the letter from Mr. Mecartney to Mr. Harris, a report or version in writing of the Degoijen transaction, which, as it is stated in that letter, he had made several years before I would like to ask
608 on behalf of the Kansas City Southern Railway Company and Cambria Steel Company an opportunity to examine that report or letter.

The Master: Who has it?

Mr. Smith: The Trust Company has it, I assume.

The Master: Do you know, Mr. Rosenberger?

Mr. Rosenberger: Oh, I don't know that it is referred to at all. I question whether any of those matters are available, in view of the changes that are involved in the successive receiverships and changes in management and I doubt whether it could be had. If it could be, I would strenuously object to making the slightest effort to find it, because it is utterly immaterial, the merits of the DeGoijen matter having been inquired into in the main litigation, the Cambria suit, and determined.

The Master: That is not an offer; that is a request.

Mr. Smith: That is a prayer for opportunity to examine that document, which is referred to in that correspondence.

Mr. Rosenberger: My answer to that is, I don't know that it is in the Trust Company's possession. I have never seen it and if it were in our possession, I object to producing it or permitting it to be examined, on the ground it is utterly irrelevant.

The Master: Go ahead, Mr. Smith; that don't call for any ruling by the Master.

Mr. Smith: I am asking the Master to require that the letter be produced for our inspection; yes, I am asking for it in that form.

The Master: Well, for the reason stated by counsel and because it seems to the Master irrelevant, and immaterial and because of the impracticability of complying with your request, it will be refused; that is, no order will be made to produce this document.

To which last action and ruling of the Master in refusing to order the production of said letter, the Kansas City Southern Railway Company and Cambria Steel Company, at the time, by their counsel, duly excepted.

609 Mr. Smith: I now want to offer in evidence on the question as to the costs that may be taxed in this case, if costs as between solicitor and client may be taxed herein, the following extracts from the testimony of Mr. Mecartney, appearing on pages 344, 1194 and 1195 of the record in his case in the State Court. I am offering these on the theory they are statements by counsel in that case, and I want them so they may be presented to the Master and the Court, show-

ing the position taken by Mr. Mecartney and I am offering them on that account. I have read those to the Master heretofore.

Mr. Rosenberger: I object to that as absolutely irrelevant.

The Master: The objection will be sustained.

Mr. Smith: It may be considered that I am offering evidence supporting the testimony contained on that matter without reading it here now again. I have read those to the Master heretofore.

The Master: Is this on the question of whether some particular items are properly chargeable as costs between solicitor and client?

Mr. Smith: No; Mr. Mecartney in giving his testimony in the state court stated in his testimony upon what issues he contended costs might be taxed. It is in his evidence in the case and other reports made by him.

The Master: The Master will sustain the objection. I don't care what his views are on the subject. I don't see how it could be relevant.

To which last action and ruling of the Master excluding the testimony offered of Mr. Mecartney as to costs, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

The extracts of testimony so offered in evidence are as follows:

"Q. In a letter from you to Mr. Prescott of date February 28, 1906, you estimate the Trust Company's claim against the Belt or Southern Company for attorneys' fees, stenographers' fees and other expenses at $40,000.00. Upon what was that estimate made?

610 "A. That estimate was made upon the basis outlined in my preliminary report that the court, notwithstanding it was considerable of a precedent, would allow us an attorney's fee for the frivolous litigation that had been prosecuted on behalf of the accounting cases * * * I ought to say in this connection that I found out in the prosecution of my inquiry that the Federal Court, and under practically the same status (evidently he said 'statutes'), had allowed attorneys' fees as a matter of course, and had stopped the practice on the ground that it could not tell when litigation

was frivolous or not, and for that reason had dropped it, but there was no reason why the court would not take it up again in a case of this kind. (1194, 1195).

The matter was new, and more or less a precedent." (344).

Mr. Mecartney further testified:

"I never expected the court to allow all of our attorneys' fees in the entire litigation * * * I may several times have claimed that, but I don't think I did, but I did feel that if we got an impartial hearing in that case that the court would allow us a good round share of our attorneys' fees in the accounting matter on the ground that the litigation had been trivial, and the record had been made on false pleadings, and a patent theory, a theory patent on the face of the pleadings, common business rules, etc. I never stopped to consider just how much, but that it was a proper claim to make in negotiations for settlement, and to earnestly make, and that the court would tax a good round sum against them as attorneys' fees in the accounting issue only; not in the consolidation issue, but on the accounting issue, possibly even on the intervention issue, as it developed. (344).

It only included the accounting issues, and not taking into consideration any other side issues." (1194).

Mr. Smith: Now on the issue of good faith, I want to read from Mr. Mecartney's report, Exhibit 46, made by him on February 14, 1905, to the president and executive committee of the Guardian Trust Company, the following statement in his report, page 589 of the record.

611

Mr. Rosenberger: What record?

Mr. Smith: Mecartney case record in the Supreme Court.

Mr. Rosenberger: I object to reading it as irrelevant on counsel's own statement that it is offered on the question of good faith, that matter having been decided.

The Master: The objection will be sustained. The Master will not hear it.

To which last action and ruling of the Master, in refusing ot hear said report of Mr. Mecartney's, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Said report, Exhibit 46, is marked Kansas City Southern Railway Company's Exhibit 7, and is in words and figures, as follows:

"Kansas City Southern Railway Company's Exhibit 7.

Exhibit 46.

February 14, 1905.

In re Trimble & Braley Bill.

To the President and Executive Committee,
Guardian Trust Company.

Gentlemen:

Mr. Prescott is chairman of the committee to whom was referred the matter of the bill of Trimble & Braley; but at the request of himself and Mr. Heyneker, I have had correspondence with Judge Trimble, and, in connection with the committee, negotiated verbally with him.

Judge Trimble wrote me that he would furnish the executive committee at the coming meeting with a copy of the correspondence had between him and me with respect to the bill, and Mr. Prescott and Mr. Heyneker will have my letters to them. I annex hereto a copy of Judge Trimble's letter received yesterday, as well as his revised bill amounting to $22,162.30, which includes interest at six per cent from March 30th, 1904.

612 He evidently is going to make an effort to have the Executive Committee accept his offer of $13,000.00 in full settlement.

The more I look into the question of recovering the $6,000.00 item for the Texas and Louisiana foreclosure, the more I am convinced: (1) That the chances of recovering the half of it are very poor; and (2) That the company acted on his advice in incurring this indebtedness, and if it cannot recover the amounts paid, it is chargeable to Judge Trimble's error in advising it.

I would very much like to have the claim settled; but, if we settle it on Judge Trimble's basis, it will be practically settling his bill with but $2,000.00 or $3,000.00 discount; for the other seemingly heavy discount will be all consumed by the loss in the intervention.

But I have more things to suggest in regard to Judge Trimble's bill, which it is not more pleasant for me to suggest than it will be for him to recognize them, and these relate principally to the conduct of the Belt case.

In my printed report I stated that the matter of this long accounting should have been shut out at the beginning, either

by demurrer to the bill, or by insisting by formal motion that the question of whether or not the Guardian Trust was entitled to account, should be first tried. If it had been the court would never have gone into one-third of these matters that have been plowed through in the case, consuming an inordinate amount of time, and causing the Trust Company a big expense and great damage by delay.

Judge Trimble says Judge Black felt we would have to account sooner or later; but, as Judge Trimble was counsel of record in the case, it was his privilege to formally protest against going into these everlastingly tedious details extending over the whole business life of the company, and to place himself of record in writing.

But, even if he were not responsible for going into the accounting, he certainly is responsible for no effort
613 being made to have it tried by the well-known and ordinary schedule plan, i. e. by 'surcharging and falsifying the account'. A motion to do this we have lately made and the Master has sustained it. It could have been made several years ago as well as now, and saved the taking of four-fifths or nine-tenths of the testimony which has been taken.

Mr. Willey has said that Judge Trimble has consistently objected to going into these old matters. But that was not enough and did not release him from the affirmative duty of adopting the regular plan of getting rid of the accounting in short order,—a plan which has been in vogue for centuries.

Counsel cannot escape such a responsibility by mere passive objection.

The two vital errors made: (1) As to going into the accounting; and (2) a failure to conduct it according to the ordinary rules,—are not matters of practice on which two well-informed counsel would disagree. There is no question but what the court's and Master's duty would have been to yield to these motions, as Judge Douglass has lately specifically ruled.

At the beginning of such a case a trial brief should have been prepared on the methods of practice; for, in a case of this kind, the merits of the case are largely involved in the way it shall be conducted.

The most casual reflection will show that probably $75,000.00 to $100,000.00 have been consumed by both parties to this case in dragging it along in this manner for three years,

counting the damage by delay and all indirect damage in addition to the direct expense.

This is a frightful showing and somebody is responsible for it. Who on our side is responsible but the counsel in the case?

My relations with Judge Trimble have been very cordial, and I have found him to be a frank and candid man, and consider him a decidedly able lawyer. But I think he has made the mistake of trying to do too much. There
614 were heavy responsibilities thrown on him at the time this suit was started which he should have declined. It was much more than he or any other man could have done well in the time allowed him. The result was that the most vital and necessary things to be done at the beginning of this case were not done; nor were the court and master furnished with any brief, nor were motions made which would throw the responsibility for the enormous consumption of time and the great waste occasioned, upon the shoulders of others.

I think, if Judge Trimble insists on settling the whole matter, that $10,000.00 for his total bill is a mighty liberal offer on the part of the Trust Company, all things considered. More than that, if the matter comes to a trial in court, he will be very apt not to get a dollar. For I am satisfied that the court would sustain a cross-claim on the part of the company for far more than the total amount of his bill as presented.

Respectfully submitted,

H. S. MECARTNEY."

Mr. Smith: In that same connection, I want to offer from page 1164 the testimony of Judge Trimble with reference to the Degoijen transaction.

The Master: Is that on good faith?

Mr. Smith: That is on good faith.

Mr. Rosenberger: I object to said testimony of Judge Trimble's on the ground that it is offered on the question of good faith, that matter having been decided by the upper courts.

The Master: The objection will be sustained, for the reasons heretofore stated, that the Master considers he is foreclosed from going into the good faith question by the higher courts.

To which last action and ruling of the Master, in excluding the testimony of Judge Trimble, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Said testimony of Judge Trimble so offered in evidence,
615 is marked Kansas City Southern Railway Company's Exhibit 8, and is as follows:

"Kansas City Southern Railway Company's Exhibit No. 8.

A. The claim that we called the Degoijen item was one that was very difficult of ascertainment. It was difficult to get at the controlling facts to a certainty, so as to determine what the merits of it were, because it was a very complicated matter, complicated bookeeping and other matters outside of the record and bookkeeping that had to be corrected before you could determine. I had Mr. Wilcox come here from wherever he was, to assist in looking that up, and he did, and wrote me fully about it. I not only saw his letter and read it, but had several conferences with Mr. Wilcox while he was in the office of the Trust Company looking over the books and accounts preparatory to making his report to me. I also had Mr. S. G. Willey go over the accounts and report to me, and I in connection with Mr. Willey and Mr. Wilcox talked the matter over several times, the result of which was that I concluded that the Guardian Trust Company's claim in respect to that matter was valid and safe. I won't say safe, but was valid, and would probably be allowed. I don't now remember the details of the claim, but I do remember that I concluded that the Guardian Trust Company's position in regard to that claim was correct. Whether I ever told Mr. Mecartney that or not, I don't remember. I don't remember whether I talked with him about that particular transaction or not."

Mr. Smith: On that same issue, I want to offer from page 732 of the record a sentence from Mr. Rosenberger's description of this Degoijen transaction and I would like to offer it with the understanding that I am not required to ask it of him as a witness.

Mr. Rosenberger: I make the same objection.

Mr. Smith: You do not object on the ground I am not asking it of you personally as a witness?

Mr. Rosenberger: No.

616 The Master: The objection will be sustained, for the reasons heretofore stated, on the issue of good faith.

To which last action and ruling of the Master in declining to receive in evidence said statement of Mr. Rosenberger in relation to the Degoijen transaction, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Said evidence of Mr. Rosenberger so offered, is marked Kansas City Southern Railway Company's Exhibit 9, and is as follows:

"Kansas City Southern Railway Company's Exhibit 9.

A. I have already mentioned the filing by the complaining receivers of an amended bill. The actual work of preparing the answer to it devolved upon me, although this, as well as everything else I did in the case was submitted to Mr. Mecartney, and there were consultations concerning it. I have the answer of the Trust Company prepared as stated, before me. This is a printed document of 118 pages and contains a complete re-draft of the prior pleadings with much new matter; among the new matter in this answer being the setting out of all the facts and circumstances touching the Degoijen item, to which I referred early in my testimony, of about $90,000. I perhaps should have said in connection with that item that the book entries of the Trust Company concerning this transaction with Degoijen and the Belt Company were very equivocal to the extent that Mr. Willey, the auditor of the Trust Company, confessed his inability to unravel it. To properly state the defenses of the Trust Company concerning that item, required an exceedingly tedious investigation, and the defense as there stated is in substance according to the facts found by the Master in his report. This Degoijen item had been regarded by the former counsel of the Trust Company as one which would have to be yielded to the receiver, and I think that at an early stage Mr. Mecartney himself was of that opinion, and I think that I also was of that opinion, but after I had investigated it and had reported to Mr. Mecartney and discussed it, we decided there was abso-
617 lutely nothing in the claim of the receivers, and we ought to be able to successfully defend it."

Mr. Smith: I want to offer from the statement of Mr. Mecartney on page 360 of the record in his case in the Supreme Court and also from page 299 of the same record his evidence

to the effect that the liability of the Southern Company was a complicated legal question.

The Guardian Trust Company objects to the offer of said statement of Mr. Mecartney contained in the record in the Supreme Court for the same reasons as last above stated.

The Master: The objection will be sustained, for the same reasons and on the same grounds.

To which last action and ruling of the Master in excluding said statement of Mr. Mecartney, contained on page 360 of the record in the Mecartney case in the Supreme Court and also on page 299 of the same record, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Said statements of Mr. Mecartney, so offered in evidence, are marked Kansas City Southern Railway Company's Exhibit 10, and are as follows:

"Kansas City Southern Railway Company's Exhibit No. 10.

Q. The brief that you allude to is in reference to the consolidation issue, and the liability of the Southern was not a matter that should be controlled entirely by the pleadings, was it, Mr. Mecartney?

A. Yes sir; the pleadings and one or two actual conceded facts in the record.

Q. Those facts were quite long and complicated, were they not?

A. No, sir.

Q. Involving the entire plan of reorganization?

A. Well, those are not the facts; they are documents.

Q. They relate to facts, don't they?

A. There was no fact in that reorganization plan necessary for us to sustain our claim that was disputed or
618 that was not conceded, no necessary fact.

Q. There were issues of law, however, growing out of the conceded documents, that were more or less complicated, were they not?

A. On of the most complicated questions that I have ever worked on, and the brief the hardest to master I ever worked on, and that consolidation brief was the best of which I am capable, which is not probably saying much." (Mecartney Rec. page 360).

"In respect to the question of ultimate recovery against the Southern, I recognize that that is more a question of law." (Mecartney Rec. page 299)."

On Friday, February 8, 1924, at 9:30 o'clock A. M. said hearing was resumed before the Master, and the following proceedings were had:

The Kansas City Southern Railway Company and Cambria Steel Company offered evidence, oral and documentary, that this litigation was instituted and prosecuted in good faith, and on reasonable grounds, which evidence the Master, on the objections of the Guardian Trust Company and its receiver, excluded on the grounds that he was precluded by the order of the District Court from trying such issue, to which ruling of the Master, the said Railway Company and the Cambria Steel Company duly excepted. Thereupon said Railway Company and said Steel Company made an offer of proof and filed their motion for leave to offer evidence upon such issues, such motion and offer including a voluminous statement of oral and documentary evidence which said parties desired to offer and on motion and offer, were, upon the objection of said Trust Company and its receiver, overruled, and denied by said Master, the said parties duly excepting separately to each of said rulings of the Master.

Mr. Smith: I want an understanding as to certain pieces of evidence. We may understand that the decision in Guardian Trust Company vs. Kansas City Southern Railway Company, 146 Fed. 337, the first injunction, may be considered in evidence by the Master without incorporating
619 in the transcript; and the same as to the second, the same title, 171 Fed. 434. I want it understood they may be considered in evidence without having them incorporated in this transcript.

Mr. Rosenberger: That is all right; without elaborating, my position is that the Court and Master have the right to conditionally notice those opinions.

Mr. Smith: You won't put it on one ground, but may be on one ground or the other, either on that theory or your theory.

Mr. Rosenberger: I don't want to be guilty of making them part of this record. I have stated as broadly as I can I consider them both before the Master.

Mr. Smith: I don't accept your proposition on that. I don't think all these things are before the Master.

The Master: They are before me two ways, because they are originally and because you put them in.

Mr. Smith: I am offering them in evidence with the understanding Mr. Rosenberger says they are already in evidence.

The Master: Mr. Rosenberger does not recede from his position already stated.

Mr. Smith: I also want to offer in evidence the voucher showing the payment of the amount that it was adjudged the Kansas City Southern Railway Company was required to pay to the Guardian Trust Company, showing that it did pay the same on April 15, 1916; and I think possibly it would be better to have that voucher introduced and have it copied into the record, because it was paid with the understanding that the amount due on the judgment might hereafter be adjusted.

The Master: Any objections to that?

Mr. Rosenberger: I don't object to the voucher, but I do object to the statement that seems to be implied, not intentionally by Mr. Smith, that the Southern Company had paid what was due on the statement.

620 Mr. Smith: I want to offer in evidence the voucher which was paid as a result of the decision of the Supreme Court of the United States in this case.

Said voucher last above offered in evidence by the Kansas City Southern Railway Company is received by the Master and is in words and figures as follows, to-wit:

"Law Dept. No. .... Auditor's No. 68 Apr. 1916.

The Kansas City Southern Railway Company

To Guardian Trust Company, Dr.

1916. Kansas City, Missouri.

Apr. 15, 1916.

For

On account of judgment to be entered in the case of Cambria Steel Company vs. The Kansas City Suburban Belt Rail-

road Company, et al. No. 2468 in the District Court of the United States for the Western Division of the Western District of Missouri, in accordance with the mandate of the Supreme Court of the United States in the case there styled "The Kansas City Southern Railway Company, Appellant, vs. Guardian Trust Company, et al., Appellees, as follows:

By Draft	$821,623.28
By receipt by Guardian Trust Company as its own of the Special deposit referred to in paragraph 5 of the decree of the Circuit Court and directed by the Circuit Court of Appeals to be deducted from the amount of the judgment	40,001.25
By interest actually earned on said special deposit to this date	17,268.01
	$878,892.54

It is agreed that this is an approximation only, and that it shall be checked and verified as soon as possible, and that any errors of computation which may have been made are subject to correction, and that an adjustment will be made as between the parties by paying any balance found to be due from one to the other.

It is also understood that the Trust Company is to make delivery to the Southern Company of the residue of the collateral, to which, under the decree, it is entitled at the time of satisfaction of judgment.

See Bill #54725

Approved	Approved	Approved	Approved
P. W Wooley, Assistant Auditor	S. W. Moore, General Solicitor	J. A. Edson, President.	L. J. Hensley, Auditor

Distribution:

Guardian Trust Co. Judgment 878,892.54

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621 Received Apr. 15, 1916, from

The Kansas City Southern Railway Company

Eight Hundred Seventy-eight thousand, eight hundred ninety-two and 54/100 Dollars in full payment of above account.

GUARDIAN TRUST COMPANY,
By John A. Prescott,
Vice-President and Treasurer.

Note—The above receipt must be dated and signed by the party in whose favor this voucher is made, or when signed by another party, the authority for so doing must in all cases accompany it; and when signed "His Mark" signature Must Be Witnessed. When receipted for a Railroad Company or other corporation or organization, the party signing must designate his official title and name of corporation or organization. One party signing for another must give his own name in full.

Said voucher is endorsed on its back as follows:

"Voucher No. 68 Apr. 1916,
The Kansas City Southern Railway Company
Receipt of
Guardian Trust Company
Kansas City, Missouri.
$878,892.54
Treasurer.
Paid Apr. 15, 1916.
Kansas City, Mo."

Mr. Smith: I would like to have Mr. Rosenberger to agree in the record that the evidence in this cause was closed and the case was submitted to the Master for final decision. It is admitted that before Mr. Mecartney's discharge by the Trust Company, the case was submitted and argued before the Master?

Mr. Rosenberger: My recollection is the testimony was completed before Master Douglass about April 1, 1906. I am very definite in my recollection that the case was argued orally before the Master on all the issues involved in July, 1906, and was taken under advisement by the Master on briefs, on the arguments and briefs thereafter to be furnished, which were furnished later.

Mr. Smith: One of the briefs was filed by you as late as 1907, was it not?

Mr. Rosenberger: That is my recollection. I think it was in 1907.

Mr. Smith: Didn't you file a brief just before Mr. Mecartney was discharged?

622 Mr. Rosenberger: That is not my recollection. The exact date of my last brief that I filed, according to a

recollection I have—I don't think I am mistaken about it—was February, 1907.

Mr. Smith: Now, Mr. Rosenberger, this conversation that you and I have had here may go in as part of the facts with reference to that submission?

Mr. Rosenberger: Yes.

Mr. Smith: I offer from page 344 of the Mecartney record in the Supreme Court of Missouri, the second and third questions and answers on that page; and also in that same connection the questions and answers appearing on the bottom of page 1194 and at the top of page 1195 of that record.

Mr. Rosenberger: I object to it as an attempt to retry the issues adjudicated in the suit of Mecartney against the Guardian Trust Company; and also as irrelevant to any issue in this case and as having no probative value; and as hearsay.

The Master: The objections are sustained.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Smith: You will admit, Mr. Rosenberger, that the portions that I have offered here appear in that record?

Mr. Rosenberger: I don't know. I want to say if parts of that record are offered and excluded and then brought into this record, fragments of Mr. Mecartney's testimony, I reserve the right in making up the record to show the whole testimony on that subject as part of the excluded testimony.

Mr. Smith: I think if that is going to be done it ought to be done now because I want to see them. I have been able to find no other testimony touching that point.

The Master: It is a matter of fact that what he was talking about, as I understand, what Mr. Smith is trying
623 to show, is what he stated as to what he thought the courts had decided about taxing fees as between solicitor and client?

Mr. Rosenberger: I want to make my position clear to the Master so he will know, and the court will know, when the time comes to make any record on appeal that wherever there is offered from the abstract of the record in the Mecartney suit fragments of evidence, oral or documentary, and such evidence is excluded, that I reserve the right to put in any

matter which may explain anything that is in there. I am not going to get myself in the position of offering testimony and proceedings in the Mecartney suit. I will confine myself to the offer of the record proper, but if in the course pursued by the other side, it is going up on appeal it is not going up on a partial record. It is going up on such record as will fully set forth such parts as we may deem material on excluded evidence.

Mr. Smith: Just a moment on that: this is a hearing before the Master to determine the evidence that is to be considered by the Master and I insist that if there is any evidence that is to be offered, any record, that it be offered here and now so that we may know what it is that is going in, and make our objection to it.

Mr. Rosenberger: I say that is a matter that is going to be controlled by law, as to what constitutes the proper part of the record. I don't think it is proper for him to offer parts of this record without bringing it all in, matters of testimony and matters of exception. The record proper I offered myself; that is, certain parts of it sufficient to show the bringing of the suit, what was in issue in the case and judgment in the case. That is all I have offered and all I intended to offer. He is offering here and there testimony in the case.

Mr. Crane: The Master announced at the beginning of the hearings and during the hearing that he did not propose to retry the Mecartney case; that is, case or cases, meaning thereby the cases that Mecartney had brought against the Guardian Trust Company and which have ripened into
624 judgments. We now on behalf of the Southern Company and Cambria Company request, insist and demand that the Master permit us to introduce evidence going to the question of the reasonableness of the fees of Mecartney in this Cambria litigation.

The Master: As fixed by the judgment, you mean, reasonableness of the fees?

Mr. Crane: Reasonableness of the fees for services rendered by him irrespective of the judgments, to the end that we may have the Master pass upon and determine the reasonableness of those fees, regardless of the judgment, our position being that in any event we are not liable for more than reasonable fees and that judgments in cases to which we were not parties and were not called upon to defend or not notified that we would be bound by the judgments in those cases, are

not controlling and conclusive against us; that the question of their reasonableness still remains open. Our position furthermore is, that in the event the Master should find he was bound by this ruling and memorandum opinion of Judge Van Valkenburgh's, to wit: the fees, costs and expenses that may be charged are such as have already been liquidated and determined, the former almost entirely at the end of contested litigations in courts of last resort. That that language of Judge Van Valkenburgh is disclosed by this hearing is erroneous. We contend that the hearing here held develops that those fees have not been liquidated and determined. Referring especially to the case of Mecartney against Trust Company, reported in the Supreme Court of Missouri, it now appears that there was no liquidation of his fees earned in this Cambria litigation, but that was a judgment covering those fees and other fees. That Judge Van Valkenburgh's memorandum opinion is in error, therefore, in saying that they have been liquidated. We insist that the reasonableness of the fees cannot be determined except by a hearing which will show what is reasonable in the Cambria case and what is reasonable in other cases. We are asking in view of what has developed in this hearing, not that we be permitted to
624 introduce merely specific questions and answers touching the matter, but all of the testimony applicable thereto, so that the Master may consider as an issue to be determined by him the reasonableness of those fees independent and outside of these judgments referred to in the memorandum opinion. I mean by all the evidence showing his handling of the litigation, the mistakes and errors committed by him, as we claim, the whole of his course and handling and services rendered in the matter, so that, as I said before, we may have your independent judgment on what is reasonable for his services in this case. In other words, we demand that you now, in the light of what has developed in this hearing, try that proposition as an issue here. And we say that if you hold that the memorandum opinion does not permit you to try that as an issue, then it now develops by the course of this hearing that this memorandum opinion is in error in that regard on the facts as disclosed.

And we make this demand and insist further, in view of the fact that it appears there were two sets of attorneys handling this Cambria litigation for the Trust Company and we are being required to pay for all of those, are being called upon to pay for all of those, and preparation that each one had to make and acquaintance they had to get to handle the case, which we contend is not reasonable and just and not right

and, therefore, again, for the purpose of determining what is a reasonable fee, if we are liable for any on the ground of taxing costs between solicitor and client, you must try the issue as to the reasonableness and not undertake to be bound by the judgments.

And further, I want to state as our contention, that we insist and contend that the order appointing the Master itself requires that you make a separation of attorney fees as between what would be reasonable charges for the Trust Company in the defending against the action brought by the Cambria Company and the Southern Company and the Belt Company and its receivers as contradistinguished from the fees incurred by them in asserting their claims against the Southern Company for the amount ascertained to be due after the accounting had been had; and in order to follow the
626 court's direction in this regard it becomes necessary for you to try out as an issue the reasonableness of these fees covering the whole of the controversy on which costs might be taxed as between solicitor and client, if any be taxed.

Mr. Crane: Is there any objection to my offer?

Mr. Rosenberger: That objection has been repeatedly made. I object not only to the granting of leave to put in that line of evidence, but also to the statements made by counsel lest it be said, as it so frequently is, that when those assertions were made no reply was made thereto.

But reference has been made to the fact that the Trust Company during many years of this litigation had three sets of attorneys. If they were permitted to mitigate their liability from that fact, we would claim the right to show why it became necessary for the Trust Company to change its counsel from time to time and you would be required to go into the whole scandalous mess which resulted from the Kansas City Southern Railway Company putting in its own paid agent, Prescott, in control of the Trust Company and having relations with Prescott. It would become necessary for us to show how it was that Prescott got lodgment in the affairs of the Trust Company and that while there he was consistently and persistently serving the interests of the Southern Company, which had put him there. Now I don't believe the Master wants to go into all of that scandal and if they were permitted to do that and if those statements were not to go unchallenged as to these frequent changes of counsel, which were the direct result of the employment of Prescott in the

management of the litigation, why, then, of course, we would practically have to retry an issue which has frequently been ventilated in the various suits in connection with the Guardian Trust Company. It was ventilated in the Mecartney suit against the Guardian Trust Company, decided by the Supreme Court of Missouri. It was again ventilated in connection with Mr. Mecartney's suit for services rendered subsequent to his discharge in March, 1907 or 1908, decided
627 by the United States Circuit Court of Appeals, in which they quoted with approval the terrific denunciation of the Supreme Court of Missouri of the conduct of Prescott and the Kansas City Southern Railway Company.

Now I say that because the assertion has been made here ironically about these several changes of counsel, and I don't care to let that statement go unchallenged. But my plain and simple objection to this testimony is that which I have repeatedly made at these hearings, that to receive it by the Master would be going contrary to the order appointing him; that it appears here that the judgments referred to in the offer were rendered at the end of contested litigation, vigorously contested litigation, and that the Trust Company was required to pay those judgments or else submit itself to execution. I think the court plainly indicated those matters are not open to inquiry in this case, and I object to it as irrelevant to the issue on trial.

Mr. Crane: As long as Mr. Rosenberger has made the assertion with regard to Mr. Prescott's employment by the Guardian Trust Company I want it to appear that we deny, as emphatically as we possibly can, his statement that Prescott was the paid agent of the Kansas City Southern Railway Company, or that that railroad company had anything whatever to do with his employment by the Guardian Trust Company. In other words, we don't assent for a moment to that statement and we want in this record to say our denial is complete and emphatic.

Mr. Moore: Also his statement about the scandalous proceedings. We deny all that in every part so far as we are concerned.

Mr. Smith: Let us put in here, as Mr. Rosenberger has stated by our remaining silent, it may be taken somebody is assenting to something, or acquiescing, let it be put in this record that any statement that counsel have made by way of objection, or by way of argument, in the representation of his client, is not admitted in any manner by adversary counsel,

or the opposing counsel. We haven't sought when Mr. Rosenberger has made these statements to start a controversy on these various things, because we never supposed for a moment that anybody would consider that we were
628 accepting those statements as statements of fact and we don't want it understood either as against us or as against him.

The Master: The Master is not going to retry the Mecartney case, as he has already announced, considers himself bound by the order of the District Court and the memorandum opinion. The Master has previously said that if you could show by the record in the Mecartney case that any part of the judgment for legal services of Mr. Mecartney and his assistants and associates was for services that had no connection with the Cambria litigation and can show what they amounted to, it would be permitted.

Mr. Crane: Our position in regard to that is, that it is impossible to do anything of that kind, in view of the facts that the judgment embraces other matters, without showing a trial of the issue of the reasonableness of his fees in the Cambria case.

The Master: The Master takes the view that the final judgment as rendered by the Supreme Court of Missouri for those services and, therefore, paid on compulsion by the Guardian Trust Company, must be at least a prima facie showing that those services were rendered in that litigation.

Mr. Crane: Well, it is our position that the services, the reasonableness of the value of the services to be ascertained, is the reasonableness of the services, value of the services, rendered in this case, this Cambria case, and not in some other case and our position is that is the only way that you can separate the items and ascertain what should be charged in this case.

The Master: The objection will be sustained.

To which last action and ruling of the Master in sustaining the last foregoing objections, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Thereupon the Cambria Steel Company and the Kansas City Southern Railway Company rested their case.

629 On Monday, February 18, 1924, at two o'clock P. M. the hearings were resumed before the Special Master, and the following proceedings were had.

The Guardian Trust Company, in support of a supplemental claim, filed with the Master, introduced the following oral and documentary evidence, to-wit:

H. B. LEAVENS, recalled as a witness on behalf of the Guardian Trust Company, testified in substance, as follows:

Mr. Smith: If the Master please, on the filing of this supplemental claim, I would like to have it understood that this supplemental claim is subject to all of the motion, petitions and objections addressed to the original statement and that we may be understood as objecting to all of the evidence in support of the items on the supplemental account on the grounds stated in the objections to the original account.

The Master: I have no doubt Mr. Rosenberger will stipulate to that effect.

Mr. Rosenberger: That is perfectly agreeable.

The Master: It is so stipulated.

Mr. Rosenberger: Referring to a disbursement made in June, 1905, to Wash Adams, it is my recollection that that item, being one for $6,000.00 as stated in this account filed with the Master, refers to a voucher number 908 and that such voucher is missing. The item of charge on the account refers to the Guardian Trust Company's cash book page 119; have you got that cash book with you?

Mr. Leavens: I have.

Mr. Rosenberger: Will you please examine it and state whether it shows any disbursement of $6,000.00 to Wash Adams on or about that date, and, if so, read the entry to the Master.

Mr. Smith: I want to ask Mr. Leavens a question before he answers it, so I can make an objection.

Mr. Rosenberger: Mr. Leavens, you did not make this entry?

Mr. Leavens: No, sir.

630 Mr. Rosenberger: You know nothing about it at all except as you find it in the book?

Mr. Leavens: That is correct.

Mr. Smith: I object now to this evidence of this witness about the item and I object to the book, because it has not been shown that the person who made the entry had any knowledge of the facts.

Mr. Rosenberger: It is shown by the witness Willey that those books were kept in the regular course of business and are part of the books of the Guardian Trust Company.

The Master: What book is this? What is it denominated?

A. This is the cash book of the Guardian Trust Company opened I think at the period when the Guardian Trust Company receivership of Wash Adams and Judge Black ended and the book was turned back about October, 1902.

The Master: Is the entry book about which you are testifying, is it transferred to some other book or is this the book of original entry?

Mr. Smith: The Master understands I am not disrepectful in this objection, but I want to make an objection to that question, because the evidence in this case has been that Mr. Adams was employed prior to that time and, therefore, it could not be a book of original entry in the sense of being a statement incident to his employment.

The Master: The Master didn't mean that. What I want to ascertain is if it shows that the entry was made on this or whether it was an entry copied from the journal or ledger or some other book.

A. It was made in the cash book before it would appear in the ledger.

Mr. Smith: Mr. Leavens, you just make that statement from your assumption that would be the natural course of business?

Mr. Leavens: From my knowledge of booking.

The Master: Well, would it be made in the cash book first or would it be made—you say it would be made in the cash book before it would be made in the ledger? Made in the cash book before made in the [made in the] ledger, if
631 they had a journal?

Mr. Leavens: I don't think entries of this sort were made in the journal at that time. I cannot conceive of any place where it was made before it was made in the cash book.

The Master: This book you obtained from the regular files of the Guardian Trust Company in your position as the custodian?

Mr. Leavens: It is part of the business items of the Guardian Trust Company.

Mr. Rosenberger: And what are your present relations with the company?

Mr. Leavens: I am employed by the receiver of the Guardian Trust Company.

Mr. Rosenberger: Has the custody of these books been turned over to you by the receiver?

Mr. Leavens: Nothing has ever been said directly to that point, I have access to all those books and go to them, or those books, their archives and go to them if necessary; you might ask the receiver himself, he knows most of them.

Mr. Rosenberger: Where are they kept?

Mr. Leavens: This book I first saw in the office of the receiver in the Fidelity Building. These books were there when I came into the office.

The Master: Now what is the ground of your objection?

Mr. Smith: I am objecting to this, because the transaction is of such a character that I think it cannot be shown by the book entry; that it requires some positive evidence of some person who may give some information with reference to the character of the service and on what branch of the Guardian Trust Company's litigation the services were rendered.

The Master: Standing by itself, I would overrule the objection. I think the entry is admissible for what it is worth and probably Mr. Rosenberger expects to supplement, or he may have already supplemented, it by some showing
632 of what the character of service Wash Adams rendered, on what matters.

Mr. Rosenberger: That has already been shown by other witnesses.

The Master: The objection will be overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Rosenberger: You may now read the entry, Mr. Leavens, on the cash book.

Mr. Leavens: Under date of June 21, 1905, charges for legal expense item from statement Wash Adams' bill, voucher 908; amount $6,000.00.

Mr. Rosenberger: Did that entry refer to an entry on the Trust Company ledger?

Mr. Leavens: Yes; it is posted, Item is posted to account called legal expense on the Guardian Trust Company's ledger.

Mr. Rosenberger: And what page of the ledger?

Mr. Leavens: Page 129.

Mr. Rosengerger: Have you that ledger here?

Mr. Leavens: Yes, sir.

Mr. Rosenberger: Will you find the entry on the ledger where that is posted to?

Mr. Leavens: Yes, sir.

Mr. Rosenberger: Will you read the entry on the ledger?

Mr. Smith: I make the same objection to it.

The Master: The objection will be overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Leavens: Posted on date of June 21, to this account called legal expense.

Mr. Rosenberger: What year?

633 Mr. Leavens: 1905; and reads, entry reads: "From statement Wash Adams' bill $6,000.00."

Mr. Rosenberger: Now what was the number of that voucher?

Mr. Leavens: 908.

Mr. Rosenberger: Were you able to find that voucher 908?

Mr. Leavens: Haven't been able to find it, no, sir.

The Master: I want to ask; is that the only voucher that is referred to on this original claim, one that is missing?

Mr. Rosenberger: That is my recollection.

The Witness: I could not tell; I don't know.

Mr. Rosenberger: Are you able to state as a bookeeper whether, as shown by the cash book and ledger, which you have produced here, that that $6,000.00 appears by the Trust Company to have been paid out?

Mr. Leavens: It is posted; in my own mind that $6,000.00 was paid to Wash Adams, or the entry would not have been here in the book.

Mr. Rosenberger: But what I am getting at is, does that show that a disbursement or does it show a receipt?

Mr. Leavens: Well, it shows a disbursement. It wouldn't appear here in the cash book if it hadn't been a disbursement.

Mr. Rosenberger: That is what I am getting at. Referring now to Item No. 441 on the supplemental claim of the Trust Company, dated February 14, 1924, and filed with the Master, relating to the $3,500.00 payment to Wollman, Solomon & Cooper, I will ask you, Mr. Leavens, if you have brought with you voucher number 145 of the Guardian Trust Company referred to in this claim?

Mr. Leavens: Yes, sir, I have it here.

Mr. Rosenberger: Please produce it.

(Said voucher No. 145 is here produced by the witness.)

Mr. Rosenberger: Is it a duplicate original?

Mr. Leavens: The voucher is marked duplicate, but attached to it is the receipt of Wollman, Solomon & Cooper, which appears to be the original receipt.

634 Mr. Rosenberger: We offer in evidence Voucher No. 145.

Mr. Smith: I object to it for the additional reason to the reasons or grounds heretofore preserved that it does not appear from the voucher that the charge made had anything to do with this litigation or that this litigation had anything to do with the voucher or services rendered.

Mr. Rosenberger: I expect to show that by other testimony.

The Master: In view of counsel's statement that he expects to show by other testimony what special service was performed by Wollman, Solomon & Cooper for which this voucher was issued, the objection will be overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Said voucher of the Guardian Trust Company, No. 145, last above received in evidence by the Master, is in words and figures as follows, to-wit:

Voucher No. 145.

"Accounts Payable"

To the Treasurer Guardian Trust Company,

To Wollman, Solomon & Cooper, Dr. Address.

Oct. 8, 1902 For in full for professional services as attorneys & Expense rendered & expended to & on a/c of the receivership of Guardian Trust Co. paid under order of Court filed 10/6/02....$3500.00

I certify that the above is a true copy of an original account duly authorized; that the same has been examined by me and found to be correct and is hereby approved for payment.

Approved and Countersigned.

.....Secretary. F. C. S. Asst. Gen'l Bookkeeper.

Received 189.. of the Guardian Trust Company Thirty-five Hundred & 00/100 Dollars, in full for the above account. $3500.00 See Receipt Attached.

Please return this voucher to Guardian Trust Company, 7th and Wyandotte Streets, Kansas City, Mo.

The following appears on the back of said voucher:

"Wash Adams, Receiver, Accounts Payable. Record No. 145, $3500.00. Receipt of Wollman S. & Cooper, Address.... Treasurer's No. 2861. Distribution Liab. settled $3500.00. Date of Voucher Oct. 8. 1902."

635 Attached to said voucher following receipt of Wollman, Solomon & Cooper:

"We the undersigned firm of Wollman, Solomon & Cooper, attorneys at law, do hereby acknowledge that Wash Adams, Esquire, as receiver of the Guardian Trust Company has this day paid to us the sum of Thirty-five Hundred Dollars ($3500.00) being the amount allowed us by Judge Thayer in

his order dated October 4th, 1902, discharging the receiver of said Guardian Trust Company.

This $3500.00 is paid us and accepted as full compensation for our professional services and expenses rendered to the said Receiver, Wash Adams, and to his predecessor in said receivership, Francis M. Black, and also for all services rendered to the said Guardian Trust Company itself during the time of said receivership.

Oct. 8th, 1902. WOLLMAN, SOLOMON & COOPER."

Mr. Rosenberger: Now taking up Item No. 442 on the supplemental account, referring to payment of $1500.00 to Wollman, Solomon & Cooper, and referring to Voucher No. 489, which the claim recites is missing, I will ask you if you made search for Voucher No. 489?

Mr. Leavens: I did and it wasn't in the file of old vouchers.

Mr. Rosenberger: Did you make diligent search?

Mr. Leavens: I did.

Mr. Rosenberger: Were you able to find it at all?

Mr. Leavens: No, sir; the voucher is gone.

Mr. Rosenberger: Did you find any entry on the books of account of the Guardian Trust Company of January, 1904, in relation to the entry of $1500.00 disbursement to Wollman, Solomon & Cooper?

Mr. Leavens: I find an entry on the cash book here under date of January 24, 1904,—

Mr. Smith: (Interrupting) Just a minute, Mr. Leavens; I object to the entry, for the same reason or on the same grounds as the objection made to the entries in reference to Item 109.

The Master: The same cash book, Mr. Leavens?

636 Mr. Leavens: The same cash book.

The Master: The objection will be overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Rosenberger: Will you please read that entry?

Mr. Smith: I also want it understood that in addition, I make the same objections as I made to Item 441 and that those objections may apply to this 442.

The Master: It will be so understood.

Mr. Rosenberger: Please read the entry.

Mr. Leavens: This is under head of "Claims prior to Liquidation"; under date of January 20th, 1904, "Cash Settlement of Wollman, Solomon & Cooper for legal services in full $1500.00".

Mr. Rosenberger: Does that refer to the ledger entry?

Mr. Leavens: The posting number here I will get (examining book). Yes.

Mr. Rosenberger: On what page of the ledger does that cash book refer you?

Mr. Leavens: Wait just a moment. I made a mistake. I was looking first for the ledger, I was reading by mistake at that time from my ledger and not the cash book entry.

Mr. Rosenberger: Well, read the cash book entry.

Mr. Leavens: Under date of January 20, 1904, charged to claims "prior to liquidation". "Full settlement with Wollman, Solomon & Cooper for legal services Voucher 489, $1500.00".

Mr. Rosenberger: Now is that entry posted into the ledger?

Mr. Leavens: That entry is posted into the ledger I have here; charged to account called "Claims prior to Liquidation".

Mr. Rosenberger: Read the ledger entry.

Mr. Leavens: "January 20, 1904, Cash Settlement of Wollman, Solomon & Cooper for legal services in full
637 $1500.00".

The Master: What is the page of the ledger you gave?

Mr. Leavens: Ledger page 100.

Mr. Rosenberger: Is that the entry that shows disbursement of that amount to Wollman, Solomon & Cooper?

Mr. Leavens: It certainly is.

Mr. Rosenberger: Now taking up Item No. 443, being in amount $1777.51 paid to H. S. Mecartney, and referring to Voucher No. 802, did you at my request hunt up the voucher?

Mr. Leavens: I did, I have it here.

Mr. Rosenberger: We offer in evidence, Voucher No. 802.

Mr. Smith: I object to the voucher, for the additional reasons that it appears on the face of the voucher that the item for services was for making a report to the Trust Company of litigation which had theretofore been in the hands of counsel and that if any charges may be made for attorney fees in this case, it would not be right or proper to charge as costs the expenses of the duplication of services of counsel growing out of the conduct of the Trust Company in changing its counsel from time to time and thereby increasing and duplicating the work. I also object to it because on its face it shows that it included traveling expenses as the result of the Trust Company employing Chicago lawyers to take care of Kansas City litigation; and I also object to it because the voucher on its face shows there is included in it a substantial item for printing a report which is not a proper charge to make against this litigation in any event.

The Master: Mr. Rosenberger, I understand that this item was not included in Mr. Mecartney's claim for which he sued in the Supreme Court of Missouri?

Mr. Rosenberger: Your understanding is correct, as the petition in that case will show.

The Master: The objection will be sustained.

Mr. Rosenberger: On what ground, if the Master please.

The Master: Well, the Master has already announced he cannot try the Mecartney case; and he includes in this
638 voucher fourteen trips to Kansas City and Chicago and also quite a substantial item for printing a report and I don't feel that this is such an item as appeals very strongly to the Master as a proper one to allow for disbursement between client and counsel. It is under paragraph two, isn't it?

Mr. Rosenberger: I think the Master and I are at cross purposes. Did you understand me to say, as I did, that every item in that account is an item not included in any amount recovered by Mr. Mecartney in his suit against the Guardian Trust Company?

The Master: Yes.

Mr. Rosenberger. If it is not included in that account, I cannot understand on what theory the Master excludes it, where it has never been charged against the Southern Company in any item of the account already under consideration. If you are undertaking to exclude it on the ground that it was not a legitimate expense incurred by the Guardian Trust Company in this Cambria suit, why, that is a matter that arises on other evidence not yet offered. The only purpose now is to show that that disbursement was made, not what it was for; and the Master would be prejudicing the item to exclude it on such ground as last indicated by him. Supposing that in the year 1910, after the period for which he recovered compensation, the Trust Company had re-employed Mr. Mecartney and paid him money for taking care of the matter—as in effect it was held in the subsequent litigation that took place in St. Paul, and in the Appellate Court, is the Master going to exclude that? What the Master is sitting here to do is to determine what expense the Trust Company was subjected to by reason of this litigation. Now here is expense for inquiring into the status of litigation and getting the Trust Company a report thereon.

The Master: Part of your argument appeals to the Master, that is your statement that the Master is sort of prejudicing this item at the present time.

Mr. Rosenberger: Why, yes, I think so.

The Master: I think perhaps it would be true that probably the judgment of the Master may be slightly prejudiced, but the fact is he has said that for economy of
639 time and for various other reasons, because he feels himself that an item which has been paid by the Guardian Trust Company after a long contest in the Supreme Court of Missouri and after a final judgment has been rendered precludes the Master from going into the reasonableness of those items and may have caused him to somewhat prejudge that offer and Master thinks that it would be more appropriate to admit the evidence for what it is worth at this time.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Said voucher No. 802, above received in evidence, by the Master, is in words and figures as follows, to-wit:

Voucher No. 802.

"Accounts Payable. 802.

To the Treasurer
Guardian Trust Company

To H. S. Mecartney, Dr.
Address Chicago, Ill.

Jan. 14, 1905.

For services examination or report on pending litigation with K. C. Suburban Belt Co. and Port Arthur Channel & Dock Co. $1500.00

Traveling & other expenses 277.51 $1777.51

I certify that the above is a true copy of an original account duly authorized; that the same has been examined by me and found to be correct and is hereby approved for payment.

Approved and countersigned.

.....Secretary. ..... Asst. Gen'l Bookkeeper.

Received 1/17/05 of the Guardian Trust Company, Seventeen Hundred Seventy-seven & 51/100 Dollars in full for the above account.

$1777.51 H. S. MECARTNEY.

Please return this voucher to Guardian Trust Company, 7th and Wyandotte Streets, Kansas City, Mo."

The following appears on the back of said vouchers: "Accounts Payable, Record No. 802. $1777.51. Receipt of H. S. Mecartney, Address Chicago, Ill. Treasurer's No. ..... Distribution. Expense $1777.51. Date of Voucher Jan. 14, 1905."

Attached to said voucher is the following statement:

"Telephone Central 690.

Chicago, December 6, 1904.

Guardian Trust Company,
H. S. Mecartney, Dr.
Attorneys and Counselors.

640 John Milton Oliver
Harry S. Mecartney
To cash paid out as follows:

145 LaSalle Street,
Roanoke Building.

1904

Nov.	18	Trunk and express on same with contents	$ 6.85
Dec.	5	Telegrams on October bill	.46
Dec.	6	Four trips to Kansas City, as follows:	

1st trip		
Fare, berth, hotel and meals		29.00
2nd trip		
Fare and berths (self and asst.).	$60.00	
Meals	10.00	
Hotel	15.00	85.00
3rd trip		
Fare and berths	30.00	
4th trip		
Fare and berths	30.00	
Meals, hotel and telegrams	6.80	36.80
To public stenographer copy of Cambria Steel Co. Bill		7.50
To Barnard & Miller, law printers, printing report on claims Guardian Trust Company against K. C. Sub. Belt Ry. Co.		75.00
		$277.51
To services investigating merits of pending litigation with Suburban Belt Co., Port Arthur Channel & Dock Company and others,		1500.00
		$1777.51."

Mr. Rosenberger: Is this voucher you have produced, an original voucher?

Mr. Leavens: It is.

Mr. Rosenberger: On file among the records of the Guardian Trust Company of which you have charge?

Mr. Leavens: It was, yes, sir.

Mr. Rosenberg: Found in the place where it belonged?

Mr. Leavens: Found in numerical order in the files.

Mr. Rosenberger: In connection with the charge made for the Mecartney report and referred to in Item No. 443 on supplemental account covered by the voucher last introduced in evidence, I offer in evidence all that part of the minutes of the meeting of the executive committee of the Guardian Trust Company held November 4, 1904, which bears on the Mecartney matter and which I shall read, giving op-

posing counsel the privilege of reading any other
641 portion which he may consider as relevant to that subject.

The Master: You are reading from the record of what suit?

Mr. Rosenberger: Those minutes appearing on record in Volume 3 in the Shedd case, page 2379:

"Kansas City, Mo. Nov. 4, 1904.

Pursuant to adjournment, a meeting of the Executive Committee was held under the call of the Chair, Friday, November 4th, 1904, at the office of the Company in Kansas City, Mo., the full committee being present. The minutes of the meeting of October 26th, 1904, was approved as read"—

Mr. Smith: (Interrupting) Now just a minute: I want to object to these minutes that Mr. Rosenberger is reading.

Mr. Rosenberger: Just a minute, please: I want this to go into the record, and not all chopped up, because it is going into the record no matter if your objection is sustained or not. Now after I have offered it, it can be objected to and moved to be stricken out, but I would have to start all over again and that would unnecessarily multiply the record.

Mr. Smith: I want to preserve my rights, I want to object to that because the minutes of the Guardian Trust Company are self-serving declarations and not binding upon us.

The Master: As to the entire claim?

Mr. Rosenberger: Yes, sir.

Mr. Smith: I object to it as hearsay as to us.

Mr. Rosenberger: The Master is inquiring into what expense and when the Trust Company incurred this expense and here is a corporate record, as much so as the books of account, as to the circumstances under which this expense was incurred.

The Master: The objection will be overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Rosenberger: (Reading) "Kansas City, Mo., Nov. 4, 1904.

642 Pursuant to adjournment, a meeting of the Executive Committee was held under the call of the Chair, Friday, November 4th, 1904, at the office of the Company in Kansas City, Mo., the committee being present. The minutes of the meeting of Oct. 26th, 1904, were approved as read.

* * * * * * *

"Mr. Mecartney, an attorney from Chicago, who accompanied Mr. Shedd to Kansas City at his request, was, upon the suggestion of Mr. Shedd, invited to attend the meeting. Mr. Mecartney was here introduced to the members of the Committee, and in general conversation the matter of our litigation with the K. C. S. B. R. R. was taken up. Mr. Mecartney stated that he thought he could review the case sufficiently to be able in about two weeks to advise the Committee as to what, in his opinion, might be the result of the litigation, and advise as to what action sould be taken and also determine as to whether he could take charge of the matter if it was so desired by the Committee.

"Whereupon, on motion of Mr. Bradbury, it was voted, that Mr. Harry S. Mecartney, attorney, be employed by this committee to look into the claims of the Guardian Trust Company, vs. The K. C. Suburban Belt R. R. Co., with the view of furnishing this committee with this legal opinion in writing as to the amount we can reasonably expect eventually to recover providing no compromise be had."

* * * * * * *

"Meeting was adjourned subject to call of Chair."

Mr. Rosenberger: I next offer in evidence the following extract from the minutes of the Executive Committee of the Guardian Trust Company, held December 7, 1904, appearing at page 2386, Volume 3 of the Shedd record.

Mr. Smith: It is understood all of this evidence is subject to the objections heretofore made?

The Master: It will be so understood.

Mr. Rosenberger: (Reading): "Kansas City, Mo. Dec. 7, 1904.

"Under call of the President, a meeting of the Executive Committee of the Guardian Trust Company was held at the Company's office in Kansas City, Mo., December 7th, 1904.

643 "Present, Harris, Shedd, Prescott, Heynecker and Willey."

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"Mr. Mecartney was invited to present his proposition as to employment by this Company as counsel in the cases of this Company vs. the K. C. Suburban Belt R. R. and Port Arthur Channel & Dock Co.

"Mr. Mecartney presented his opinion as to the cases in printed form and verbally in a general way his ideas as to the action that should be taken in the matters in question, and offered the following proposition as to the employment as counsel."

Here follows his proposition with which I think the Master is familiar.

The Master: What page is that?

Mr. Rosenberger: Page 2386.

Mr. Smith: And the one on which he made his proposition, is that page 2386 also?

Mr. Rosenberger: Yes.

Mr. Rosenberger: (Reading) "Mr. Mecartney presented his bill for services and expenses in his review of the cases as submitted in his printed report, including a reasonable number of such printed reports. Services, $2000.00, Expenses $277.71. Mr. Mecartney having withdrawn from the meeting, his proposition as to employment as counsel in the litigation in question and his bill for services and expenses in review of the cases as submitted in his printed report, was the subject of general discussion, and after quite an extended time so devoted to the matter, Mr. Mecartney was again invited to present himself and after discussing the matter with the Committee and making explanations in answer to some questions by various members of the Committee, he stated that in consideration of the proposal to employ him as counsel to carry on the litigation, he would amend his bill for services in the review and report upon the matters in question to read $1500.00 in place of $2000.00, so resulting in said bill for services and expenses being a total sum of $1777.51 instead of $2277.51.

644 "Whereupon on motion duly made, it was voted that the sum of $1777.51 be paid Mr. Mecartney in full for such services and expenses."

Mr. Rosenberger: I now offer in evidence Mr. Mecartney's report referred to in these minutes, dated, Chicago, December 1, 1904, and entitled; "Report upon claims of Guardian Trust Company against Kansas City Suburban Belt R. R. Co. and others by Harry S. Mecartney", appearing at pages 556 and following of the record in the suit of Harry S. Mecartney vs. Guardian Trust Company, this offer being made solely for the purpose of showing the general nature of that report charged for and paid by Voucher No. 802, heretofore introduced in evidence.

Mr. Smith: Now I object to that report, for the reasons hereinbefore given; and also for the reason that it is a long dissertation on this law suit and Mr. Mecartney's views of the world in general and is an unnecessary, expensive encumbering of the record in this case; no occasion for putting it all in this record.

Mr. Rosenberger: I think counsel is inconsistent. He first objects on the ground that the disbursement was not [unecessary]. Now this report shows on its face, its general nature and why it was necessary and shows the nature of the services rendered and yet when I offer to show what services were rendered, which are shown by the report, the amount of labor that was put upon it so as to justify it as an expense, and its necessity for the Trust Company, it is objected to on the ground it is a long dissertation.

Mr. Smith: I stick to the objection with just as much vigor as before. I suggest if Mr. Rosenberger is going to try this law suit on costs and the question of value of services rendered he might as well suggest putting in all the record in the original case and all the record in the Mecartney case and all the record in the Trimble & Braley cases.

Mr. Rosenberger: I have explained the theory of my offer, which was for the purpose of showing this charge of $1770 odd dollars, which is not included in the trial of
645 any litigation heretofore had between Mecartney and the Trust Company.

The Master: Only for the reason that it may throw light on the propriety of this item of 1770 odd dollars, it will be admitted, and the objection will be overruled.

To which action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Said report of Harry S. Mecartney is in words and figures, as follows, to-wit:

"Report Upon Claims
Of
Guardian Trust Company
Against
Kansas City Suburban Belt R. R. Co.
And Others
By
Harry S. Mecartney.

Chicago, Dec. 1, 1904.

To the President and Executive Committee of the Guardian Trust Company.

Gentlemen: Acting under a resolution of your Executive Committee passed several weeks ago, I have made several trips to Kansas City, examined thoroughly into the pleadings and testimony of the legal imbroglio with the Suburban Belt and allied railroad companies, and submit below my

Report.

The matters in dispute are covered by the pleadings in the case of the Cambria Steel Company vs. the Kansas City Suburban Belt R. R. Co. and others, and the ancillary bill filed by Messrs. Knott & Swinney as receivers of said Belt R. R. Co. and its subsidiary companies against the Guardian Trust Company and others, pending in the Federal Circuit Court at Kansas City.

It seems that this litigation started in September, 1900; that the taking of testimony commenced only about two years ago on the part of the receivers and their testimony is not yet completed.

In the ancillary bill (a species of cross-bill), which is
646 the basis of the principal attack upon the Guardian Trust Co. and under cover of which the claims of the Guardian Trust Co. vs. the Belt and said other companies (amounting with interest to nearly $500,000.00) are resisted, the receivers seek to have an accounting between the Trust Company and the Belt Railroad companies, and to have the court inquire into the history of all their mutual dealings and negotiations, as well as all their accounts extending over a period of many years and covering the entire existence of the Trust Company.

Brief History in Outline.

The Kansas City Suburban Belt R. R. Co. was organized in January, 1887. For several years, it struggled along in attempts to build portions of its road, but did not succeed, and it had during this period no particular financial support to its plans.

The Trust Company was organized on February 4, 1889, as the Missouri, Kansas & Texas Trust Co. Its name was changed on July 17, 1899, to the Guardian Trust Company.

Shortly after its original organization and under contract of May 31, 1889, the Trust Company placed a number of bonds of the Belt Company, enabling the latter to build its first 4-½ miles of road, extending from Second and Broadway Streets in Kansas City, Mo., to Cecil Station.

This contract, as were others subsequently made between the companies, was voted by the Directors of the Belt Company and ratified by the stockholders.

Shortly thereafter the Trust Company placed more bonds, enabling the road to build six miles further, viz., south to Brush Creek.

In May, 1891, the Belt Road was desirous of building about two miles further to the west, to the State line between Missouri and Kansas.

The Consolidated Terminal R. R. Co. was organized May 16, 1891, to build this line.

The Guardian Trust Company placed its bonds and stocks.

In July, 1892, the two railroad companies were consolidated, the new company still retaining the name of the
647 Kansas City Suburban Belt R. R. Co.

Another extension of the Belt's line to Independence—about six miles further—was determined upon.

The Kansas City & Independence Air Line Co. was organized January 23, 1891, to build this extension, and the Guardian Trust Company assisted in procuring its franchises and public concessions, etc., and placed its bonds, and received a small amount of money—about $10,400—for the service.

In order to complete the Belt around Kansas City, it was, of course, necessary to build a portion in Kansas.

The Union Terminal R. R. Co. was organized December 28, 1891, for this purpose. The Guardian Trust Company

financed this concern, and placed its bonds and some of its stock.

About 1895 the Kansas City & Northern Connecting R. R. Co. was organized for the purpose of building ninety miles of road from Kansas City to Pattonsburg, to connect with the Omaha, Kansas City & Eastern R. R., which was then almost continuous from Omaha to Quincy, and the 30-mile 'gap' to complete it was constructed about this time.

The Belt Company, being desirous of increasing its customers for the use of its terminals, entered into a contract with said Connecting Company on June 30, 1896, to build said ninety miles of road and to take the bonds and stock of the Connecting Company as consideration for said construction.

The Guardian Trust Company sold the bonds of said Connecting Company for the account of the Belt Company.

The Kansas City Terminal Construction Company was organized in 1889 to build the original Belt R. R. and the Guardian Trust Company in handling the original sale of bonds, dealt with it and on its account. Said construction company was also used to build the six miles of Air Line Road.

During the progress of the construction of the Belt
648 Road and its various extensions, several companies grew up—independent of the railroad company, yet allied to the road after a fashion—such as:

(1) The Missouri Elevator & Terminal Co., organized in December, 1891, which constructed three elevators on the line of the road, the Belt Company ultimately becoming the owner of all of its stock.

(2) The Central Improvement Co., organized for the purchase of the lands along the line of the Belt Road and the Gulf Road. These two companies together held the stock of the improvement Company, and I believe the Trust Company now holds a little of the stock on account of the Belt and as collateral to the claims against it.

(3) The Second Street Improvement Company holding title to certain real estate leased to the Belt Road, but which is entirely foreign to this case, and with which the Trust Company has no concern.

(4) The Northern Town Site Company organized to purchase lands along the line of the Northern connecting Road. The Trust Company holds a little of the stock as collateral to its claims against the Belt.

(5) The Fairmount Amusement Company organized for the purpose of furnishing amusement in Fairmount Park, thus increasing the trade of the Suburban Belt. The Trust Company has a little of this stock as security, but it is generally considered worthless.

The Guardian Trust Company has nothing to do with several of these companies, except that in several instances it advanced moneys at the time of their incorporations, on account of the Belt, and the accounts for such moneys were merged with that of the Belt Company years ago.

The various accounts between the Guardian Trust Company and the various railroad companies were also ultimately merged in one account and carried against the Suburban Belt when it became the owner of all of the stock of said companies, and the accounting now is primarily with the Suburban Belt Company.

One of the principal feeders to the Belt R. R. was the road that was built from Kansas City to Port Arthur and
649 completed in 1897, originally the Kansas City, Pittsburg & Gulf R. R. This 'Gulf' company, as well as the Suburban Belt and its associated railroad companies, went into the hands of receivers early in 1900.

The Cambria Steel Company which had furnished steel rails for building the Northern Connecting Company's road to Pattonsburg, took 'snap' judgments on notes given for its 'rail' accounts, went through the form of issuing an execution and ordering it returned as a basis for an ordinary credtior's bill, and thereupon filed said bill, making the various railroad companies and the auxiliary improvement companies parties defendant thereto, and alleging that the Guardian Trust Company on an accounting would owe the Belt Company (against whom the Steel Comppny's judgment was actually obtained) a large sum of money.

Shortly thereafter Messrs. Knott and Swinney, who had been appointed receivers for the Belt Road and its constituent companies in certain foreclosure suits against the various roads, filed its above mentioned ancillary bill in said suit against the Guardian Trust Company, seeking to attack the relations between the Trust Company and all the dealings it had had with these various companies, whether consummated or not—their entire dealings, in fact, 'past', present and future.'

The ancillary bill in question proceeded upon the theory that the Guardian Trust Company had fathered all of these various railroad schemes and extensions, and, as a majority of the directors of the Guardian Trust Company had, during all the years covering the transactions, been directors of the Belt Company and constituted a majority of its directorate, therefore all the transactions should be inquired into strictly. It was alleged that the Guardian Trust Company had taken advantage of its 'dominating position' over the other companies 'to gather to itself inordinate commissions, charges and profits' arising from the various railroad and other enterprises; that if an accounting were had the Guardian Trust Company would owe the Belt Road a great deal of money and more than enough to offset the notes and
650 claims shown by the books to be due the Trust Company from the Belt.

As collateral to its notes due from the Belt, the Guardian Trust Company has securities estimated to be worth somewhere in the neighborhood of $120,000 or more. It has also realized $40,000.00 by the sale of certain collaterals, which through order of the court has been deposited in escrow to await the final decree in the case. The Trust Company was enjoined by order of court from further disposing of collaterals pending in the inquiry as to the account.

The Kansas City, Pittsburg & Gulf R. R. and the Belt R. R. and its allied roads were in the hands of receivers in 1900, as was also the Port Arthur Channel & Dock Company, a corporation which constructed the terminal to the Gulf Road at Port Arthur and connected it with deep water shipping.

A plan looking to the consolidation of the Gulf Road, the Belt Roads and the Dock Company was put forth by a committee, (frequently called the Philadelphia Committee) on August 17, 1899, for whom Max Pam, of Chicago, was the dominating counsel. The plan was modified and reissued November 7, 1899.

This plan was carried out, the Gulf Road was bought in late in 1900, and the Belt Road and Dock Company assets a little later.

The corporation that bought in these assets, as is well known, is the Kansas City Southern Railway Company and it has now been operating for nearly four years. It is needless to add that the Belt Road's terminal facilities have greatly increased in value since said organization, as well

as the property of the Gulf Road, and the K. C. Southern is in thriving condition.

Under well-known rules of law usual in railroad reorganization cases, the Kansas City Southern Road, having purchased all of the property and assets of the Belt Roads and the Dock Company, received the stock of said companies is liable to pay the debts of said companies; and it is the Kansas City Southern interests that are behind the present attack upon the Guardian Trust Company and its claim.

651 The Guardian Trust Company sued at Beaumont, Texas, for a claim for advances of $21,916.44, which it had against the Port Arthur Channel & Dock Company. This suit was defended by the Dock Company and it set forth in defense similar claims to those now made by the receiver for the Belt Company, questioning all of the accounts with the Trust Company, etc, etc.

The Dock Company, now owned or represented by the Kansas City Southern interests, retaliated by suing the Guardian Trust Company for $1,000,000.00 alleged to be due it by reason of a subscription to the capital stock of the Dock Company.

The subject-matter of these claims and counter claims is treated hereinafter.

The main question here recurs upon the book accounts and transactions between the Guardian Trust Company and the various companies outlined above.

For two years after this Kansas City suit was commenced little, if anything, was done therein. A prominent lawyer, Judge Black, was at that time receiver of the Guardian Trust Company; and it is stated by various people that he had 'hoped' that Mr. Pam, who was then dominating the affairs of the interests adverse to the Trust Company, would 'settle' the matter.

It is stated by several directors of the Trust Company that Mr. Pam, representing the Belt Company, had his expert accountant examine the books of the Belt Company and the Trust Company, and that the expert reported that books agreed with the exception of some minor and immaterial items, and that Mr. Pam at one time promised to pay the balance found due and fixed a date therefor. This was afterwards repudiated by him. It is not revealed on what basis

Judge Black hoped to have Mr. Pam change his attitude; but at all events two years' time was entirely lost by doing nothing.

The basis for the suit's prodigious dimensions is the general theory roughly outlined above—that the Guardian
652 Trust Company was a sort of a parent to all the other companies which it helped in financing—a sort of a guardian angel—and that the trust relationship constantly existed between them, under which in effect said company was the active trustee and the other companies a species of cestuis que trustent; that the Trust Company was a sort of adult guardian, and the other companies mere infants to be looked after by it.

Then the charge is made of a far-reaching scheme that was devised from the first by the Guardian Trust Company to father all these schemes, and by a deliberate process of overcharging, etc. to gather to itself 'inordinate profits', etc, etc.

The Case was referred to Special Master Shannon C. Douglass, who, after the commencement of the taking of testimony, went upon the State Circuit Court bench to fill out an unexpired term, but has lately failed of re-election to the judgeship. The taking of testimony has progressed most of the time in his absence, and at other times his attendance has had, of course, to wait upon the business of the State Court.

Twelve thousand pages of evidence have been taken by the Cambria Company and the receivers of the Belt Road, the moving parties, and they have not yet closed their testimony, and no time has been fixed therefor.

None but the very vaguest suggestions of compromise have been made by the opposition, growing less as time has elapsed, while a definite written offer of compromise and several specific verbal ones made by the Trust Company have been entirely ignored.

It is apparent to the most superficial that, if the temptation had ever existed to use the courts for the purpose of beating off a liability, and by delay consuming a great deal of the substance of the case, the circumstances, as they existed at the commencement of this suit, offered such a temptation.

It is also apparent that the volume of complexity that could easily be evolved from the pleadings in the case, together with other features of the case, would supposedly
653 furnish a very comfortable even if temporary cover for any intent of this kind.

It is easy to cry fraud. It is not so easy to allege fraud when there are no specific facts to show it. When, however, there are relations which might furnish an opportunity for fraud, it is here again made easy to cry fraud.

When, too, financial undertakings fail, and many people are affected by the unfavorable turn in the deal, and indiscriminate condemnation is heard on all hands, it is here again more easy to suspicion and to attack.

I am informed by Judge Trimble (who has kindly assisted me in my investigation) that in the two years of taking of testimony in the case, he has had to fight constantly for the hearings, and that at no time have the opposition crowded the effort to take testimony and get through with the matter.

In order to advise you as to the merits of this claim, I have not pretended to read over all of this 12,000 pages of testimony. It is not necessary, however, to do so, in order to arrive at a fair idea of the merits.

I have examined the accounts, the history of the case, various minutes from the books, and looked carefully over the mass of testimony bearing upon the more important transactions and outlining the course of dealing. This testimony was all been offered by the other side and forms a good basis for investigation of any bona fide defense which they may have. Such a mass of testimony must, of course, consist largely of repetitions and be full of tedious recitals.

The pleadings and admissions of the parties, the course of business and the knowledge of the rules of conduct that usually impel men, together with the facts that the books agree, and that accounts were exchanged between the companies from time to time, are far more important and furnish a better and safer basis for judging of the merits than could
654 a detailed examination of the whole mass of evidence.

The erroneous items discovered in the books are so small and so exceptional that they furnish strong testimony to the fact that through these years of dealing the Trust Company has maintained a strict integrity in dealing with the other companies, and as strict as if it were in fact a legal guardian and others mere infants which needed looking after.

The open or covert threat that there will be years of litigation in store before we are enabled to reach a decree in the case naturally has the effect of making some of our people

discouraged at times, and is apt to tempt them to a very cheap compromise.

Compromise is a big factor in wisely conducted litigation; but there is a point beyond which it ceases to have merit and becomes unwise and weak. There may be a recklessness in compromise that is sheer waste and is invidious.

If we are right in our judgment of the merits of this case, there is no reason for compromise for any sum suggested by the opposition, unless it be the fear that the opposition may delay this inordinately.

What ground is there for this fear?

Are courts not really courts of justice?

Or, are they courts of justice only when claims are simple and accounts few, and both parties are willing, and actually trying, to make a speedy end of the inquiry?

Are suits upon notes given by adult people, acting for themselves or associated as corporations, to be discounted half or more simply because numberless transactions which preceded them and which are displayed upon regularly kept books, and all of which have been closed years before, are sought to be attacked, and ripped open and inquired into and made the basis of numberless tedious inquiries?

I admit that the course of lawsuits in the past and common experience would naturally raise a fear of failure of justice in this case, especially when we consider the breadth of the pleadings and the two years of testimony that has been taken on one side of the case.

655 But I do not see why the Federal Court, or any other court, should be powerless to grant us a speedy determination of this inquiry, and give us an early decree for what may be found due.

Is the reported claim upon the one side that 'the matter will be kept in court six or seven years,' and the fear that exists in the minds of some of the parties interested of the truth of the challenge, well founded?

Ordinary experience, it is true, lends some color to the claim. There have been railroad and other lawsuits that have lasted for such a period and longer. But usually this is due to the want of a settled policy looking towards speeding the cause and a determination not to let anything interfere with its steady progress, and from the non-employment

of methods,—new methods, possibly—suitable to the case and demanded by its exigencies.

The long delay in disposing of complex cases is simply the emphasized result of the habitual looseness that obtains generally in court practice. Besides continuances for other engagements of counsel, and other frequently unimportant reasons, moves in the case are deferred on account of some imagined prejudice or whim of court, master or counsel, and there is a sort of habitual compromising with Time at nearly every step, which seldom if ever pays and always occasions delay.

Complexity spells waste. Complex lawsuits must yield to stringent or 'surgical' methods. 'Justice' must not be sought by as detailed and thorough and tedious examinations of numberless transactions and accounts of years as would ordinarily be applied to single transactions between individuals. Otherwise the substance of a case would be entirely consumed by the efforts and time thus required to extract it, and the net result, even though exceptionally accurate, could not be called 'justice'. It would be far less just than a far less accurate result economically and quickly arrived at.

Usually parties are at fault who have allowed their
656 transactions to get so involved that it would take inordinate labor to thoroughly examine each item as an individual transaction—to require the court not only to examine books, but to practically make the books between the parties; and any loss that might arise to either one from appropriately speedy and stringent methods in striking a balance between them would thus be attributable, at least partly, to each party's own fault. In such involved cases, the court is entitled to protect itself against having its decree result in mere waterhauls, by adopting schedule testimony, by demanding resultant showings and expert opinions, by avoiding inquiries as to completed transactions, etc. etc. Only by such methods of conducting its inquiries is it possible for it decrees in such case to earn the labor of 'justice awarded.'

If, therefore, in the present case it had been right for the court or master to allow the opposition to inquire into all the accounts and transactions which had been made and had transpired between the Guardian Trust Company and these railroad and various other companies from the very organization of the Trust Company down to the beginning of the suit in 1900, a period of over eleven years—nevertheless the

methods of inquiry which allow the taking of the startling volume of twelve thousand pages of evidence on either side or even on both sides, or even the half of it, would seem to be shockingly loose and out of place. This cannot possibly conduce to the attainment of justice, no matter what the ultimate award will be.

A natural and logical scope to useful and legitimate testimony in such case might have been:

A detailed history of the formation of the various corporations, with their general objects and the work constructed by them, their relations to the Guardian Trust Company, a statement of the prinicpal transactions between them, a schedule of events in chronological order, articles of incorporation and other essential exhibits in order; lists of officers of various companies; indices and cross-reference; distributive and resultant showings; copies of the book accounts with expert testimony of accountants; brief oral testimony as to the principal transactions, allowing reasonably thorough cross-examination.

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All of such written data could have been prepared in advance of the hearing, and if the oral testimony had been held within reasonable close bounds, a report and decree ought to have been ground out by the 'mill' long ago, and with far greater accuracy than would accompany attempts to wade through thousands of pages of testimony and volumes of copies and vouchers.

But there was no occasion for the court or master to throw open the door, as had been done, for inquiry ad libitum into all these accounts and transactions, closed and unclosed, completed and uncompleted.

The theory of the attack upon the Guardian Trust Company and upon the accounts interchanged between the companies from time to time (which agree upon the books, by the way) is based upon the mere fact that the Guardian Trust Company had been officered largely or chiefly by the same men who directed the affairs of the Belt and its subsidiary companies. The opportunity thus given, as it is imagined, for one company to enrich itself at the expense of the other seems to furnish a rich suspicion of wrong, and to be the basis of the right claimed by the Belt to test each and every transaction between the companies. This suspicion seems even to have infected the court in awarding the injunction against the sale of collaterals and is the mare's nest in the whole case.

Now, why should the fact that these corporations were similarly officered, let down the bars for endless testimony and unlimited inquiry into the whole history of these companies and of every act that each of them ever performed?

Is it not a common feature of modern corporate life that companies engaged in similar enterprises or distinct features of one general enterprise have a co-operate dominating directory?

658 There are railroad companies and there are construction companies for building the roads; there are gold mine stamp mills, and there are coal mine companies furnishing the chief commodity for their operation; there are railroad companies and elevator companies furnishing a large traffic for the roads; there are large manufactories and there are companies exclusively handling their product; in each of which due of companies directors are sometimes duplicated, frequently as to a majority, sometimes only as to a minority, sometimes entirely duplicated.

Now, in such cases, are the general rules of business and of business conduct, of contracts and their binding effect, of estoppels to question completed transactions, suspended? Or, are the transactions binding only with the proviso that whenever one company or its stockholders or creditors choose to request it the court will hack over every transaction between the two corporations? Such a conception is at once shocking to ordinary common sense, and to all ideas of industrial justice and economy.

As a matter of fact, the progress of our industrial develoepement and the gradual intensifying of our industrial life brings out the principle of co-operation and closer managing authority in industries closely allied or where one industry largely feeds the other. It is all in the interest of economy and is preventative of waste. It is a species of limited corporate partnership.

Such a relation brings greater responsibility to the managers; but, if honestly conducted, the financial benefit to the companies is correspondingly great.

Now, is there no responsibility for such dual management relations between various companies resting upon the stockholders of the companies? Can they consent to and establish such a relationship, make no move to change or disrupt it, take the benefits or advantages accruing from it, and after years of dealings enlist a court of justice in the effort to

rip open all their mutual transactions, and involve the
659 companies, or either of them, in burdensome and seemingly endless litigation? The inordinate advantage which a mercenary stockholder would have in such case, in 'holding up' prospective deals or organizations of the companies, in gaining a position to 'be bought off', or which the one company would have in resisting payment of the amounts due and owing from it to the other, etc., would result in the court becoming used as a tool of oppression, with no corresponding penalty accruing to the instigator of the fruitless inquiry.

In case of such relationships, it is clear that the stockholders by deliberately entrusting the management of their company to a set of officers largely interested in the other, by that act consent to what their judgment may be of what is fair to each in the deals to be made between them; they place special responsibility and take the ordinary consequences; they must be held to closer scrutiny of the transactions and of officers' reports; they must act more quickly than in ordinary cases of alleged fraud or unfairness in dealings between companies dealing at arm's length, or be held to have acquiesed.

Can the Belt Company, having dealt with the Trust Company for eleven years, upon the sole plea of semi-mutuality in office management between the companies lately interposed, and a general charge of a dark, diabolical scheme on the part of the Trust Company, conceived at the outset, 'to gather unto itself unfair and inordinate profits', etc., and with scarcely one specific charge in its complaint, ask the Guardian Trust Company to account with it for all the transactions of their mutual business life?

Were there no account kept between the companies? And, if not, did the complaining company, or its stockholders, diligently move to have them kept?

Were the chief transactions between them of a secret nature?

And, if so, were prompt efforts made from time to time to learn of them and of their terms?

Were not reports to the stockholders of the various
660 companies made from time to time? If so, was there any audible and open claim that these were false? And, if insufficient or too meager, was any effort made to have them made more specific? And if this was refused, was prompt application made to the courts to have the duty enforced?

Was it possible for these companies to do so much in the way of constructing railroads, selling bonds, issuing prospectuses, publishing statements, and the one be enabled to systematically defraud and take advantage of the other, and no complaint be made at any time by any of the adult parties most vitally interested?

I am creditably informed that the filing of the bill of complaint in this case, at the apparant instigation of Mr. Pam, was the first definite complaint, and certainly the first attack upon the dealings, the 'book showings' between these companies. And certainly the bill and cross-bills do not attempt to account for delay in making complaints.

It seems clear to me:

First—That the bill of complaint in this case, and the cross-bills of the Belt receivers asking for an accounting between these companies, should have been demurred to and dismissed upon their face.

Second—That in case the court would not do this, then a plea should have been interposed to that portion of the bill seeking an accounting, beyond some recent period of accounting or interchange of accounts as to which any inquiry would be foreclosed upon the face of the proceedings.

Third—That in any event, whether such a plea were or were not sustained, then in the taking of evidence an appeal to the court should have been made to require a proper and strong showing of alleged fraud, etc., and a sufficient accounting for lack of earlier complaints or attack, before the court would inquire into the old and completed transactions and accounts regularly closed between the parties. In other words, before going into the accounting, there should have been an interlocutory decree finding that such accounting was proper and necessary, and fixing the basis upon
661 which it should be taken.

It is strange upon what a slender basis of fact a general yet grave charge of fraud will sometimes be made. The absence of specific charges in these attacks upon the Guardian Trust Company would ordinarily condemn the general charge of unfair or fraudulent dealing upon its face.

The similarity or duplication in the majority of the directorate of the companies is put forth as a substitute for facts; and it seems quite evident that the remarkable latitude in pleadings and evidence is traceable to the idea (more or less prevalent with nearly everyone concerned with the case, as

well as with the court possibly) that there is something not only essentially suspicious but definitely wrong in such a relationship. This quite fooling notion must be exploded before much progress can be made in the case.

The attacking counsel evidently assume that this relationship being shown or admitted, the burden is cast upon the Guardian Trust Company to show every transaction between the companies to have been fair, and every commission reasonable, and every charge correct, as in case of a guardian proving his account against an infant ward.

It seems not to be recollected that the Belt Railroad was a corporation managed by adult persons, the same as the Guardian Trust; that there was no actual or legal infancy about it.

Why not suspect and charge that the Belt Company took advantage of this relationship to defraud and cheat the Guardian Trust? The fallacious, unjust and evil-bearing nature of the notion is self-evident.

How soon can the lawsuit be terminated? Sooner, much sooner, than either party probably imagines. It depends upon counsel, upon the master and upon the court.

But there is a plain and urgent duty upon every one
662 concerned to end this case and end it speedily. And it is not clear why this duty cannot be made clear to some and enforced as against others.

The case involves about $500,000. This represents the wages of hundreds of human toilers for years. Several thousand of stockholders in the Guardian Trust Company and the Southern Railroad are interested.

The time of the court and the master, which the case has consumed is already great. The expense of stenographers and counsel, the time of witnesses, the correspondence, the time of all persons directly and indirectly concerned, the plans more or less thwarted or deferred by the waiting for the end, etc., all reveal a leviathan of waste which must be vigorously attacked, and speedily dispatched, or court practice must be confessed to be essentially a failure.

It matters not that the proceedings in course of law are frequently slow and sometimes seemingly interminable. Courts are constantly making radical changes in decisions on matters of law, or changes that seem radical, and the application of old law to new conditions occasionally startles us and shakes our preconceived notions.

So the courts are occasionally announcing new rules and decisions of practice, made necessary by changing conditions; and wherever such rulings can be made to conduce to the attainment of justice, the court has—must have—inherent power to so conduct its inquiries as to bring about an economical and speedy decree. Deliberate their investigations should be; but not necessarily tedious and absorbing all or a huge portion of the substance of the subject-matter in dispute.

Courts can learn and change and progress. If we have learned anything from Jarndyce vs. Jarndyce, such a case could not be ground through today at the same old pace, without the court and counsel involved becoming as notorious as the case itself.

In the present case, when its apparent magnitude and complexity were first apparent, the court upon the application of either counsel, should have appointed a special master,
663 who would agree to give his entire business hours to the hearings; the court or master should have given full notice that it would require the hearings to proceed regularly without intermissions except for extraordinary or emergency reasons; each side should have more than one counsel, each of whom would be competent to proceed in the absence of the other.

With the counsel working to end the case speedily and the court and master vigorously enforcing the duty, this case, if the inquiry as to old settled accounts had been shut off, as we think it ought to have been, should have been disposed of in a number of months; and by the use of schedules and condensed testimony applicable to accounts, a year should have sufficed in any event.

The two years' delay of Judge Black was sheer and unpardonable waste.

The allowance of two years for one side to take only a part of their testimony is not attributable to any procrastination or lack of industry on the part of Judge Trimble, counsel for the Guardian Trust (lately resigned), a practitioner of recognized ability. He apparently has been dragging the opposition along from week to week with persistence; and, considering his other engagements, his attention to the case has been assiduous. It is due rather to deep-seated habits of the courts and counsel, to the ruts into which court practice has settled, and a failure to recognize the just demands that such a prodigious lawsuit (involving in fact many lawsuits, or

amounting to as much) has upon the time of the court and counsel, and to strenuous though deliberate methods in its conduct.

No matter what custom and habit has been upon the part of all of us engaged in court practice, no matter what changes in practice would be involved by meeting such demands, they are just, and the case and its suitors are entitled to have them granted.

And this case of signal dimensions is as good as any other with which to make a turning point, upon which to base
664 an earnest appeal for the court to bend its practice to meet such just and economical demands. This may be necessary in such case to save the court from becoming a very juggernaut riding over justice by the usual delays.

There is here, it is hoped, no disposition to be critical upon counsel heretofore, handling the case for the Trust Company. It is easy to criticise, especially in the light of the past and by one not held to accountability.

On the other hand, we can always serve each other best by being thoroughly candid; and a thorough report upon the history and merit of the case necessarily involves some accounting for the delay in bringing it to a conclusion and for the apparent confidence of the opposition of their ability to prolong its pendency and to continue a huge portion of its substance before a final decree is entered.

In the first place such a case should never be given out to or accepted by counsel upon a salary. It should be given to one in position to devote his whole time to it; or (as this might be difficult to arrange for), to one who would take responsibility for its steady and unremitted attention, put the 'hooks' of energy, determination and a settled policy into the case, keep himself ready to counsel and respond to all important moves in the case, and who would assign a competent associate or assistant exclusively to taking the evidence and dragging the matter along with all due speed and persistency; who would anticipate future work by preparing in advance such tables, data and rough framework, the use of which it would be possible to anticipate, and to the extent feasible; who would be willing and anxious to fight any and all methods or moves tending toward undue delay, and not temporize with imagined prejudice or fear to risk reasonably severe methods in doing his part in the legal surgery which the complex case demands. A case in which such a large share of the indus-

trial life of a large community is sought to be hacked over in wearisome detail at the mere behest of one making a merely general charge, or uttering a mere cry of fraud, is en-
665 titled to precedence upon the part of the court, master and all counsel involved in the case.

And if it should be allowed to thrive for years feeding its own substance and leaving its awful trail of waste behind it, there must be some way of placing responsibility upon those having charge of it or upon the courts which permit it, or upon the community where it occurs.

The suggestions here made as to the appropriate practice in such a case as this are not mere accidental or academic pleas, or strained methods thought up as a bolster to hope for the speedy ending of the case.

The writer has 'lived' with them for some years.

The reflecting and progressive element of our communities is getting ready to demand, and to enforce the demand, for radical changes in court practice. Probably first among the reforms demanded, in addition to appropriate bills of cost, enforcing penalties for trivial delays in prosecuting unfounded claims or defenses, is a radical change in the ethics of the profession.

Several years ago the writer dwelt at length upon this subject in a formal communication to the Chicago Bar Association, and concluded that there was nothing in the way of the profession and the community holding both counsel in a case to account for delays in lawsuits, or a miscarriage of justice, and condemning a fight upon practice lines solely, the exercise of trick, skill, etc., etc.

The duty of the counsel as an officer of the court is usually forgotten in such cases.

What definite Advantage Can Accrue to the Opposition by Delaying the Case?

The prevalent idea probably is that as the Guardian Company has to recover its claim, has to 'chase' for its money, therefore, the Belt Company can well afford to defend against the claims, even though they ultimately be found to be just; and that the cost of counsel fees 'stringing out' the case is a small offset to the damage thereby done its opponent, the Trust Company, and to the advantage of the Belt Com-
666 pany, has by using the funds ultimately required to pay its debt, for investments in the meantime and as it chooses.

As a matter of fact, the advantage which ordinarily occurs from 'fighting off' a just claim by the use of the 'law's delays', is usually largely exaggerated. Any wise and progressive business man knows, and experience teaches, that this is very poor business.

Where merits are in doubt, fair compromise or speedy arbitration should be the rule. If delay is deliberate, it is the privilege of the moving counsel to push the case with vigor; and usually it can be pushed almost or quite as cheaply as it can be defended, and the debtor if solvent, usually pays his share of the cost of delay. Some opprobium (heretofore not half enough) attached to all methods of delay. Altogether they are very 'poor business'.

On the other hand, a party who has faith in his claim and has resources to prosecute it, has the privilege and it is his duty, after having made liberal offers of compromise or arbitration, to push the case vigorously to the end.

He will thus have placed the other side in default, and it will either result in his obtaining substantial justice, or if not, someone will be put upon record, and responsibility can be placed, which always costs somebody something and which ordinarily will be avoided if a determination to place it is made plain in advance by the conduct of the case.

What commercial advantage attends a merely dogged defense, or which averages up from such defenses, arises largely from the fact that a large number of suitors do not have the resources or the 'back'bone' to push their cases to the end.

And it is also true that the bills of costs usually awarded in many states are shamelessly inadequate to compensate even substantially the successful party for his his law fees and expenses, or to affix even a substantial penalty on him in the wrong.

667 But even as it is, the court's power in the premises, and especially the power of a court of chancery, and more especially in exceptional cases, is not appreciated. Courts of equity have power not only to do equity, but also to protect themselves from abuse in practice and needless and ruthless annoyances to suitors. This power is inherent in the court as a court.

There are, too, special cases which are and must be treated as exceptions to the ordinary rules as to the fixing of costs.

For instance, a trustee, who has faithfully discharged his trust, and rendered true and just accounts, who has been use-

lessly and wantonly attacked by his cestui que trust and harassed by expensive litigation, has been allowed reasonable counsel fees incurred in his defense, and to retain the amount from the balance of the trust funds in his hands.

If the Guardian Trust Company were a trustee for these other companies, it is clear that the court has power to and ought to allow it some compensation for being put to this terribly long record and inordinate delay and expense, provided its accounts be found to be subsequently accurate and just.

The theory of the opposition is that the Trust Company is a species of active trustee, liable to account to the Belt Company in all the transactions between the company during the whole of their mutual existence. The attacking party by the attack itself assumes to place the Guardian Company in this trust relationship, and has harassed the Trust Company to the same extent that it could have done had such relationship actually existed. Is there any sound reason why it should not stand at least a portion of the expenses thus ruthlessly thrown upon the Trust Company, in the same manner as if the relation, which it alleges to have existed, had in fact existed? It has hacked over and toyed with every item of the accounts for years. It has used the courts as whimsically, it has annoyed the Trust Company as much in this case, as it
668 possibly could in the other.

We, therefore, make bold to assert that in case the opposition prolong this inquiry further and further load down the record with much more of this repetitious and tedious testimony, and oppose the prompt disposition of the case, they will stand a splendid chance of paying a substantial sum outside of the claims of the Guardian Trust and interest thereon and the usual court costs.

We are now brought to another feature of the case and the practice logically applicable to it, which may be likewise thought novel or out of place by the ordinary practitioner or suitor.

The idea has found definite lodgment in American communities that arbitration is the way to settle industrial and wage disputes. The loss and damage and waste to the community at large, the third party, from continued locking of horns by the interested parties, is the basis for this idea. The party refusing to arbitrate is usually placed in default.

Now, why should not such a duty primarily rest upon parties having other disputes, especially where the questions

are matters of account, the value of services, the 'wages' of commissions, the prices of market commodities, etc.? Why should not the reckless use of the overcrowded courts consuming months of their time and attention to matters of mere book accounts between business men be also decried? Why is there not a duty upon both parties to such a controversy to have their differences arbitrated?

It is expected that the suggestion of a positive duty upon business disputants to arbitrate their differences will be thought by many to be novel or naive. But persistent thinking will reveal it to be well based. And it is not novel; for the courts and statutes have encouraged it from time immemorial. It is a duty to the community. Lawsuits are a species of enforced arbitration. There is ordinarily a reflection upon somebody when the courts must be used to compel arbitration. In fact, such a practice of voluntary
669 arbitration and an earnest public sentiment enforcing it would do more to relieve the present over-crowded court dockets throughout the land than any other thing; and it is a matter of grave doubt whether we will not be forced to adopt such a practice. It is probably the 'ripest' subject for the American Bar Association at the present time.

And if it be a positive duty on both sides to a dispute to arbitrate it, neither party can place the other in moral default until he has made his offer.

In this case, I am aware of no offer having been made by either side to arbitrate the matter of these claims; although if there ever was a case peculiarly fit for arbitration, this would seem to be that case.

It is not sufficient for one side to excuse the want of an offer to arbitrate by saying the other side 'would not have accepted it anyhow'. No matter how probable the truth of such alleged fact be, such a course does not perform a duty, accept a privilege or put anyone in default.

I, therefore, suggest that the offer be now made upon the part of the Guardian Trust Company to arbitrate this whole dispute. As there has been but a portion only of the voluminous testimony taken in the presence of the master and certainly not yet considered by him for the making of a finding, there would be but little duplication of expense and little lost but time in case the offer is accepted.

An offer of this kind, fair-minded men, treasuring the good opinion of the community, should certainly hesitate to de-

cline—such a declination would definitely place the responsibility for the further troubling of the courts.

This offer should be made to the opposition direct and also placed of record before the court or master before proceeding further in the case. It would also, it is thought, have a bearing upon the subject of costs and allowance of
670 counsel fees, as costs in equity lie in the discretion of the court; and such offer certainly would weigh in the exercise of such discretion.

We are informed that the Kansas City Southern is now controlled and 'voted' by Mr. Harriman and his associates. Mr. Harriman has the reputation of being liberal-minded and progressive. It is not believed that he would be apt to decline an offer of the kind outlined; and he is, we believe, decidedly above any disposition to use courts to delay the collection of a just claim. And as the method of arbitration is both economical and speedy, the chances are not small that he would accept it.

The hope of ultimately realizing upon the Guardian Trust Company claims above the collateral which it holds, is in fastening a liability upon the Kansas City Southern. It seems clear, therefore, that the Southern Company should have been made party to the case. This should be done now. Equity will enlarge the scope of a case and take in parties to save a multiplication of lawsuits and circuity of action. This course, however, would not let it open to the Southern Company to go over all the ground heretofore covered by the testimony. The Belt Company is primarily liable and the accounting is primarily with it, and no loss or embarrassment in the conduct of the case would be occasioned by making the Southern a party now.

Or suit could be brought on the law side of the court against the Southern upon the notes and the account; and the moment that the accounting with the Belt became final in the pending case, the question of liability of the Southern could be immediately tried and judgment upon the award be entered forthwith in case it were held liable.

So far the Southern Road has been absolved from open or public connection with the dispute with which it is legitimately concerned, and it thus has a direct inducement to use the defunct Belt as a means of dragging out the origin-
671 al case, or at least not to speed its progress. This is not right.

I am informed that an effort was made at Beaumont, Texas, to make the Southern a party to the suit against the Port Arthur Channel & Dock Company. The court refused the application. This would seem clearly to have been error.

The court at Kansas City, however, may not have thus erred and the effort to make the Southern a party there should have been made in any event.

The refusal of such an application would not bar a common law action of the kind mentioned above against the Southern direct, and this would substantially answer the demands of the situation.

The Merits of the Company's Claims.

The Guardian Trust Company's notes against the Belt Road (face) aggregate $337,762.23. The earliest of these notes were given in March, 1899, and the remainder during the next year and a half. These notes were given in renewal of other notes, the latter being given for advances and balances due on account as shown by the books. There is no dispute about the fact that the amount of the notes is correct as based upon or compared with the books showing. The open account of the Trust Company against the Belt is $31,809.49. Total claim, $369,571.72.

The basis of the attempt to escape a recovery on the notes is chiefly or entirely by way of counter-claims.

The Trust Company sometimes sold bonds and securities for the Belt Company; sometimes it guaranteed its paper; sometimes it acted as agent in various capacities; and sometimes it purchased the securities upon its own account and afterwards sold them.

In no instance that I have been able to discover was the relation in which the Trust Company acted, whether as purchaser, agent, etc., concealed from the Belt Companies, and there is no claim that it was. The books of each company reflected accurately the transaction, the prices paid or obtained, etc.

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Here, again, we pause to observe that it is simply impossible to conceive why the companies should not be bound by these completed transactions. They were owned by adult stockholders and managed by adult directors. If the majority acted badly or unwisely, it was incumbent upon the minority of directors, knowing or having reason to know of the transactions, or of the stockholders who had access to

the books, to call upon the courts for redress, if any redress was to be had. They could not lie by, take advantage of the deals if they turned out profitably and complain if they resulted in loss.

For business men who are concedely 'free agents' to establish a mutuality-of-directors relationship, or to submit to it for years, and then be permitted by the courts to attack all the business deals transacted between the corporate bodies, and require an entire accounting and involve the taking of seemingly endless testimony, and consume in loss of time a large [proposition] of the money value of each transaction—a thing which under other circumstances would never be thought of—is by every principle of common fairness and abuse of the use of the courts, is nauseating to all sense of economy, and galling to everyone with any substantive justice in his heart.

And in any event, it is the duly of the master and counsel to 'chop off' this [injury] at the point where accounts had been rendered between the parties and accepted, or where a reasonable time had elapsed without complaints made as to their accuracy.

But now as to the offsets claimed there are three items of offset or counter-claim against us, two of which must be allowed and the third of which is doubtful, viz:

1. An item of $89,333.33 with which in 1899 the Belt Company credited the Trust Company at the time a special credit was allowed the Belt by Mr. DeGoijen to better the book showing as to its financial condition. The Guardian Trust Company had guaranteed certain purchase money
673 paper put out by the Belt to the amount of the above sum. Degoijen put his personal guaranty behind the paper and the charge against him should have been by the Trust Company. It was, however, made by the Belt Company ultimately and the amount credited to the Guardian. As the Belt Company ultimately paid the notes and released DeGoijen from liability, the Belt Company should be re-credited with this amount. It is said upon the part of the Trust Company that the amount was really intended to be credited to the Trust Company on account of certain second mortgage Northern Connecting bonds which Degoijen persuaded the Trust Company to buy of the Belt, he agreeing to repurchase them of the Trust Company; yet the Trust Company's books show the item to relate to the purchase money notes. The error occurred from roundabout and erroneous bookeeping, and is

not attributable to the Trust Company, but to the Belt Company itself. The item must be allowed.

2. The Perkins bonds item: On April 28, 1892, the Trust Company sold to Caroline A. Perkins three Consolidated Terminal bonds for $2,550. By some error in entering the sale, the item was lost and the proceeds never accounted for. We should allow this item, with interest from the date of sale.

3. As to the third item, which may be called the 'stock profit' time: The Guardian Trust Company bought certain stock of the Belt Company at $35.00 and sold it in the East a day of two later to some Holland capitalist at $55.00. It thereby realized an almost immediate profit of $23,000. This does not look well upon the face of it.

It is, however, true that the local market had been a drag for months at $35.00. It is also true that $55.00 was an inordinately high market price. It might, therefore, be more logical for the purchasers to complain of the transaction than for the Belt Company to do so. Besides, while the Trust Company made a big profit upon this deal, there were many other such deals in which it lost much, which would make no more than a fair offset.

674 The fact is, however, that shortly before the purchase of the stock in question, the Trust Company had been agent for the sale of the stock; and this is a strong factor in testing this item. Still, the company bought stock as well as sold it on commission, and was a regular dealer in such stock. I am satisfied that some, and maybe all, or nearly all, of the directors of the Belt Company knew of the transaction from the first; and said company may now be estopped to question it. As [to] the extent of this knowledge cannot be told now, I must simply put this down as a doubtful item.

By promptly allowing the above first two items the account of the Trust Company will be pruned of all known doubtful items, and its attitude as a genuine seeker for justice will be most strengthened.

4. The 'Northern Connecting R. R. Co.' transaction.

It seems that the Suburban Belt Company, having a direct inducement therefor, by a prospective increased use of its terminals, contracted with the Northern Connecting Company to build the road of the latter for its bonds and stock.

To furnish the Belt Company money for the fulfillment of it contract, the Trust Company sold its Northern Connecting

Company bonds. The price obtained was $75. and with each bond went $350. of second mortgage bonds and five shares of stock. It was a fair price (sale made in exceptionally hard times), and the commission realized by the Trust Company was $70,000—less than 3 per cent of the par value of the bonds sold. (The Trust Company also, in 1897, sold and purchased some of the second mortgage bonds and accounted for the proceeds to the Belt Company). This part of the deal is not seriously questioned. But it is claimed that the contract of the Belt for building the road was oppressive and resulted in loss; and responsibility for its entering into the contract is placed upon the Guardian Trust, who, it is stated, 'dominated' or induced the Belt Road to do the unwise thing which on the face of it concerned the Belt Company
675 and the Connecting Company alone.

Here, again, the adult-and-infant, father-and-child, mother-and-baby idea intrudes itself. It is the chief bugaboo, the cardinal mischief, the lodestone of error which has so far dominated this case.

As a matter of fact, such a contract in terms, as is well known, was one that is frequently made between railroad companies and contruction companies; (2) that the Belt did not realize directly as much as was expected from the construction contract, was due solely to bond market conditions, which in 1896 and 1897 were not thriving; (3) it resulted in a decided profit to the Belt Company, for the rental paid by the Connecting Company for the use of the terminal facilities of the Belt was a good one—so good that later the Connecting Company later sued to be released from it, but failed to break it contract; (4) the Belt Company was 'of age'; it could deal for, as well as 'speak for', itself.

The other chief transactions, which have been inquired into by the receivers of the Belt Companies, relate to the purchase and sale of stocks and bonds during the progress of road building. The most important of these were:

5. The sale of $54,000.00 of bonds, taking with it some stock of the original Suburban Belt Railroad, for the construction of the first 4-½ miles from Second and Broadway to Cecil Station.

Mr. Stilwell made a contract with the Belt Road to organize a Construction Company and have it take $450,000 of the $500,000.00, the total bond issue of the Suburban Belt, and build the said 4-½ miles, or the first section of said road.

The Kansas City Terminal Construction Company was organized, and the Guardian Trust Company gave its services in procuring the subscriptions to the stock of said Construction Company. It was all subscribed for at par and paid in, the road was built and $400,000.00 instead of $450,000.00 was distributed among the stockholders of the Construc-
676 tion Company in accordance with the contract. The Guardian Trust Company received nothing for its services in this matter.

Furthermore, the six-mile extension to Brush Creek had been determined upon before the completion of said contract, and the Terminal Company agreed to allow the increase of bonded indebtedness to $1,000,000.00 and accept $400,000.00 out of the $1,000,000.00 issue; whereas it was entitled, or said Stilwell under his original contract was entitled, to $450,000.00 of a $500,000.00 issue only. At this time there was only one director in the Guardian Trust who was director in the Suburban Belt.

6. The purchase about August 1, 1890, by the Guardian Trust Company of $500,000.00 of the increased issue of the Suburban Belt. The bonds were purchased by the Trust Company at 92 net, were carried along for two years, and then sold for the same amount. The road was in its initial stage, and any one with railroad or bond experience would concede that this was a fair price.

7. The Trust Company, at four different times, commencing in August, 1894, and ending about April, 1895, purchased stock of the Belt Company, aggregating 2,750 shares. The prices paid were from $18.00 to $32.00 per share. The amount of these sales was paid to the Belt Company and duly accounted for. At the same time and partly during the same period the Trust Company sold 4,500 shares on commission for the Belt Company, aggregating $19.00 and $20.00 per share. It received $1.00 per share commission for the sale of 400 of these shares, and for the other 500 nothing.

8. Various sales from August to December, 1891, of 667 bonds of the Consolidated Terminal with 80 per cent stock bonus. Of these the Guardian Trust itself took 213 at the same price at which the others were sold in the market, with the exception that the Guardian Trust Company got only 20 per cent stock bonus instead of 80 per cent, which was given to other purchasers.

On October 27, under special resolution of the Con-
677 solidated Terminal Company, the Trust Company was to be paid 12 per cent net on all of the first issue of said Company's bonds, which were sold or disposed of to others—this to be also in consideration of services rendered by the Trust Company in its promotion. This would amount to $90,000.00. As a matter of fact, the Trust Company got $49,000, partly in bonds, and taking them at their market value, its compensation netted only about $43,000, or less than 6 per cent.

9. The Air Line Railroad transaction: It was determined to extend the Belt Road from a point near Blue River to Independence—about six miles. The Kansas City & Independence Air Line Company was incorporated January 23, 1891. It issued $300,000.00 of bonds, and then made a contract with the Kansas City Terminal Construction Company to build the road.

The Trust Company raised the funds for the Terminal Company by selling its stock—nearly $200,000.00 worth—and had a contract in writing to receive therefor a commission of $20,000.00 in full paid capital stock of the Construction Company and $5,000.00 in cash.

The Kansas City & Independence Air Line Co. met with difficulty in getting its railroad crossing and street crossing franchises, the money market was tight, and the Terminal Construction subscriptions were not all paid in, but the Construction Company almost completed its contract, and by special resolutions on the part of the Air Line Company and said Construction Company, the road was turned back to the railroad company in its then condition.

What the Trust Company actually got for its services in handling this matter was thirteen bonds and some worthless stock, the whole equivalent to $10,400.00 in cash.

10. The Union Terminal Railway bond transaction: This company was organized in Kansas for the building of the Kansas portion of the Belt Road. The Trust Company sold 444 bonds of its $2,000,000 bond issue at 87.64, and bought 1,496 of said bonds, for which it paid 86.1/3. The proceeds of sale and of said purchase were strictly accounted
678 for by the Trust Company.

Almost any one familiar with the bond sales of prospective railroads would say at once that there was nothing unfair upon the face of these scheduled transactions, and cer-

tainly that they could not be considered decidedly or grossly unfair. Especially is this clear when it is considered that the Belt Road had no backing to its bonds or papers (except an occasional guaranty by the Guardian Trust in which case the latter earned an extra stipend), and had to struggle along to build itself piece by piece, link by link.

Notwithstanding that the whole matter of the account and dealings between these companies, as has been several times said herein, is absolutely foreclosed from legitimate inquiry, yet the testimony of Mr. Willey, who was called by the opposition, is full and exhaustive as to all the transactions, and each of the hundreds—yes, thousands of items—upon the books is fully accounted for and explained. The proceeds of all bond sales, the disposition of the various bonds, the course of dealing, and every transaction, etc., etc., are fully outlined and reoutlined, etc.; and it would seem that a complete history of everything connected with or relating to these companies, directly or indirectly, has been made, with nothing missing unless it be the private life of the various persons who figured in these enterprises.

Mr. Johnson, auditor of the Kansas City Southern, was called by the opposition, and has likewise given exhaustive testimony. The attempt has been made, through Mr. Johnson, to have the accounts show differently from the results arrived at by Mr. Willey; but this is chiefly done by assuming that the companies were not competent to contract between themselves or modify their contacts, and by seeking to reestablish an account between them upon what the attacking party might be pleased to call an 'equitable' basis—especially in view of subsequent events which could not be foretold at the time. A thorough analysis of the testimony of each
679 of these two expert witnesses does not reveal serious or ominous dicrepancies between them as to the book showing, and this must control.

It is worthy of note that accounts were exchanged regularly between these companies from the beginning; that the auditor of each company checked up his account with the account of the other company at the end of each month, rectifying any errors that might have temporarily intervened; that from time to time notes were given to settle monthly balances and interest allowed upon monthly balances, and that yearly the books of the companies were examined by experts at the request of a large number of the stockholders.

Yet, notwithstanding these facts and this course of dealing, and that the parties had legal power to contract between

themselves, the case has been loaded down with such a mass of vouchers, accounts, data and testimony as would utterly bewilder an Alaskan boundary or Behring Sea arbitration tribunal, or any other tribunal called to pass upon national issues or even to decide the fate of nations.

There is one duty which this company owed the case, which, it is believed, it has thoroughly performed. A case of this kind should be the subject of compromise between fair minded business men, and efforts should be made to compromise it before even courts or arbitrators are [trouble] with it. The company has made three or four definite and clear offers of compromise to its opposition. The last one was a very specific and definitely outlined offer made in writing a year and a half ago by Judge Trimble. It was an offer to accept $275,000 and cancel and release all the Trust Company's claims involved therein, and in addition thereto a number of outside claims, to which there was no sort of defense and which aggregated over $50,000, besides several large contingent claims on which recovery was doubtful.

The offer was not only fair, but more than fair, and it is thought that it was not wisely rejected—,or, rather, not wisely ignored.

680 On the other hand, the opposition does not seem to have been so anxious to end the case and lift the burden of it from the courts, as to have ever made any definite offer or counter-offer, or even to have made any definite reply to the offers made to them, except, as I am informed, to lately give out some tentative suggestion to pay a mere fraction of the company's claims. The Trust Company has, therefore, exhausted its efforts at compromise and performed its duty, as it is believed, in this respect.

The Channel & Dock Co. Suit.

(Pending in United States Court, Beaumont, Texas.)

As to the claim for advances to the Channel Company by the Trust Company amounting to $21,916.44, its merits cannot be seriously questioned. The Trust Company claims that the Kansas City Southern is liable for this claim in the same manner as it is liable for the Belt Company's debts; for the Channel Company stock and assets were involved in the reorganization scheme of the Southern Company in the same manner as were those of the Belt Company. I am firmly of opinion that the Southern is so liable.

The said claim of the Guardian Trust Company is sought to be defeated by way of counter-claims. These latter are:

1. A claim on the part of the Channel Company that the Trust Company officers misused it in the same manner as it was alleged to have misused the Belt Company; and a claim to an accounting between the companies and a decree for 'large sums' due the Channel Company. 2. The claim of the Provident Life and Trust Company against the Guardian Trust Company upon an alleged stock liability of the latter to the Channel Company. The Provident Life, as trustee for the bondholders of the Channel Company amounting to the tidy sum of $1,360,318.08. The decree was for a deficiency remaining after the foreclosure of the Channel Company property covered by the mortgage given to secure the bond issue.

There was some land of the Port Arthur Town Site Company also included in the mortgage which has not yet
681 been foreclosed, and when it shall be the said decree will have to be credited with what will be realized on it. It is conjectural what such land is apt to bring, but it has been estimated to be now worth several hundred thousand dollars.

The net liability sought to be fastened upon the Trust Company is, therefore, upwards of a million dollars ($1,000,000.00).

It is not claimed that the Trust Company originally subscribed for the stock in question; but a roundabout theory of liability is evolved from a series of stated transactions, care being taken to omit dates and other essentials and to ignore legal and business relationships and the natural processes of cause and effect.

Transactions are complained of (dates being omitted) that were in fact old and which were formally completed and the accounts therefor squared between the companies before the credit arising from placing the bonds was given to the Channel Company.

The Trust Company acted as agent for the Channel Company in placing the bonds as in the case of the Suburban Belt bonds.

It took the stock certificates, as agent for the Channel Company, and transferred them to the purchasers of the bonds, they being entitled to the stock as a bonus.

There was an express provision in the bonds to the effect that the Trust Company should not be liable on the said stock.

This would seem to be controlling to the ordinary mind.

To get around its effect, the Provident Life made sundry charges of mismanagement of the Channel Company's affairs by the Trust Company, of undue 'Domination' by the latter, of getting undue advantage in the way of profits from its dealings with the former, etc., the charges being similar to those made in the Kansas City case.

It is also said that the payments made in lands and other property for Channel stock subscriptions were grossly inadequate, and that hence the stock was not fully paid, and that therefore, the Trust Company and all concerned with its management of Channel and Dock affairs are liable
682 for this managerial malfeasance. (These complaints are repeated by the Channel & Dock Company in its answer to the intervening petition of the Trust Company).

In investigating the merits of this claim, I have not had the advantage of evidence as in the case of the Kansas City suit, and, therefore, cannot speak so positively as to the facts. Yet the whole theory of the complaint, in general, goes upon the same old theory of 'domination' on the part of the Guardian Trust and infantile helplessness and contractual imbecility on the part of the Channel Company.

They are charged also several acts of grave irregularity on the part of Mr. Stilwell, which I can tell nothing about, but I cannot see that the parties complaining were legally affected by them.

From the admitted course of dealing, and certain undisputed and controlling facts, I can see nothing appreciably ominous in these claims of the Provident Life and the Channel Company, independently of certain legal propositions that bar recovery upon them.

As to the alleged stock liability, and the claim in effect that the Trust Company notwithstanding the specific provisions for non-liability upon the stock, is liable on the stock, it is difficult to conceive of a theory upon which such claim with color of right, can be made by the Provident Life. If the stock had been full paid, nobody was liable upon it. The only purpose of the provision in favor of the Guardian Trust Company was to exempt it from liability if the question as to its being fully paid should arise. The question now arises; and the clause must now fulfil its purpose, and as a matter of course, the exemption must inevitably attach.

There are several other reasons, each of which, in my judgment, is sufficient to bar a recovery on this alleged stock

liability, which I will not lengthen this report in detail and explain.

This is a large, very large claim. But figures themselves
683 are not ominous. A claim of ever so many figures that runs counter to the law of gravitation or mathematical processes or well known and simple rules of contract, is not ominous. When circumstances are many and complexity exists, theories are sometimes spun which may confuse and mystify and occasionally swing the courts into error. But several common contractural principles that govern this Channel Company case are so clear and so easily understood that the complex theories woven in the pleadings can but poorly hide them.

I am firmly of the conviction that this case against the Trust Company must fail, and that the chances of the court ultimately holding it liable are exceedingly slight.

Conclusion.

After a study of the case, thought to be thorough enough for the purpose, I conclude:

That after allowing the above first two items of counter-claim of $89,333.33 and $2,550, the Guardian Trust Company has a net valid claim against the Belt Company of $277,688.39. Upon which interest to date amounts to about $92,400.00. Making a total due at this date of substantially $370,088.39; and of which about $34,500 (being $23,000 and interest thereon since April, 1896) only is at all doubtful.

To the above must be added the claim against the Port Arthur Channel & Dock Company of $21,916.44.

Upon which interest to date amounts to about $7,900—$29,816.44.

Making a grand total in the two cases of about $399,904.83. Or substantially $400,000. (Later, May 1, 1905).

The evidence adduced on the part of the Belt Company since this report was written reveals this Degoijen item of $89,333.33 to have been connected with other transactions and to work out in favor of the Trust Company; it is the writer's belief that the item must legally and equitably be allowed in its favor.

It appears, too, and this from the testimony of the op-
684 position that as to the 'stock profit' items put down in the report as doubtful, the purchase of the stock

from the Belt by the Trust Company was made long before the resale by the latter, although the transfer was made shortly before; and it is believed that these items are, therefore, not doubtful upon their merits.

The net showing, therefore, allowing liberally against the Trust Company, as to a few new items of lesser importance, is to increase the estimate in the report to the extent of $100,000 or more and to make a grand total of about $500,000.

As to the Texas case—the Channel & Dock suit—has been settled. $30,000 of the Trust Company's claims must now be deducted from this total estimate.

There is a feature of this case that must not be ignored in making a full report of its status and its history. There is, somehow, a feeling, shared, at least, by some interested in the company, and hence in the case, that the company has been more or less handicapped from the beginning of this case on account of a well-advertised public prejudice against Mr. Stilwell, who is ordinarily supposed to have been the dominating personal factor in the directory of the companies involved. This notion, as such notions usually are, is apt to be exaggerated. We do not doubt that, if such a prejudice existed in the community, it could be made in part a cloak for what would otherwise seem to be a wanton attack upon long existing business relations and a more or less impertinent attempt to inquire into matters of such age as would ordinarily preclude court inquiry. But it is simply inconceivable that present stockholders of the company could be prejudiced by any court or official who might have anything to do with the case, because of any prejudice against the person who sold them stock. Judges are apt occasionally to be impelled by their feelings toward certain parties to make wrong orders and to commit injustice; but in
685 nearly every instance this arises from an impulsive and earnest hatred of wrong itself, and not primarily of the person involved, and it is very rare that a judge, on being shown that he has judged persons incorrectly, is unwilling to reframe his judgment in accordance with facts shown him. This feeling, which is shared only by some, that the Guardian Trust Company has an uphill fight to get what it is clearly entitled to, should be banished forthwith.

It is also proper to state that the whole course of dealing between these companies does not reveal to an unprejudiced mind anything on which to single out Mr. Stilwell for severe condemnation. He was a promoter, and hence an optimist. The promoter has his place. He sees chances to make money,

which frequently others do not see. He initiates the development of properties and opportunities. He is entitled to fill his place and to be allowed his reasonable reward. It is not right, however, to allow the promoter, who may personally possess but a mere fraction of the means necessary to back the enterprise, and who ordinarily has not paid the penalties of heavy personal losses through financial errors, and who has not climbed up the 'stormy' side, to dominate the financial policy and affairs of the enterprise. The promoter is impatient for results; he takes 'short cuts'; he neglects essential formalities, which brings its share of ultimate financial discredit. A new industry, to be healthfully promoted—no matter what are its prospects of remunerative or 'fat' returns—should always be 'placed' within a conservative financial experience; and the principle sould ever and constantly be recognized that even 'the good things' must yield to sound financing methods. If, however, the promoter is allowed by others interested, and who are placed with him in the management, to constantly dominate the whole deal and the policy of the enterprise, and failure or reverses occur, the responsibility therefor should not be placed upon the one man, but upon all concerned.

686 There is a lesson to be learned, however, from the financial history of the Kansas City Belt Road.

The scheme was a logical one and the Belt Road a public industrial necessity. It is now paying well, and interested parties claim that it has always paid a fair interest upon the actual original cost. But it would seem to an outsider that even a logical and promising enterprise should await its development until it could enlist the support of people financially able to stay by it until it is thoroughly consummated, and who are also able and willing to keep it out of the courts, when the interest which it might pay was temporarily in times of depression or adversity reduced from, say, eight or ten per cent. to, say, three or four per cent.

As railroad enterprises are usually financed, the courts now interfere almost as a matter of course whenever the enterprise fails to pay the rate of interest which the promoters have calculated upon and arranged for by bond issue, etc. The total cost, directly and indirectly, to the enterprise, and to the stockholders of the usual court proceedings, receiver's expenses, reorganization committees, law fees, delays in contemplated improvements, with all their attendant damage, frequently amount to the money difference between the old and the reorganized basis.

Secondly. The use of construction companies and 'section' companies is, as it is plain to any outsider, a mere device to place financial backing to the enterprise upon the public—as some would say, to 'float' it. The use of these companies adds complexity to the whole deal, and complexity, as elsewhere said, means waste. Even the continued harmonious conduct of the various branches of the enterprises by the use of separate corporations always demands for itself and appropriates to itself its full share of cost or waste. And when the time of dispute and 'filing out' comes this cost is multiplied in extent. We do not say there is in no instance a logical place for the construction company or
687 for 'sectionizing' railroad companies when the ultimate objective enterprise is great in extent and covers a great deal of the country. There may logically be large sections of an interstate railway, each of which can be controlled and managed by a local company, and its bonds placed and its financiering done with special reference to it as a local railroad. We simply say that this method carried its cost. There are cases where the legitimate advantage may exceed that cost. It is, however, true that in a small local railroad the advantage of the sectionizing process is comparatively little and the cost comparatively great. It is confessedly true that the Consolidated Terminal and the Independence Air Line, whose roads were an essential portion of the contemplated Belt, were organized simply because of the fact that their construction bonds could be better placed upon the public by organizing a new and 'fresh' company. Yet, as we believe, it was an error.

This method was consented to by all parties concerned, and was in line with current financial railroad building methods. There is no special condemnation, therefore, that should be visited upon Mr. Stilwell or his co-directors for adopting these plans. Everybody knew of them and everybody interested consented to them. Such methods are not the wrong methods of these particular men; they are real financial habits, they are railroad habits, they are community habits which prevail throughout the whole country.

Every bit of useless complexity in such cases breeds its proportion of doubt and mystery in the mind of the distant stockholder, and helps to prompt attacks in court to cover the motive for it, and to swell the volume of evidence to reduce the mesh and to add to the 'mess'.

It is believed that there is an opportunity for some progressive railroad man to take the lead in simplifying the

methods of railroad construction and of placing the financial obligations therefor upon the public. It is far easier for the investing public to understand the status of one com-
688 pany with a construction department and various other departments than it is to understand the status of one general enterprise farmed out to different companies with largely differing stockholders and a varying directory and office force, etc., etc. And when the time of stress comes the very absence of varied subsidiary or 'section' companies gives a big economic advantage to re-organization plans; and economy is wealth.

In conclusion, I recommend:

1. That an offer of arbitration of the subject-matter in dispute be at once made to the Belt Company and the Kansas City Southern Company.

2. That without waiting for any reply to said offer, the case be placed promptly in the hands of counsel, who will

(a) Give it precedence in the matter of attention and hold himself ready to respond in court to all important moves in the case, and take the responsibility for an unremittent and agressive policy looking towards getting it concluded as early as possible.

(b) Assign an associate or assistant counsel exclusively to speeding up the case and closing the testimony, etc.

(c) Anticipate all work to be done and papers, etc., to be drawn by preparing in advance such drafts and data as can practically aid in the prompt disposition of the case.

In making suggestions above, as to the future conduct of this case, there has been no effort made to suggest abnormal methods or prophesy 'great things'. No particular genius, as it is thought, is required to put the case through in such manner as it deserves. If one with ordinary skill and economic sense simply recognizes what the continued taking of testimony in the good old way will entail, and what in-
justice it will result in, and outlines to the court and
689 master and opposing counsel a definite plan of promptly and economically getting at the merits of the case in all its phases, it seems to me that he will be able to place the responsibility of making far greater progress in the case upon the consciences of all the parties concerned, and to enlist court, master and counsel in systematic and earnest cooperation in relieving the court of this involved accounting

and account. If he should not succeed in this, he could, by making his earnest appeals at every step and in writing, where possible, succeeded in making the record and placing the responsibility, which, if the case is not soon ended, would be a grave responsibility upon some one. And ordinarily such responsibility, if seen in advance, by progressive officials and faithful lawyers, recognizing also a duty as citizens to the community, will be avoided.

If the matter be taken hold of vigorously, and the master and court can be enlisted in the effort to speed the cause in the way that fairness to the case demands, a final decree in the case should be reached in four or five months, and certainly within eight months at the outside. The opposition should be ruled to close their proofs within a very short time. The Trust Company could then agree to put in its proofs in a very short time. While the remaining testimony was being taken the salient points of the testimony already taken could be abstracted and scheduled up for the master's consideration. When the testimony shall have been closed, the case could be promptly argued and promptly decided. It is not to be expected that the master and court, as well as the counsel, will be reluctant to submit to any policy that will tend to speedily lift this burden from the courts and from the community, so that the small army of parties engaged and interested may devote their time and attention to the real work of life.

Respectfully submitted,

HARRY S. MECARTNEY,
145 LaSalle Street, Chicago."

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690 Mr. Rosenberger: As to item for $3500.00, number 441, paid to Wollman, Solomon & Cooper, I offer the sixth paragraph of Judge Thayer's order made in October, 1902, discharging Wash Adams as receiver of the Guardian Trust Company.

Mr. Smith: Does that refer to the Wollman, Solomon & Cooper item?

Mr. Rosenberger: Yes.

Mr. Smith: I object to it for the reason the order does not show for what services the compensation was allowed or that

it had anything to do with the litigation under consideration in these proceedings.

Mr. Rosenberger: I expect to show that by further testimony.

The Master: With that announcement, that counsel expects to show that by further testimony, the objection is overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Rosenberger: I read from that decretal order, which appears on pages 411 and following, Volume I of the record in the Shedd case, said paragraph 6 being on page 418 thereof:

"Sixth: That there is hereby allowed to the Receiver, Wash Adams, Esquire, in full compensation for his services and expenses as Receiver, the sum of Seven Thousand and Five Hundred (7500) Dollars and the further sum of Seven Thousand One Hundred and Twenty-five ($7125.00) Dollars to the firm of Trimble & Braley, and the further sum of htirty-five hundred ($3500) Dollars to the firm of Wollman, Solomon & Cooper, for their professional services as attorneys and expenses rendered and expended to and on account of the said Receiver, Wash Adams, and his predecessor in such receivership, Francis M. Black, which sums shall be paid by the Receiver out of the funds in his hands before turning the same over to the Guardian Trust Company as hereinbefore directed."

Mr. Rosenberger: Let the Master please refer to the original account, Item No. 127, as bearing upon the
691 amounts paid by the Guardian Trust Company to Trimble & Braley for services rendered to the Trust Company in the Cambria suit prior to the appointment of Judge Black as receiver and included in Item No. 127 of this account before the Master, I offer in evidence the answers filed by Trimble & Braley on behalf of the Guardian Trust Company in the four foreclosure suits filed by the Provident Life & Trust Company, September 6, 1900, against the Kansas City Suburban Belt Railroad Company, Kansas City & Independence Air Line and Consolidated Terminal Railway Company and the Union Terminal Railroad Company, said answers being filed on November 5, 1900, said answers in said suit of Provident Life & Trust Company vs. Kansas

City Suburban Belt Railroad Company being set forth on page 158 in the record on appeal, number 2329, in the United States Circuit Court of Appeals in the appeal entitled: "Guardian Trust Company, Appellant vs. Kansas City Southern Railway Company, being the first injunction appeal, and the tenor and contents of the other answers being shown by stipulations numbers 7 and 8, paragraphs 7 and 8, on pages 2 and 3 of said record:

Mr. Smith: I want to object, if the Master please, to the uncertain and conflicting offer of these answers that is made by counsel for the Trust Company. All four of these answers are offered in evidence and then after he gets through he says there is a stipulation. Now, I want to object, I don't know as I do want to object, but I want to find out before I make my objection whether counsel is taking the position that these answers are being offered in evidence for the purpose of showing the value of the services rendered by Trimble & Braley. If he is I think that is a very proper way to try this issue of Trimble & Braley's judgment and also because there isn't any other way for the Master to try it, except hear evidence of services rendered. If this is being done because the judgments are binding and can't go into the merits of those issues, then I can't see how you can receive these answers in evidence to show what character of service was that was
692 rendered. The Master either must take one position or the other. Now if the judgments are to be construed by the Master as binding on us, I object to the answers going in, because unduly encumbering the record, making a record extravagantly long without any need or occasion for it. I think counsel ought to be required by the Master to state his position and theory on this thing, so we may know what he is driving at, whether he wants all the exhibits copied in the record or whether he wants the Master to consider the exhibits as bearing on the value of services rendered by Trimble & Braley, or what is his theory.

The Master: For what purpose do you offer it, Mr. Rosenberger?

Mr. Rosenberger: For the purpose merely of identifying the answers which are referred to in the opinion of the Supreme Court of Missouri in the Trimble & Braley case, 244 Mo. at page 228. The judgment in that case on the face of the record includes items of fees which are not being sought to be recovered in this proceeding and for the purpose of identifying answers for the preparation of which Trimble & Bra-

ley were allowed fees in that case and their relation to the Cambria case solely I am making this offer.

The Master: Then it goes to that service?

Mr. Rosenberger: No; not offered for that purpose, merely for the purpose of showing—

The Master: What the service was?

Mr. Rosenberger: What the service was as shown by this opinion.

The Master: The objection will be overruled.

To which ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, duly excepted.

Mr. Smith: Is the Master going to have all four of these answers in here?

The Master: Are they all alike, Mr. Rosenberger?

Mr. Rosenberger: It is so stipulated in this record.

593 The Master: The Master will admit one of them with a paragraph in the stipulation that the other answers are like it.

One of the foregoing answers so admitted in evidence, and the stipulation referred to, are as follows:

"In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

The Provident Life and Trust Company of Philadelphia, Complainant,
No. 2464. vs. In Equity.
Kansas City Suburban Belt Railroad Company, Defendant.

Separate Answer of the Defendant, The Guardian Trust Company, to the Bill of Complaint in the Above Entitled Cause.

The Guardian Trust Company, having been made a defendant in the above entitled cause, and having been given leave, as such defendant by an order of this court, to plead, demur or answer to all or any part of the complainant's bill of complaint, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for an-

swer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to—answering says:

That this defendant admits that the complainant is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and is a citizen of said state; and admits that the defendant, the Kansas City Suburban Railway Company, is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and a citizen of the said state; and a resident and inhabitant of the Western Division of the Western District thereof, with its principal office in Kansas City, Missouri.

This defendant further admits that the Consolidated Terminal Railway Company, a Missouri corporation, being thereunto duly authorized by its stockholders and board of
694 directors, did, on the first day of February, 1892, make and execute its certain series of seven hundred and fifty (750) bonds of the denomination of one thousand dollars ($1000) each, aggregating seven hundred and fifty thousand dollars ($750,000) payable on February 1st, 1922, at the agency of said company in Philadelphia, with interest thereon at five per cent (5%) per annum, payable semi-annually, on the first days of February and August in each year, at the same place upon the presentation and surrender of the coupons annexed to said bonds, as alleged in the bill of complaint, and as described in the copy of the mortgage filed with and made a part of the bill of complaint and marked "Exhibit A".

This defendant admits that on or about the first day of February, 1892, being thereunto duly authorized by its stockholders and directors, said Consolidated Terminal Railway Company executed and delivered to this defendant, under its then name of Missouri, Kansas & Texas Trust Company, and to the complainant, a certain deed of trust in the nature of a mortgage, whereby it conveyed unto this defendant and the complainant, as trustees, the property described in the bill of complaint and in the copy of the mortgage filed with the bill of complaint, marked "Exhibit A", in trust to secure the payment of the principal and interest of said bonds; and admits that this defendant and the complainant accepted the trust created and conferred upon them by said mortgage or deed of trust, and admits that all of the property described in and conveyed by said mortgage or deed of trust is situated in Jackson County, Missouri; and that said mortgage was duly

recorded in the office of the recorder of deeds of said county on May 11, 1892.

This defendant further admits that on or about the 25th day of July, 1892, the said Terminal Company entered into articles of consolidation—as authorized by and in accordance with the provisions of the statutes of the State of Missouri—with the Kansas City Suburban Belt Railroad Company, another Missouri corporation, thereby forming one continuous line of railroad, running in the same general direction; that said Articles of Consolidation were duly approved and
695 ratified by the stockholders of said company, and filed in the office of the Secretary of State; and that thereby there was formed and organized the defendant, the Kansas City Suburban Belt Railroad Company; and that by reason of such consolidation, the defendant became and is directly and primarily liable for the bonds and coupons of said Belt Line Company, hereinbefore referred to and for the obligations, covenants and liabilities of the said Belt Line Company, under the terms and provisions of the said mortgage or deed of trust, as alleged in the bill of complaint.

This defendant, further answering, states that it has no knowledge or information sufficient to enable it to form a belief as to whether or not the said Terminal Company and the defendant, the Kansas City Suburban Belt Railroad Company, or either of them have or has acquired other property which was intended or expressed to be included in and covered by the description of property in said mortgage or deed of trust, hence this defendant asks that complainant be required to make strict proof of its allegations as to that fact, if it be a fact.

This defendant admits that the payment of each and all of said bonds was duly guaranteed by the defendant, the Kansas City Suburban Belt Railroad Company, as alleged in the bill of complaint.

This defendant further answering admits that all of the bonds authorized as aforesaid to be issued under the terms of said mortgage or deed of trust, to-wit: the bonds aggregating in the principal sum the amount of seven hundred and fifty thousand dollars ($750,000) have been duly executed by the said Consolidated Terminal Railway Company and duly certified to by this defendant and the complainant, as trustees, as provided in the said mortgage; but this defendant denies that all of said bonds, or that any of them except sixteen

(16) or less of them, are outstanding in the hands of the holders thereof, for value, as alleged in the bill of complaint.

And this defendant states and shows that seven hun-
696 dred and thirty-four (734) or more of said seven hundred and fifty (750) bonds were, prior to February 1st, 1900, called in and taken up for and on behalf of The Kansas City Southern Railway Company, a Missouri corporation, who owns all or substantially all of the stock of the defendant, the Kansas City Suburban Belt Railroad Company, and of said Terminal Company; and were in March, 1900, duly pledged by said Kansas City Southern Railway Company as collateral security for bonds of its own issue; and that they ever since have been, and still are, held by the pledgee thereof as collateral security for the bonds of the said Kansas City Southern Railway Company, not to be enforced or collected, either as to the principal or interest thereon, except in case default be made in the payment of the principal or interest of the said bonds of The Kansas City Southern Railway Company; and that no such default has occurred or been made; and that said seven hundred and thirty-four (734) bonds are not outstanding so as to be enforceable or collectible, but lie dormant in the hands of the pledgee, awaiting the said contingency which would give the holders of the bonds of The Kansas City Southern Railway Company, or the said pledgee on their behalf, the right to enforce their collection, and to apply the proceeds to the payment of the bonds issued by The Kansas City Southern Railway Company. The facts connected with the taking up and pledging of the said bonds and the ownership of said stock of the defendant, the Kansas City Suburban Railroad Company, will be more fully hereinafter stated.

Further answering, this defendant admits that it was provided in and by said mortgage, that in case default was made in the payment of interest on any of the bonds, and that if such default should continue for three months, the trustees named in the mortgage should have the power to enter upon the premises and after such entry, or without it, to advertise and sell the mortgaged property as stated in the bill of com-
plaint; and it admits that it is provided by said mort-
697 gage that said rights of entry and sale should be cumulative remedies, additional to other remedies allowed by law, including the remedy of foreclosure by way of judicial proceedings. But this defendant states and shows that the true intent and meaning of the said mortgage is that the trustees therein can institute and maintain such foreclosure

proceedings, only after the holder or holders of some one or more of said coupons—who, by reason of being such holder, had the lawful right to collect the same—had duly presented such coupon or coupons at the place specified in said mortgage and duly demanded payment thereof without avail; and that after such presentation, demand and failure to receive payment, had requested the trustee to resort to foreclosure so as to enforce the right which such holder or holders had to the payment of such coupons; and this defendant further states and shows that no such presentation, demand, refusal or request, has at any time ever been made or had by any one having the right so to do, on any of the coupons attached to any of said bonds.

This defendant admits that on August 1st, 1899, an installment of interest on said bonds fell due, amounting in the aggregate to eighteen thousand, seven hundred and fifty dollars ($18,750), but defendant denies that there was any such default made in the payment of any part of said installment of interest as would entitle the trusees in the mortgage, by virtue of the terms thereof, to ask a foreclosure of the mortgage.

This defendant states and shows that all of the coupons representing said installments of interest which were presented for payment at the agency of the said Terminal Company in the City of Philadelphia, the place specified in the mortgage and the coupons for their presentation and payment, were paid. That coupons of said installment aggregating eighteen hundred and twenty-five dollars ($1825) were not presented for payment, but were and are held and owned by this defendant; and that all of the other coupons of said installment of interest have been paid and discharged when and as presented for payment; that the said eighteen
698 hundred and twenty-five dollars ($1825) of coupons so held by this defendant, have not been paid, but they have not been presented for payment and no foreclosure has been requested on account of the non-payment thereof.

This defendant denies that an installment of interest aggregating eighteen thousand seven hundred and fifty dollars ($18,750) fell due on February 1st, 1900, and denies that another and further installment of interest upon said bonds amounting to eighteen thousand seven hundred and fifty dollars ($18,750) fell due on the first day of August, 1900; and denies that a large part or any of the coupons representing either of said installments of interest were presented for payment and payment thereof demanded by the lawful holders thereof; and denies that payment thereof, or of any of

said coupons, was refused; and denies that any part of either of the said last named installments of interest maturing February 1st, 1900, and August 1st, 1900, remains due and unpaid.

This defendant states and shows that, by the terms of said bonds and coupons, such installments of interest would have matured on the first day of February, 1900, and the first day of August, 1900, if the said bonds had, at that time, been outstanding obligations in the hands of holders who had the right to demand the payment of such interest; but that only sixteen (16) or less of said bonds were, on February 1st, 1900, and August 1st, 1900, outstanding in the hands of persons who had any right to collect the interest thereon; and that if the payment of the interest on said sixteen (16) or less of said bonds, or any of them, was demanded, and payment thereof refused, on or after either of said interest-paying days, that such refusal was fraudulently made by the defendant, the Kansas City Suburban Belt Company, and the said Kansas City Southern Railway Company, for the purpose of creating a colorable default on which to predicate a foreclosure, in order to accomplish, by collusion with the complainant, the fradulent purpose of cutting out, and cheating the unsecured creditors of the said defendant, the
699 Kansas City Suburban Railroad Company, as will be hereinafter fully stated.

This defendant further answering, admits that the defendant, the Kansas City Suburban Belt Railroad Company, has a large floating indebtedness, the exact amount of which this defendant does not know, but it is informed and believes and avers the fact to be, that said indebtedness is nearer six hundred thousand dollars ($600,000) than four hundred and fifty thousand dollars ($450,000) as stated in the bill of complaint; and admits that amounts on account of wages, labor and current expenses incurred in the operation of its railroad, are, from time to time, becoming due; but denies that the said defendant, the Kansas City Suburban Belt Railroad Company, is insolvent, or unable to pay all or any of its said floating indebtedness, or all or any of the said amounts due or to become due on account of wages, labor or current expenses incurred in the operation of its railroad; but states and shows that, upon the contrary, the said defendant, the Kansas City Suburban Belt Railroad Company, is amply able to pay all of its floating indebtedness, and that its earnings and income are more than enough to pay all of its fixed charges, including the interest payable on its bonds, its oper-

ating expenses, and any and all amounts due or to become due its employes for wages or labor; and denies that the property and premises covered by the mortgage or deed of trust is an inadequate and insufficient security for the payment of the outstanding bonds and coupons secured by said instrument; but states and shows that, upon the contrary, the property conveyed by said mortgage is worth very much more than the total amount of all of said bonds and coupons described in and secured by the said mortgage, together with all of its floating indebtedness and other liabilities; and denies that there is danger that any judgment may be recovered against said defendant, the Kansas City Suburban Belt Railroad Company, on any of its liabilities of whatever nature, which it could not promptly pay, if those
700 persons who hold its purse and dominate and control its actions as hereinafter stated, wanted to pay them.

This defendant, further answering, denies that it is necessary or even proper for the protection of the interest of the holders of any of said bonds and coupons secured by said mortgage or for the protection of any other person or persons interested in the property of the defendant, the Kansas City Suburban Belt Railroad Company, that a receiver or receivers of its property should be appointed; but states and shows that, upon the contrary, there are no obligations against the said defendant, the Kansas City Suburban Belt Railroad Company, including the unpaid interest on any of said bonds —if any such interest be unpaid—which could not be collected by the ordinary remedies at law, if the persons holding any such obligations would, in good faith, insist upon the payment thereof.

This defendant further answering, admits that the railroad and other property of the defendant, the Kansas City Suburban Belt Railroad Company, connects with certain other lines of railway constructed by the Kansas City & Independence Air Line, by The Union Terminal Railroad Company, and by the Consolidated Terminal Railway Company, prior to its consolidation as aforesaid; and admits that the said several properties are subject to separate mortgages; and admits that bills to foreclose each of said mortgages have been filed concurrently with the bill of complaint in this cause; but this defendant states and shows that the defaults alleged in the bill of complaint to have been made in the payment of interest on the bonds secured by the other said mortgages were collusively and fraudulently made, for the purpose of predicating foreclosure suits thereon, and that

all of said other foreclosure suits, together with this one, constitute one and the some collusive transaction, for the fraudulent purposes hereinafter stated. This defendant admits that the several railroads last above named, constitute, as they have heretofore been and are now oper-
701 ated, one entire and continuous system of railway; but this defendant denies that they constitute an indivisible system of railway, but states and shows, upon the contrary, that they are susceptible of being profitably operated separately; and denies that it is esential to the security of the holders of any of the bonds issued and certified under the mortgage herein sought to be foreclosed or of any other person or persons, interested in the premises, that receivers should be appointed for all or any of said lines of railway.

This defendant further answering, admits that it was provided in the said mortgage that the words "the trustees" when and as used in the mortgage, should—for all purposes—be taken and construed to mean the corporation or person charged for the time being, with the execution of the trust created by the mortgage—whether the same be this defendant and the complainant, or any successor of them; but denies that it is provided in said mortgage that either of said trustees might be removed by a majority in interest of the holders of all bonds then outstanding, and denies that upon such removal of either of said trustees, another might be substituted in its stead but states and shows that it is provided by said mortgage that both of said trustees might be so removed and another appointed as successor to both trustees so removed; and it is the true intent and meaning of said mortgage that both of said trustees should act jointly and that neither should separately have and exercise any of the powers of the mortgage, and that only in case of the removal of both trustees by majority of outstanding bonds, could a successor be appointed and that then such successor must be some corporation or person having power to act, other than either this defendant or the complainant; but this defendant denies that on the 31st day of August, 1900, or at any other time, a majority in interest of the holders of the onds secured by said mortgage and then outstanding, did by proper instrument in writing, under the hands and seals of said holders or otherwise—remove this defendant from its position,
702 office, powers or authority as such trustee; and denies that this defendant was, or at any time has been, removed from its said position as trustee under said mortgage or deed of trust, or otherwise divested of any right, power,

authority, title or interest which it had and held by reason of the terms and provisions of said mortgage; and this defendant denies that after the alleged removal of this defendant from its position as trustee, or at any other time, the majority in interest of the holders of all said bonds secured by said mortgage or deed of trust and then outstanding, did—by an instrument in writing, under the hands and seals of such holders—appoint and designate the complainant, The Provident Life & Trust Company of Philadelphia, as the successor trustee under the said mortgage or deed of trust; and denies that the complainant thereupon, or at any time or by any means whatever, became invested with the rights, powers, duties or authority conferred upon the trustees or their successor by the terms of the said mortgage.

The defendant further answering states, that if any attempt was made by any person or persons claiming to hold any of the said bonds, to remove this defendant as trustee (which this defendant does not admit, but denies); and that if any attempt was made by any person or persons claiming to hold any of said bonds to appoint and substitute the complainant as successor to this defendant as such trustee (which this defendant does not admit, but denies)—that each and both of said attempts were wholly made without power or authority, and were made, if at all, by persons not the holders of any bonds then outstanding within the meaning of the terms of the mortgage.

This defendant further answering, states and shows that the complainant, The Provident Life & Trust Company, is a corporation organized under the laws of the State of Pennsylvania, with its principal office in Philadelphia, in said state; and that by a statute duly enacted by the Legislature of the State of Missouri, the said complainant has no authority of law, alone, to accept or to in any way undertake to en-
703 force any of the powers and duties conferred by the said mortgage upon this defendant and the complainant, jointly, as trustees, or their successors. This defendant further states and shows that it is expressly provided by the statutes of the State of Missouri, which were in force long prior to the time of the alleged appointment of the complainant as successor to this defendant, as trustee in said mortgage—and which are still in force, as follows:

"No foreign corporation or individual shall act as trustee in any deed of trust or other conveyance hereafter made by any person, firm or corporation, whereby any property, real or personal, situate or being in this state, is hereafter con-

veyed in trust for any purpose whatever, unless in such conveyance there shall be named as co-trustee a corporation organized under the laws of this state and having power to act as trustee and execute trusts or any individual citizen of the State of Missouri. No suit shall be brought to foreclose any such deed of trust, unless a resident trustee shall be a party plaintiff."

The true intent and meaning of which provision of the statute of the said State of Missouri is—that no corporation of any state, other than that of the State of Missouri, should—after the enactment of said law—be appointed as sole trustee in any mortgage or deed of trust which conveyed property situated in the State of Missouri; and that no corporation of any state other than that of Missouri, should—as such sole trustee—be permitted to institute any suit to foreclose any such deed of trust. Wherefore, this defendant says that the complainant, at the time of its alleged appointment, did not have, and has not now, the lawful power to execute or seek the execution of the trust conferred upon it and this defendant, jointly, by said mortgage.

This defendant, further answering, denies that default was made in the payment of the installment of interest on said bonds secured by the mortgage which became due and payable on the first day of February, 1900, or that default was made in the payment of any part thereof; and denies that there was or is any default in
704 the installment of interest falling due August 1st, 1899, except for the eighteen hundred and twenty-five ($1825) dollars of coupons held by this defendant as aforesaid; and denies that the payment of either of said installments or any part thereof was, in any manner, demanded at the time and place fixed for the payment thereof; and denies that any such default continued for the period of six months or more; and denies that there was any default whatever after presentation and demand, that could continue for said time or any other time; and denies that the complainant as such trustee or otherwise, elected—or that it now elects—on account of such alleged defaults and continuance thereof—that the principal of said bonds should become immediately due and payable; and denies that a majority in interest of the holders of all of said bonds, at the time outstanding, did, by instrument under their hands and seals, or otherwise, instruct the complainant, as such trustee, to declare the said principal of said bonds due and payable.

This defendant admits that no proceedings at law or suits in equity have been begun or commenced by the complainant

or by this defendant as trustees under said mortgage, or by the holder of any of said bonds or coupons secured by said mortgage to in any way enforce the collection or payment of said bonds or coupons, except this suit; and admits that the amount in controversy exceeds the sum of five thousand dollars ($5000.00).

This defendant denies that the complainant, even if it were the lawful trustee by substitution, as it claims (which this defendant denies), is remediless in the premises, at and by the strict rules of the common law, and is relievable only in a court of equity; and states and avers that all of the interest on all of the said bonds, which is alleged in the bill to have been defaulted, could have been collected, and would have been paid if the complainant, or if the holders of the said coupons had, in good faith, demanded the payment thereof, or if they, or the trustees, had instituted suits
705 at law to recover the payment thereof.

This defendant further answering, states and shows that it is a creditor of the defendant, the Kansas City Suburban Belt Railroad Company, to the extent of four hundred thousand dollars ($400,000) or more;

That the indebtedness of the said defendant, the Kansas City Suburban Belt Railroad Company, to this defendant, is —as to the greater part thereof—evidenced by and consists of certain negotiable promissory notes heretofore, for value received, duly executed and delivered by the Kansas City Suburban Belt Railroad Company, to your petitioner, to-wit: A note dated March 31, 1899, due July 12, 1899, for fifty thousand dollars ($50,000) with interest at the rate of six per cent (6%) per annum from said date. On this note there was credited on June 14, 1900, twelve thousand five hundred dollars ($12,500).

Note dated November 7, 1899, due January 9, 1900, for fifty thousand dollars ($50,000) with six per cent (6%) interest per annum from said date. On this note was credited, on June 14, 1900, twelve thousand five hundred dollars ($12,500). Note dated July 26, 1899, payable on demand, for two hundred and three thousand nine hundred dollars ($203,900) with interest at the rate of six per cent (6%) per annum from date. On this note was credited on July 11, 1900, nine thousand, nine hundred and ninety-six and 65-100 dollars ($9996.65).

Note dated September 21st, 1899, payable on demand for twenty-three thousand and fifty-six and 48-100 dollars ($23,

056.48) with interest thereon from date at the rate of eight per cent (8%) per annum.

Note dated October 23, 1899, due on demand for seven thousand one hundred and sixty-two and 40-100 dollars ($7,162.40) with interest thereon at the rate of eight per cent (8%) per annum from date.

Note dated June 11, 1900, due October 11, 1900, for ten thousand four hundred dollars ($10,400) with interest at the rate of.....per cent from.....

706 And a note dated May 25, 1900, due September 25, 1900, for twenty-five thousand dollars ($25,000) with interest thereon at the rate of.....per cent from.....

That this defendant holds and owns fifteen hundred and twenty-seven (1527) interest coupons duly issued by a corporation known as The Union Terminal Railroad Company, aggregating thirty-eight thousand one hundred and seventy-five dollars ($38,175), which matured August 1, 1899—the payment of which coupons is duly guaranteed by the defendant, Kansas City Suburban Belt Railroad Company—and also holds and owns seventy-three (73) interest coupons duly issued by a corporation known as the Consolidated Terminal Railway Company, of Kansas City, aggregating eighteen hundred and twenty-five dollars ($1825) which matured August 1, 1889, the payment of which coupons was duly guaranteed and assumed by the said defendant, Kansas City Suburban Belt Railroad Railroad Company.

That the remainder of said indebtedness consists of open book accounts. That frequent demand has been made by this defendant on the said defendant, the Kansas City Suburban Belt Railroad Company, for the payment of each and all of said notes and said open book accounts; but said defendant has heretofore failed and refused to pay the same; that the same are now long since due and payable.

That the payment of the said indebtedness was heretofore partially secured by the pledging of certain stocks, bonds and other personal property by the Kansas City Suburban belt Railroad Company to this defendant, as collateral security to and for said indebtedness; but the said collateral security was and is wholly insufficient to secure the payment of the whole of said indebtedness; and if this defendant were at liberty to enforce its rights against said collateral security, it could not, under the most favorable conditions, realize therefrom enough to pay more than one-fourth (1/4) of said

indebtedness; that the remainder of said indebtedness is wholly unsecured.

707 That the said defendant, the Kansas City Suburban Belt Railroad Company, by collusion with and in the name of one of its other creditors, to-wit: The Cambria Steel Company, did, on the 6th day of September, 1900, cause your petitioner to be temporarily restrained and enjoined, by order of this court, from enforcing its rights against any of the stocks, bonds and other personal property so pledged as collateral security for said indebtedness, and from in any way selling or disposing of any part thereof, so as to apply the proceeds thereof towards the payment or reduction of said indebtedness; and the said temporary restraining order of this court is still in force.

This defendant, further answering, states and shows that on April 1st, 1899, and prior thereto, the Kansas City Pittsburg & Gulf Railroad Company, a Missouri corporation, was operating a railroad from Kansas City, Missouri, to Port Arthur, Texas; and under a rental contract, was using the lines, tracks, station houses, yards and depots of the said defendant, the Kansas City Suburban Belt Railroad Company, as its terminals at Kansas City; and was using the canal of the Port Arthur Channel and Dock Company, in Texas, as its southern terminals, so as to get its freight to and from the open sea.

That on April 1, 1899, the said Kansas City, Pittsburg & Gulf Railroad Company, defaulted in the interest on its mortgage bonds, and a suit to foreclose its mortgage on account of said default, was instituted in this honorable court, on the 6th day of April, 1899, and receivers were appointed to operate the road pending the foreclosure.

That a certain number of persons, about that time, got together and appointed themselves as a committee, hereinafter called the Philadelphia Committee, to reorganize the said Kansas City Pittsburg & Gulf Railroad Company, and readjust its securities so that it would thereafter be burdened with a less interest charge and one clearly within its ability to earn; that said Philadelphia Committee, after some resignations and substitutions, was composed of William F.
Harrity, A. Heckscher, Herman Sielcken, William Ed-
708 enborn, Max Pam, Samuel R. Shipley, Silas Petitt, and Winthrop Smith. That the said Philadelphia Committee in pursuance of its said purpose, adopted and published a plan and agreement for the reorganization of the said Kansas City, Pittsburg & Gulf Railroad Company and

the said terminal companies, which provided among other things, for the formation of a new railroad company, which would issue its bonds and stocks in exchange for the bonds and stock of the said Kansas City, Pittsburg & Gulf Railroad Company, and in exchange for the stocks and bonds of the said defendant, the Kansas City Suburban Belt Railroad Company, and the said Port Arthur Channel and Dock Company, in order, as stated in said published plan, "to merge these three corporate managements into one, so that the system shall be capable of operation as a whole, under one management, from Kansas City to the ship's side at Port Arthur;" so that the said new railroad company which would, after the reorganization, own the main line and property of the Kansas City, Pittsburg & Gulf Railroad Company, would also own the bonds and capital stock of the Kansas City Suburban Belt Railroad Company and of the Port Arthur Channel and Dock Company; and that thereby "all three properties would be under one corporate ownership, management and control;" and that the bonds and stock of the said Belt Company and the said Channel Company, so to be bought by the said new company and converted into its own stock and bonds, would be pledged by said new company as security for the bonds to be issued by it.

That the complainant in this cause, The Provident Life & Trust Company, was a party to said plan and agreement of reorganization, and its President, Samuel R. Shipley, was a member of said Philadelphia Committee.

That the said Phildelphia Committee, in the furtherance of its said plan of reorganization, caused the proposed new railroad company to be incorporated under the laws of the state of Missouri, under the name of The Kansas City Southern Railway Company, and placed three of its members
709 on the board of directors of said new company, and two others of its members, one of whom is the said Samuel R. Shipley, president of the complainant aforesaid, on a board of voting trustees, who were to be and are vested with the absolute and unlimited power of voting all of the stock of the said Kansas City Southern Railway Company for the next five years.

That this defendant has not a copy of said published plan and agreement of reorganization, which it can file with this answer, but states that both the complainant and defendant, the Kansas City Suburban Belt Railroad Company, have

copies of said plan and agreement, and are fully advised as to the contents thereof; and this defendant asks leave to hereafter file copy of said plan and agreement for the information of your Honors, if and when desired.

That the said Philadelphia Committee, for and on behalf of the said Kansas City Southern Railway Company, as well as on its own ccount, did invite and request the owners and holders of the stock and bonds of the said Kansas City, Pittsburg & Gulf Railroad Company, the Port Arthur Channel & Dock Company, the said Consolidated Terminal Railway Company, and the said Kansas City Suburban Belt Railroad Company, to deposit their said stock and bonds with The Provident Life and Trust Company, the above named complainant, and to receive in payment therefor the stock and bonds of the said Kansas City Southern Railway Company, at a ratio prescribed in said published plan.

That in response to said invitation and request, the respective owners and holders of the stock and bonds of all of said companies, and particularly of said defendant, Consolidated Terminal Railway Company, and the Kansas City Suburban Belt Railroad Company, did deposit with said complainant, The Provident Life and Trust Company, for the purpose of converting them into the stock and bonds of said Kansas City Southern Railway Company, to the end that the said purposes of said reorganization plan might become effective and be carried out, their said stocks and bonds in sufficient
710 quantities to enable said Philadelphia Committee to consummate its said plan of reorganization; and the same was thereupon declared effective and carried out as proposed.

This defendant further answering, states that the owners and holders of the stock of the Kansas City Suburban Belt Railroad Company, and of the bonds of said Consolidated Terminal Railway Company, in response to such invitation and request, did deposit with the complainant, The Provident Life and Trust Company, of Philadelphia, seven hundred and thirty-four (734) bonds out of a total issue of seven hundred and fifty (750) bonds of the said Terminal Company; and forty-six thousand nine hundred and sixty (46,960) shares of stock out of a total issue of forty-seven thousand five hundred (47,500) shares, of the Kansas City Suburban Belt Railroad Company; that the said complainant, for and on behalf of said Kansas City Southern Railway Company, did pay for said stock and bonds so deposited with it as aforesaid in the stock and bonds of said Kansas City

Southern Railway Company, and did duly deliver the said stock and bonds so purchased to the last named company, who then and thereby became the holder of the said stock and bonds, for the purposes expressed in the said plan of reorganization, namely, for the purpose of merging the railroads, and properties of the said Kansas City, Pittsburg & Gulf Railroad Company, the said Kansas City Suburban Belt Railroad Company including said Terminal Company, and the Port Arthur Channel and Dock Company, into one ownership, management and control, to-wit: into the ownership, management and control of the said Kansas City Southern Railway Company and for no other purpose whatsoever.

That after having so acquired and converted the said stock and bonds, the said Kansas City Southern Railway Company lodged them with the Mercantile Trust Company, of New York, one of the trustees of its mortgage, as collateral security for its bonds, where they are now held for that purpose and no other.

This defendant, further answering, states that after
711 the said Kansas City Southern Railway Company, had so acquired the said bonds and the stock of the said defendant, the Kansas City Suburban Belt Railroad Company, which was substantially all of said stock and bonds, and had converted the same to its own stock and bonds, and had pledged them as collateral security as aforesaid, to-wit: on or about the first of April, 1900, a majority of the then directors and officers of the Kansas City Suburban Belt Railroad Company resigned their respective offices, and persons who were directors, officers and agents of the said Kansas City Southern Railway Company. were chosen in their stead, so that from that time ever since, the said Kansas City Southern Railway Company and the said Philadelphia Committee have had and exercised the full and unrestrained control, direction and management of all the corporate affairs of the said defendant, the Kansas City Suburban Belt Railroad Company.

That on or about the said first day of April, 1900, said Kansas City Southern Railway Company in pursuance of the said plan of reorganization, took actual possession of all the railroad, tracks, shops, depots, station houses, rolling stock and other equipment and appliances of said defendant, the Kansas City Suburban Belt Railroad Company, including the said Terminal Railroad, and has ever since that time been, and still is, managing, controlling and operating the same, and receiving and (collecting) all the earnings and income thereof.

This defendant further answering, states that it was a part of the plan and agreement of reorganization that the said Philadelphia Committee should cause a syndicate of capitalists to be formed, who would buy enough of the stock and bonds of the said Kansas City Southern Railway Company which would not be needed to retire and convert the stock and bonds of the old companies sought to be unified, and pay off and discharge all of the floating or unsecured debts and obligations of all of the old companies including those of the said defendant, the Kansas City Suburban Belt Railroad Company; that said part of said plan was carried out to the extent that such a syndicate was formed and enough of
712 the securities of the Kansas City Southern Railway Company were sold to said syndicate to provide money to satisfy and discharge all the floating and unsecured debts and obligations of all of said companies so sought to be united under the ownership and control of the said Kansas City Southern Railway Company, including all the floating and unsecured debts of the said defendant, the Kansas City Suburban Belt Railroad Company; but the said Philadelphia Committee and the said Kansas City Southern Railway Company, which it controls, have wrongfully withheld said money, and have unlawfully and fraudulently failed and refused to apply the same to the purposes for which it was raised, to-wit: to the payment of the said floating and unsecured debts and obligations of the defendant, the Kansas City Suburban Belt Railroad Company, and the other old companies, so amalgamated as aforesaid under the said plan of reorganization.

This defendant, further answering, states and shows that one Max Pam, of Chicago, Illinois, was and is a member of said Philadelphia Committee and was and is also a member of the board of directors of the said Kansas City Southern Railway Company and a member of its executive committee; that the said Max Pam was and is the general counsel and legal adviser of the said Philadelphia Committee and the general counsel and legal adviser of the said Kansas City Southern Railway Company, and was and is also the general counsel and legal adviser of the said defendant, the Kansas City Suburban Belt Railroad Company, and as such had and has the general supervision, direction and control of the affairs and legal proceedings of said Philadelphia Committee and of both of said last named railroad companies, including the question as to which of their debts, if any, they should pay, and which of their debts they should avoid or escape the payment of, and of the legal proceedings necessary to ac-

complish the avoidance or escape of the payment of such debts.

That C. W. Lucas, who entered the appearance of the said defendant, the Kansas City Suburban Belt Railroad
713 Company, in this court, in this cause, and who—on its behalf—consented to the appointment of receivers of its property is an appointee of the said Max Pam, as an assistant attorney for the said Kansas City Southern Railway Company, and the said defendant, the Kansas City Suburban Belt Railroad Company, and his salary is fixed by, and is dependent upon the wishes and word of the said Pam; and that his said action in appearing for said defendant and consenting to the appointment of receivers was in obedience to the direction of the said Max Pam, and in accordance with the wishes and for the furtherance of a fraudulent purpose wrongfully and wickedly conceived by the said Philadelphia Committee, the Kansas City Southern Railway Company, and the defendant, the Kansas City Suburban Belt Railroad Company, to avoid and escape the payment of the unsecured debts of the said defendant by means of the fraudulent and collusive practice and proceedings hereinafter stated.

This defendant further answering, states and shows that the said defendant, the Kansas City Suburban Belt Railroad Company, never at any time prior to its said absorption by and amalgamation with the said Kansas City Southern Railway Company, made any default in the payment of the installments of interest on any of its said bonds; and that it is wholly untrue, as alleged in the said bill of complaint, that the said defendant made default in the payment of eighteen hundred and fifty dollars ($1850) of said interest maturing on August 1st, 1899, upon any presentation or demand for said interest; that upon the contrary, all of the interest coupons maturing on any of said bonds on August 1st, 1899, which were properly presented at the specified place for payment were paid and satisfied—all of which was well known to both the complainant herein and the defendant, the Kansas City Suburban Belt Railroad Company, prior to and at the time of filing the bill of complaint in this cause.

That by the reason of the facts that the said Kansas City Southern Railway Company, prior to February 1st,
714 1900, owned and still owns seven hundred and thirty-four (734) of said bonds, and owns all or substantially all, of the stock of the Kansas City Suburban Belt Railroad Company and has deposited the same with the said Mercantile Trust Company as collateral security to the bonds

issued by the said Southern Railway Company, to be held by said pledgee until default be made in the payment of the interest on the bonds issued by the said Southern Railway Company, and that no default has been made in respect of said Southern Railway Company's bonds; and that said Southern Railway Company has been, and is in the possession, control and active operation of all of the railroad and other property of the said defendant, Kansas City Suburban Belt Railroad Company, receiving the earnings and income thereof as aforesaid—there was not and could not have been any such default in the payment of said interest maturing on February 1st, 1900, or August 1st, 1900, on said seven hundred and thirty-four (734) bonds, as would entitle the said Kansas City Southern Railway Company, as the holder of said bonds and coupons, or the said complainant, at its request, to a foreclosure of said mortgage.

This defendant further answering, states and shows to the court that by reason of the fact that the said Kansas City Southern Railway Company and the said Philadelphia Committee completely dominate, control and direct the action of the defendant, the Kansas City Suburban Belt Railroad Company, the said Kansas City Southern Railway Company, whenever it suits its pleasure or purposes to do so, puts into the treasury of the Kansas City Suburban Belt Railroad Company whatever moneys it desires to put in; and whenever it suits its pleasure or purposes, it takes out of the treasury of said Belt Railroad Company whatever moneys it sees fit, and applies the same to whatever purposes it desires—so that the said defendant, the Kansas City Suburban Belt Railroad Company is not left free to pay the debts and obligations which it owes, including the interest on the said bonds, as well as the debts due to its unsecured creditors, but must and does act, in respect to any and all of said
715 interest and debts—as the said Kansas City Southern Railway Company and the said Philadelphia Committee desire and direct it to act.

That the income and earnings of the said defendant, the Kansas City Suburban Belt Railroad Company, over and above its operating expenses and taxes, have been and are amply sufficient to promptly meet all of the interest on all of its bonded indebtedness; and if there was or could have been a default in the payment of all or any of the interest on any of said bonds on February 1st or August 1, 1900, said default was purposely, fraudulently and collusively made by the said defendant, the Kansas City Suburban Belt Railroad Company at the dictation and direction of the said Philadel-

phia Committee and the Kansas City Southern Railway Company, who dominate, control and direct its actions, as aforesaid, by unlawfully and fraudulently withholding the earnings properly applicable to the payment thereof.

This defendant further answering states and shows that for the fraudulent purpose of avoiding payment of the floating and unsecured indebtedness of the said defendant, the Kansas City Suburban Belt Railroad Company, the said Kansas City Southern Railway Company and the said Philadelphia Committee, and the said defendant, the Kansas City Suburban Belt Railroad Company, being so dominated, directed and controlled as aforesaid, fraudulently and collusively conspired to make and establish a default in the payment of the interest on said bonds, and to bring about an apparent declaration of the maturity of the principal thereof; and thereafter, to deceive the court into assisting them to defraud said unsecured creditors, caused the said suit to be instituted to foreclose the said mortgage, so as to cut out and defeat the creditors of the said defendant, the Kansas City Suburban Belt Railroad Company, whose debts are unsecured; and that the said complainant, on account of its intimate connection with and interest in their affairs, willingly consented to become a party thereto and a participant therein; but this defendant states and shows that the said
716 alleged defaults in the payment of the interest on said bonds, and the alleged declaration of the maturity of the principal thereof, were false and fictitious, and colorable only, and were brought about by the fraudulent and collusive acts of the said complainant, and of the said defendant, Belt Company, at the direction and suggestion of the said Kansas City Southern Railway Company, and the Philadelphia Committee, for the fraudulent purpose aforesaid.

This defendant further states and shows that the defendant, the Kansas City Suburban Belt Railroad Company, by reason of its being dominated and controlled by the said Kansas City Southern Railway Company, and by the said Philadelphia Committee, will not, in good faith, resist or defend against the foreclosure of the said mortgage, but will fraudulently and collusively consent and permit the said fictitious and colorable defaults and breaches of said mortgage to pass before the court unchallenged, to the end that the relief prayed for by the bill of complaint in this cause may be granted and that the fraudulent purposes aforesaid may be carried out and consummated.

All of which this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and to the end that the fraudulent and collusive purposes aforesaid may be prevented, hereby prays that it may be allowed to aver, maintain and prove them, on its own behalf, as well as on behalf of any other unsecured creditors of the said defendant, the Kansas City Suburban Belt Railroad Company, who may be willing to join herein and share the expense hereof; and hereby prays that the said bill of complaint may be dismissed and that this defendant may have and recover its costs and expenses incurred in making the defense.

GUARDIAN TRUST COMPANY,
By Wing & Chadbourne,
Trimble & Braley,
Its Solicitors.

Filed November 5, 1900.

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717 J. C. ROSENBERGER, resuming the stand on behalf of the Guardian Trust Company, further testified in substance as follows:

This is relating to Items Nos. 441 to 444 in the account, the Wollman, Solomon & Cooper items: at the time I was employed in December, 1904, by Mr. Mecartney to assist him in the Guardian Trust Company-Cambria-Kansas City Suburban Belt litigation, there was turned over to me and I was put in charge of a matter known as the $132,000.00 switching charge item, which up to that time had been in charge of Wollman, Solomon & Cooper. The general nature of that matter was this:

Shortly before receivers were appointed, in April, 1899, for the Kansas City Suburban Belt Railroad Company, being indebted to the Guardian Trust Company—an indebtedness involved in this Cambria suit—transferred and assigned to the Guardian Trust Company as collateral security for that indebtedness an open account or bill held by the Suburban Belt Railroad Company against the Kansas City, Pittsburg & Gulf Railroad Company in amount $132,628.60 for terminal facilities and switching services rendered by the Belt Company to the Pittsburg & Gulf Railroad Company and for labor and material furnised by the Belt Company to the Pittsburg & Gulf. That assignment made by the Belt Company to the Trust Company was in writing. When receivers were appointed for the Pittsburg & Gulf in April, 1899, the Trust Company, to protect and safeguard this 132 odd

thousand dollar claim, filed an intervention in the Pittsburg & Gulf receivership, the object and purpose of which was to declare their claim for switching and terminal facilities, and so forth preferential over the general mortgage of the Pittsburg & Gulf Railroad Company, upon the theory that the Gulf Company had no entrance or terminal facilities into Kansas City and was dependent wholly upon the Suburban Belt for terminal facilities and that the services rendered and material furnished mentioned in the Belt Company's bill or account were necessary to keep the Gulf Company in operation and to enable it to perform its public obligations.

718 That was one branch of the controversy.

This Cambria litigation commenced on September 6, 1900. In 1905 the Southern Company filed its intervening petition in the Cambria suit which, among other things, sought to deprive the Guardian Trust Company of that bill or claim for 132 odd thousand dollars. The theory of the Southern Company's petition being, that as the successor company to the Kansas City Suburban Belt Railroad Company it had acquired all of the rights and equities of the Suburban Belt Company and that in the reorganization the Southern Company had acquired all of the bonds of the Kansas City Suburban Belt Railroad Company and was, in effect, the sole bondholder of the Belt Company and that as such and as the purchaser at the foreclosure sale of the Belt Railroad Company and its constituent railroad companies, it became entitled to assert all of the rights of the mortgagees in the general mortgage of the Belt Company. It claimed further that this item of $132,000.00. switching charges, came within the lien of the after acquired property clause of the Belt mortgage and that being subject to their lien the rights of the Southern Company were prior in law and superior in equity to that of the Guardian Trust Company and that the Guardian Trust Company should be required to surrender and turn over their claim to the Southern Company and should be divested of its interest therein. Now that was the controversy.

As I have already indicated, insofar as the Trust Company was seeking a preferential lien over bondholders in the Pittsburg & Gulf receivership that matter was wholly in charge of Wollman, Solomon & Cooper and when I was employed they conferred with me and turned over some papers in the matter, such as they had, and I find in my files a duplicate original of an amended and supplemental intervening petition of the Guardian Trust Company as assignee of the claim of the

Kansas City Suburban Belt Railroad Company above referred to filed in the Pittsburg & Gulf receivership case.

719 Mr. Rosenberger: My recollection is it was filed June 8, 1900.

The Master: No file mark on it?

Mr. Rosenberger: This is not the original; that is in the court. If desired the original can be substituted.

Mr. Smith: We will agree on that date if you say that is the date.

The Master: Do you say that is the date?

Mr. Rosenberger: I can only give my recollection on it. I have a memorandum on the copy here showing "Filed July 6, 1900."

Mr. Smith: That is satisfactory to me. If the correct date is hereafter ascertained to be different you can correct it.

The Master: Yes. That is offered in evidence?

Mr. Rosenberger: Yes.

Said duplicate original of an amended and supplemental intervening petition of the Guardian Trust Company as assignee of the claim of the Kansas City Suburban Belt Railroad Company, is received in evidence by the Master, and is in words and figures as follows, to-wit:

Amended and Supplemental Intervening Petition of the Guardian Trust Company, Assignee of the Claim of the Kansas City Suburban Belt Railroad Company.

"In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

The State Trust Company, Complainant,
No. 2331 vs. In Equity.
Kansas City, Pittsburg & Gulf Railroad Company, Missouri, Kansas & Texas Trust Company, Texarkana & Fort Smith Railway Company, Kansas City, Shreveport & Gulf Railway Company, and Kansas City Southern Railway Company, Defendants.

The amended and supplemental petition of the Guardian Trust Company, assignee of the claim, demand and intervening petition of the Kansas City Suburban Belt Railroad Company, filed herein, respectfully shows to the court as follows:

First. That since the filing of the original intervening petition of the Kansas City Suburban Belt Railroad Company, in the above entitled cause, the claim, demand, account and cause of action, and all rights thereunder, of the said Kansas City Suburban Belt Railroad Company, have been duly and legally transferred, assigned and set over for a good, valuable and sufficient consideration, to the Guardian Trust Company, a corporation duly organized, created and existing under and by virtue of the laws of the State of Missouri, and which said assignment and transfer was duly made by said Kansas City Suburban Belt Railroad Company by its duly authorized President and Secretary, and which transfer and assignment fully cover the accounts, claims, demands and cause of action set forth in said intervening petition against the Kansas City, Pittsburg & Gulf Railroad Company, and which assignment was a writing, a copy of which is hereto attached, marked "Exhibit A" and made a part of this petition.

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Second. Said intervener repeats and adopts each and all of the allegations and averments set forth and contained in the intervening petition of the Kansas City Suburban Belt Railroad Company except the averment that said Kansas City Suburban Belt Railroad Company is now the owner of said claim and demand, and respectfully asks that said intervening pettiion of the Kansas City Suburban Belt Railroad Company may be herein referred to as a part of this amended and supplemntal intervening petition of the Guardian Trust Company.

Third. Your orator shows to the court that on the Fifth (5th) day of February, 1900, the final decree of foreclosure and sale was entered in said action, and by the terms and provisions of Subdivisions Four (4) and Five (5) of Section Fifteen (15) of said decree, it was ordered: '(4) That any unpaid indebtedness or liability contracted or incurred by said Kansas City, Pittsburg & Gulf Railroad Company in the operation of its railroad, payment whereof was provided for in Paragraph Six (6) of the order appointing the Receivers herein, and which is prior in lien or superior in equity to the said mortgage of April 1st, 1893, upon its being finally adjudged to be thus prior in lien or superior in equity to said mortgage, and directing the payment thereof—'

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'(5) Any unpaid indebtedness or liability contracted or incurred by said Kansas City, Pittsburg and Gulf Railroad

Company, which may be finally found and decreed to be prior in lien or superior in equity to said mortgage of April 1st, 1893, and all payments made upon such claims by the purchaser or purchasers in advance of the final accounting and discharge of the Receivers, shall be treated as advances by him or them in the final adjustment, upon such accounting.'

That Subdivision Three (3) of Section Twenty-one (21) of said decree, with respect to the distribution of the proceeds of sale, is as follows: '(3) To the payment of the claims of the classes specified in Subdivision Four (4) and Five (5) of Paragraph Fifteen (15) hereof reference is here made.' And your orator prays leave to refer to the whole of said decree as entered in said cause, with like effect as though the same were literally copied herein.

Fourth. Your petitioner further shows that under said foreclosure proceedings, the said Kansas City, Pittsburg and Gulf Railroad and all its property, both real and personal, were duly sold under the order of this Court, and that the sale of said property of said Kansas City, Pittsburg and Gulf Railroad Company covered by the mortgage or deed of trust set forth in the bill of complaint filed herein, took place at the City of Joplin, State of Missouri, on the 19th day of March, 1900, said sale being conducted by Special Master appointed by this court, Edward H. Stiles.

At the instance of the reorganization committee which had been theretofore formed, and which was familiarly known as the Philadelphia Committee and located in the City of Philadelphia, Pennsylvania, certain of its members bought in the property covered by said mortgage for the sum of Two Million, Five Hundred Thousand Dollars ($2,500,000.00). That said bid was immediately thereafter assigned and set over by said purchasers to the Kansas City Southern Rail-
722 way Company—a company which the reorganization committee had caused to be organized under the laws of the State of Missouri, in pursuance of a general plan and purpose, with a capital stock of Fifty-one Million Dollars ($51,000,000) Twenty-one Million Dollars ($21,000,000.00) preferred stock and Thirty Million ($30,000,000) common stock—the shares being of the par value of One Hundred Dollars ($100) each.

That thereupon, upon the report of said Master, and to-wit, on the 20th day of March, 1900, said sale was confirmed, and said Special Master directed by said court to make a deed pursuant to said foreclosure and sale to said Kansas City

Southern Railway Company, which has undertaken and intends to carry out the said reorganization plan of said Philadelphia Committee, by the issuance of its bonds and stocks according to said plan.

That the purchase price of said road at said foreclosure sale was settled by the delivering of about Twenty-three Million Dollars ($23,000,000) of bonded indebtedness of said Kansas City, Pittsburg and Gulf Railroad Company, and the further payment of Thirty-eight Thousand Dollars ($38,000) supposed to be sufficient to pay the holders of the bonds who had not deposited their bonds with said Reorganization Committee their proportionate share of the purchase price of said road.

That a Master's deed has been made to the Kansas City Southern Railway Company, as decreed by this court, and said sale has been confirmed, and said Kansas City Southern Railway Company has entered its appearance in this cause, and has been ordered to be and has been made a party to the same.

Fifth. Your petitioner further avers that under the plan or reorganization hereinbefore referred to, Three Million, Five Hundred Thousand Dollars ($3,500,000) in money has been provided for the treasury of said new company,
723 by the sale of Three Million Dollars ($3,000,000) of the First Mortgage Three Per Cent Bonds and Three Million Dollars ($3,000,000) preferred stock, and from Ten Dollars ($10) per share paid by the stockholders of the Kansas City, Pittsburg and Gulf Railroad, the sum of Two Million, Four Hundred Thousand Dollars ($2,400,00) has been realized—making a total sum of Five Million, Nine Hundred Thousand Dollars ($5,900,000).

That the reorganization plan contemplated and provided for the payment, among other things, of the floating debt of said Kansas City, Pittsburg & Gulf Railroad, of which the said supplies furnished by your petitioner and used in the maintenance and operation of said road, and also all traffic balances due to the said Kansas City, Suburban road, and also all traffic balances due to the said Kansas City Suburban Belt Railroad Company, and terminal facilities furnished the said Kansas City, Pittsburg and Gulf Railroad Company, and the use of the locomotives and cars and the tracks of the Kansas City Suburban Belt Railroad Company, and the joint use by said Kansas City, Pittsburg and Gulf Railroad Company of the employes, warehouses, freight

depots, station houses, lunch rooms and other facilities, and other things furnished and paid for the said Kansas City, Pittsburg and Gulf Railroad Company, as fully set forth in said intervening petition, from a part. That the purposes for which said sum of money was to be used, was set forth in said plan and agreement, as follows:

'For the payment of car trusts and interest, adjusted to date of payment, say	$1,900,000.00
'For payment of Floating Debt	475,000.00
'For payment of Receivers' Certificates	800,000.00
'For payment of First Mortgage Coupons due April 1, 1899	575,000.00
'Working Capital and expenses of reorganization	2,150,000.00
Total	$5,900,000.00

That the sum and amount set forth in claim in the intervening petition of the Kansas City Suburban Belt Railroad Company herein, together with the exhibits thereto attached, are here referred to, with the same effect as if they were incorporated herein.

724 Sixth. Your petitioner further shows to the court that the said Kansas City Southern Railway Company has obligated itself and intends to and will carry out and execute the said reorganization plan by the issuance of said bonds and stock to the various parties in interest as set forth in the same; but your petitioner avers that it would be inequitable and unjust, under the circumstances herein set forth, that your petitioner should not be paid the amount of the indebtedness held by your petitioner against the said Kansas City, Pittsburg and Gulf Railroad Company, the same being a preferential claim; yet the said reorganization committee and said Kansas City Southern Railway Company have not paid to your petitioner said sums of money set forth in said intervening petitions, or any part thereof, and has not as yet acknowledged that the same should be paid, or promised to pay same within a reasonable length of time, although equitably and justly, as well as specifically bound so to do.

Your petitioner here refers to the published and printed plan or agreement of said Philadelphia Reorganization Committee, and prays leavve to refer to the same [within] the

same effect as if it were incorporated herein, and prays that it may be used by your petitioner as part of this amended and supplemental petition, and with the same effect as though literally and wholly copied herein.

Your petitioner further shows that the foreclosure proceedings so had in the above entitled cause, were for the benefit alone of the bondholders and stockholders of the said Kansas City, Pittsburg and Gulf Railroad Company, and under an agreement between the two, for the sale and purchase for both, with a view of thereby excluding from any interest in the property of the Kansas City, Pittsburg and Gulf Railroad Company all unsecured creditors. That the said Kansas City, Pittsburg and Gulf Railroad Company, before the foreclosure and sale of said railroad and its appurtenances, was largely indebted to divers unsecured creditors, including the claim of your intervening petitioner the amount of which unsecured indebtedness this your petitioner is unable to state, but is advised and informed, and verily believes that the same far exceeds Four Hundred and Fifty Thousand Dollars ($450,000).

And your petitioner further shows that the said bondholders of the Kansas City, Pittsburg and Gulf Railroad Company, and the said Kansas City, Pittsburg and Gulf Railroad Company, through its stockholders, entered into an arrangement or agreement, as set forth in said reorganization plan, for the purpose of procuring the sale of the said property of the said Railroad Company and its purchase by and in behalf of the parties entering into such combination and reorganization thereof, and the issuing of stock to said parties, including said stockholders, without the payment of the debts and liabilities of said company, and for the purpose of hindering and delaying the said creditors, and with a view to prevent the collection or enforcement of such debts and liabilities; and that the said decree of sale was obtained by the said Kansas City, Pittsburg and Gulf Railroad Company and the said bondholders, in order to carry out such unlawful purpose, and to prevent the general or unsecured creditors of the said company from having an opportunity to be heard on the matters arising in said cause.

That the total amount of the claim as set forth in the original intervening petition of the Kansas City Suburban Belt Railroad Company, and as set forth in the exhibits thereto attached—all of which has been duly assigned and transferred to your petitioner, the Guardian Trust Company,

amounts to One Hundred and Thirty-two Thousand, Eight Hundred and Five and 44/100 Dollars ($132,805.44).

Wherefore, your petitioner prays that a decree and order be entered and made in this court, in said cause, ordering and directing that there be paid to your petitioner, out of the funds now or heretofore in the hands of said Receivers, or out of any funds realized from the sale of said property covered by said mortgage, or by the said Kansas City Southern railway Company out of its treasury or funds in
726 its hands, a sum sufficient to pay the amount of the claim and demand of the said Guardian Trust Company, assignee as aforesaid of said indebtedness, with interest thereon from the date of the respective accounts and the performance of the services and the receipt of the benefits as there alleged, amounting to the said sum of One Hundred and Thirty-two Thousand, Eight Hundred and Five and 44/100 Dollars ($132,805.44), and for such other and further relief as it may be entitled to in equity and good conscience.

WOLLMAN, SOLOMON & COOPER,
Solicitors for Guardian Trust Company, Waterworks Bldg., Kansas City, Mo."

Mr. Rosenberger: I wish to refer to Paragraph Six of the report of the Special Master Douglass in the Cambria Steel Company case, appearing on pages 896 and following of the record on appeal in Appeal No. 3489, in the United States Circuit Court of Appeals, 8th Circuit, in the case entitled "Central Improvement Company et al, appellants, vs. Cambria Steel Company, et al, appellees, and want to direct the special attention of the Master to it.

Said sixth paragraph of the report of Special Master Douglass in the Cambria Steel Company case was thereupon read to the Master by Mr. Rosenberger.

On cross examination by Mr. Smith, Mr. Rosenberger testified, in substance, as follows:

Mr. Smith: Mr. Rosenberger, do I understand you to say that this claim had been assigned by the Belt Company to the Trust Company prior to the appointment of receivers of the Pittsburg & Gulf Company?

Mr. Rosenberger: If I did so testify, I was mistaken about it. It was assigned after receivers were appointed for the Gulf Company.

Mr. Smith: Well, it was almost a year afterwards—wasn't it?

Mr. Rosenberger: That may be true.

Mr. Smith: When was it ascertained this claim amounted to $132,000.00?

727 Mr. Smith: When the Grannis case was filed on April 1, 1899, it was stated in that petition that the Pittsburg & Gulf was indebted to the Belt Company in the sum of $20,000.00.

Mr. Rosenberger: Well, I am sure that it would be impossible for me to answer any such question as that, because I had nothing to do with the Grannis case. The fact probably is, however, that this claim against the Gulf Company arose largely after the appointment of receivers for the Gulf Company and grew to its proportions that it had at the time it was assigned to the Trust Company by the Belt Company by the time the assignment was made. As I understand it, the Gulf Company after receivers were appointed quit paying its bills for terminal facilities.

Mr. Smith: Receivers were appointed April 1st, weren't they?

Mr. Rosenberger: If, as I stated, they were appointed in April, 1899, they naturally were.

Mr. Smith: This intervening petition was originally filed by the Belt Company itself, wasn't it?

Mr. Rosenberger: I am unable to tell you that.

Mr. Smith: And that claim was originally filed May 19, 1899?

Mr. Rosenberger: Well, I want you to carefully distinguish what you mean by "that" claim. If you speak of the claim filed by the Guardian Trust Company, of course, that was not filed by the Belt Company. The Belt Company may have undertaken to appropriate that claim by filing an intervening petition in its own behalf. What that petition was, I don't know anything about; had nothing to do with it.

Mr. Smith: Isn't it a fact if there was such a claim the Belt Company owned it on May 19, 1899?

Mr. Rosenberger: If that was before the date of the assignment of the claim to the Trust Company, of course, the Belt Company owned it at that time.

Mr. Smith: Isn't it a fact that the Belt Company originally filed this intervening petition and filed it on May 19, 1899?

728 Mr. Rosenberger: No, it is not so at all. I don't mean to imply the Belt Company didn't file some intervening petition in the Pittsburg & Gulf receivership; but I claim it did not set forth its claims in either manner or form as afterwards asserted by the Trust Company.

Mr. Smith: You misunderstand me; I am talking about this $132,000.00 claim; was that claim originally an intervening petition filed by the Belt Company against the Pittsburg & Gulf? Don't you remember that?

Mr. Rosenberger: I answer no, with this explanation: I have an impression that before the Belt Company assigned that claim of $132,000.00, which it held against the Gulf Company, to the Trust Company that the Belt Company itself asserted in the Gulf receivership suit priority over bondholders for that claim. But after the Belt Company assigned the claim to the Trust Company as collateral security the Trust Company proceeded in its own behalf and in its own way to assert that priority.

Mr. Smith: By independent intervention?

Mr. Rosenberger: By independent intervention.

Mr. Smith: Now don't you know, Mr. Rosenberger, that the history of that thing was that the Belt Company filed its claim on the 19th day of May, 1899, and that this claim was assigned by the Belt Company to the Trust Company about February 1, 1900, as collateral security for this claimed indebtedness of the Trust Company against the Belt Company, and that thereafter sometime prior to March 2, 1900, the Trust Company filed a petition to be substituted as intervener in place of the Belt Company?

Mr. Rosenberger: That is possibly true, but that is not inconsistent with what I have said.

Mr. Smith: I am just asking you if that is not the fact?

Mr. Rosenberger: I think that is true.

Mr. Smith: All of these claims, I mean all these intervening petitions in reference to this claim, were filed prior to July 4, 1900?

Mr. Rosenberger: No; the pleadings were amended a
729 number of times subsequently to the filing of the Cambria suit on September 6, 1900.

Mr. Smith: Didn't you just offer in evidence here—

Mr. Smith: Let me object to this answer and I will withdraw my question, if necessary to do it, because I don't want to go into any other pleadings.

Mr. Smith: What I am getting at is this: this original petition, which was filed May 19, 1899, and the substitution of the Trust Company for the Belt Company in that intervening petition and the amended intervening petition you have referred to in your testimony, were all filed on or before July 6, 1900?

Mr. Rosenberger: That is my recollection.

Mr. Smith: I want to ask you a couple of questions that do not have to do with this last matter: At the time the Mecartney case was argued in the Supreme Court of Missouri, Mr. Prescott was not then in charge of the litigation, was he? He had been removed or there had been a receiver appointed, or something had happened, he was not in charge?

Mr. Rosenberger: I will answer that question, subject to my objection to it as being immaterial, that he was not. Mr. Flower had been appointed receiver at the time of the argument of the Mecartney case in the Supreme Court and the counsel who had had charge of the Mecartney suit against the Guardian Trust Company had been Messrs. Gates & English up to the time that Mr. Flower was, on August 31, 1916, appointed receiver; and upon Mr. Flower's receivership commencing he employed Mr. Bowersock and Mr. Charles W. German, who had been attorney for Mr. Prescott in the Shedd case, to appear for and represent the receiver of the Guardian Trust Company in resistance of the Mecartney suit and Messrs. German and Bowersock argued that appeal, with a good deal of ability and vigor, in the Supreme Court sometime in October of 1917.

Mr. Smith: Now at the time of that argument Judge Gates was disabled, was he not, sick, and George English was in France in the army?

Mr. Rosenberger: Neither Judge Gates nor Mr. English participated in that argument. I know nothing about
730 Judge Gates' sickness, but I do know that George English was either in a training camp or abroad at the time in the service.

Mr. Smith: Now in this connection, I want to offer—going back to the Wollman, Solomon & Cooper items,—I want to offer in evidence—the title of a pleading filed by Wollman, Solomon & Cooper, as attorneys for the Guardian Trust Company, the pleadings being entitled: "Petition of Guardian Trust Company, formerly Missouri, Kansas & Texas Trust Company, Trustee, for compensation for its services as such Trustee for Bondholders of the Kansas City, Shreveport & Gulf Railroad Company, and for Services of its Counsel". This petition being filed in the Pittsburg & Gulf receivership case in Kansas City.

Mr. Rosenberger: What date was it filed?

Mr. Smith: March; March 20, 1900. The amount asked for in that case being—

The Master: In that petition?

Mr. Smith: In that petition, I mean; being $5000.00 to the trustee for its services and $2750.00 for services asked for by Trimble & Braley in the foreclosure of the mortgage of the Kansas City, Shreveport & Gulf Railroad Company. And I want to make a similar offer—

The Master: And nothing for Wollman, Solomon & Cooper?

Mr. Smith: I want to show they were attorneys for the Trust Company in that petition.

The Master: The petition contains no prayer, don't claim any allowance for them?

Mr. Smith: Why, no, not at all, except I want to show they were performing other services.

Mr. Rosenberger: I object to so much of the petition as prayed for an allowance to Trimble & Braley, as not having any tendency to show that that service was rendered for the Guardian Trust Company.

Mr. Smith: Well, I just want to show they were rendering this service for the Guardian Trust Company at this time.

Mr. Rosenberger: I want to renew the objection.

731 The Master: The objection will have to be sustained. I supposed you were going to show allowances to Wollman, Solomon & Cooper.

Mr. Smith: No, not offering it for that purpose. I am offering it for the purpose of showing the Guardian Trust Com-

pany as petitioner employed Wollman, Solomon & Cooper as counsel to file a claim for it, and Trimble & Braley, in this Pittsburg & Gulf foreclosure case at Kansas City.

Mr. Rosenberger: My objection to the offer is, that the offer on its face shows that it has no tendency to prove that the Guardian Trust Company employed Wollman, Solomon & Cooper to render any services for Trimble & Braley as attorneys.

The Master: For Trimble & Braley?

Mr. Rosenberger: Yes, sir.

The Master: No, but doesn't it tend to show they were authorized to render service for the Guardian Trust Company at the same time?

Mr. Rosenberger: I am not objecting to that part of it.

The Master: So far as it is offered to show that Wollman, Solomon & Cooper performed other service for the Guardian Trust Company, I will admit it, if it is contemporaneous in date; is it about the time of this other?

Mr. Smith: March 20, 1900, is when this petition was filed.

Mr. Rosenberger: I don't make the objection that it has no tendency to prove no services rendered by Wollman, Solomon & Cooper during the period of Judge Black's and Wash Adams' receivership, being the period for which fees were allowed them and to which our claim for reimbursement is limited.

The Master: Isn't it about the same period?

Mr. Smith: No; the receivership didn't commence until November of 1900, whereas this petition was filed in March, 1900. Judge Thayer's allowance is specially limited to
732 services rendered to Black and Adams, receivers.

The Master: I don't know, the Master is confused. I don't know how I can pass on the objection.

Mr. Rosenberger: Let me explain my objection, if the Master please: by this account we are seeking reimbursement for on amount allowed by Judge Thayer to Wollman, Solomon & Cooper for services rendered to Judge Black and Wash Adams, receivers; their receivership extending from November 30, 1900, to sometime in October, 1902.

The Master: Yes.

Mr. Rosenberger: Now then, counsel offers some pleading filed on behalf of the Trust Company by Wollman, Solomon & Cooper, in March, 1900, which was some six months prior to the appointment of Judge Black and my objection is that has no tendency to prove that services were rendered by Wollman, Solomon & Cooper to the receivers during the receivership.

Mr. Smith: Well, you must remember there are two items in this case; there is the $3500.00 item and the $1500.00 and I am offering this for what it is worth.

The Master: I know, but both during the same period?

Mr. Smith: No, they are not. I am not able to tell you when they rendered their services. I don't think that is my business.

The Master: The items of the account are confined to the period, as I read it, from November 30, 1900, to October 11, 1902.

Mr. Rosenberger: That is the $3500.00 item.

The Master: Both of them?

Mr. Rosenberger: Yes; to Wollman, Solomon & Cooper for full services rendered in matters last aforesaid.

Mr. Smith: No, it doesn't say that, being settlement with them in full to that date. But read the voucher offered in evidence and you will see it doesn't cover that.

The Master: Well, I know; must have been subsequent and prior.

Mr. Rosenberger: Sure, sure.

733 The Master: The objection will be sustained. I don't think any service rendered prior to November 30, 1900, the period from which services for which this claim is made would be competent, even if they had rendered all sorts of service to the Guardian Trust Company.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Smith: May it be understood then I am making a similar offer of the contents, without having it set forth, all of this petition—it is not very long, but unnecessary to do it—showing they filed a similar petition for the Guardian Trust

Company for fees as trustee of the Texas, Arkansas & Fort Smith Railroad Company, filed March 20, 1920; the amount of their trustee's fees asked in that case being $5,000.00.?

Mr. Rosenberger: I make the same objection.

The Master: The objection is sustained for the same reasons.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time excepted.

Mr. Smith: Then again the Guardian Trust Company filed a supplemental and additional claim for allowance of attorney fees of McKeighan, Barclay & Watts in that same case.

The Master: What date?

Mr. Smith: March 20, 1900, also.

Mr. Rosenberger: I make the same objection.

Mr. Smith: That is money they claimed they paid out to their attorneys in the Grannis case and Wollman, Solomon & Cooper represented them in that matter.

The Master: Tme objection is sustained for the same reason.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

734 Mr. Smith: Now I think that is all I have, except one thing: I want Mr. Rosenberger to abdicate as a witness and agree with me as counsel that the decree of foreclosure in the Provident cases, the Consolidated decree, was signed by Judge Thayer and Judge Philips. I don't know as is important but I would like to have it in the record, that is all.

The Master: You will agree to that, Mr. Rosenberger?

Mr. Rosenberger: I think it is before the court without stipulation.

The Master: Well, if it be a fact.

Mr. Rosenberger: But if it be not before the court, I am willing to concede that, although I haven't looked at that decree for a long time. I am practically certain that Mr. Smith is right about that.

Thereupon the Guardian Trust Company rested its case.

Thereupon the Kansas City Southern Railway Company and Cambria Steel Company rested their case.

On Friday, April 25, 1924, at 10:30 o'clock A. M., the Master reopened the case at the request of counsel for the Guardian Trust Company and the following proceedings were had:

Mr. Rosenberger: I would like the Master to state in the record that the recital which now appears on page .... of this transcript to the effect that the Southern Company offered in evidence, Exhibit "B", said exhibit being a certain compilation made by Mr. Jetmore, is not true and that said exhibit was not offered in evidence as thus recited and that this recital was interpolated after the hearing before the Master by the reporter at the request of counsel for the Kansas City Southern Railway Company.

Mr. Smith: The document in evidence was identified by Mr. Jetmore while he was on the stand and he testified in reference to it and it was my belief that it had been offered in evidence. If it were not offered in evidence, it was purely through inadvertence and after the the transcript
735 was made up, I asked Miss Parlin to insert it and sent a copy of the letter requesting such insertion to Mr. Rosenberger and to the Master and the Master telephoned me on receipt of the letter that I would be permitted to have it in the record.

Mr. Rosenberger: What I am complaining of is that if it had been offered, I would have made my objections at the time and if it had been received it would have wholly changed the course of my examination of Mr. Jetmore and caused me to obtain additional evidence on the point Mr. Mr. Smith was endeavoring to prove.

The Master: The Master confirms Mr. Rosenberger's statement and also Mr. Smith's and states that the exhibit was put in the record entirely with his consent and approval on the feeling that its not having been formally offered was a mere inadvertence. The Master further permits Mr. Rosenberger to make and include in the record any objections he may please to make now to that exhibit, but does not deem it of sufficient importance to recall Mr. Jetmore for further examination.

Mr. Rosenberger: And does the Master decline to permit me to rebut the showing made by that tabulation, Exhibit "B"?

The Master: Yes, the Master is going to refuse to permit you to do that, not feeling it of enough importance.

To which ruling of the Master, the Guardian Trust Company duly excepted.

The Master: Now make such objections as you please, Mr. Rosenberger.

Mr. Rosenberger: I object to said Exhibit "B" as not being the best evidence, that the vouchers of the Guardian Trust Company in relation to payments made to Mr. Jetmore spoke for themselves and that the attempt of any witness to place his own construction and interpretation of those vouchers upon them is an invasion of the province of the Master, a mere conclusion and utterly incompetent. I
736 move to strike out the tabulation, Exhibit "B", for all of the reasons stated in my objection.

The foregoing objection was, by the Master, overruled, and the said motion to strike denied, to which rulings the Guardian Trust Company duly excepted.

Mr. Rosenberger: I next ask the Master for an opportunity to prove, and offer to prove, that by the orders and decrees of the court in this Cambria case, it was ordered that the stenographer's fees and Master's fees and, in fact, all costs should be advanced during the progress of the case, as follows:

That the Cambria Company should advance one-third; that the Kansas City Southern Railway Company or Kansas City Suburban Belt Railroad Company should advance one-third and that the Guardian Trust Company should advance one-third during the progress of the case; that Mr. Jetmore in doing the work of the reporter took the work upon the understanding that he would furnish the Master's copy for Master Douglass free of charge; and that one copy would be furnished to the Guardian Trust Company and one copy to the Southern Company, or Belt Company; and the other copy to counsel for the Cambria Company and that that course was pursued so long as Mr. Hagerman was actively in the case.

And afterwards when Mr. Hagerman retired from the case all pretense that the Cambria Company was any real party to the suit ended and from that time on the Cambria Company's copy was delivered to the Kansas City Southern Railway Company, so that the Kansas City Southern Company got two copies of the record and the Guardian Trust Company got one copy of the record.

And we offer further to show that Mr. Jetmore's charge and bills throughout were made pursuant to the arrangement on the basis of a charge of fifty cents per page for transcript and that two-thirds of that amount was charged to the Kansas City Southern Railway Company by him and col-
737 lected by him; the other one-third from the Guardian Trust Company and that in that charge of fifty cents per page was absorbed by Mr. Jetmore the cost of making a copy for the Master; and I offer further to show by Mr. Jetmore that when he by his bills referred to the copy for which he collected from the Guardian Trust Company as a carbon copy that that was solely because he was at the time delivering a carbon copy and was not made in the light of the arrangement made for the advancement of these costs as ordered by the court. I offer further to show that pursuant to the order made by the court that costs should be advanced during the progress of the cause, one-third by the Guardian Trust Company, two-thirds by the other party, that in making of allowances to Special Master Douglass one-third of such proposed payments were ordered to be paid by the Guardian Trust Company and two-thirds by the other party and that consistent with this arrangement and in the final decree in the Cambria case, the costs of the litigation were taxed one-third to the Guardian Trust Company and two-thirds to the other parties, the final decree referred to being final decree of 1910, afterwards reversed on appeal.

Mr. Smith: I would like to ask Mr. Rosenberger by whom he intends to make this offer of proof?

Mr. Rosenberger: I offer to prove it, first, by Mr. Jetmore; second, I offer to prove it by the vouchers in possession of the Kansas City Southern Railway Company to which are attached Mr. Jetmore's bills.

Mr. Smith: If there is any question, if your Honor please, or any means of evidence by which Mr. Rosenberger can establish this offer of proof, I think the case ought to be opened and let him do it so far as applies to anything except Mr. Jetmore. So far as concerns Mr. Jetmore, Mr. Jetmore was asked here on the witness stand about the very thing Mr. Rosenberger is talking about and he testified directly contrary to the statements made. Mr. Rosenberger makes an intimation of some sort of stipulation or order of rec-
738 ord as regards these costs to be paid otherwise than as Mr. Jetmore has testified and I demand if there is any evidence of that kind he ought to have produced it and as he has not produced it, that he be given opportunity to produce it right now.

Mr. Rosenberger: Well, by some oversight, these vouchers don't seem to be copies in this transcript; merely because admitted by Mr. Smith that the reporter didn't copy them in the record, I want them copied in the record, being vouchers numbers 957, 2324 and 2726, referred to in Items 1, 2 and 3 of the statement of account being heard by the Master.

The Master: 1, 2 and 3, those are admitted items.

Mr. Rosenberger: They were admitted, but I don't suppose they have slipped out of the record. I want them in the record; I want to show this whole thing.

The Master: All right; those vouchers, the reporter is instructed to put them in.

Voucher No. 957, covering Item No. 1, so admitted in evidence by the Master, is a receipted statement from Shannon C. Douglass to the Guardian Trust Company, dated Sept. 18, 1905, reciting the payment of $2,000.00 as one-third of the provisional allowance made by the United States Circuit Court to Judge Douglass for services as Special Master in the Kansas City Suburban Belt case.

Attached to said voucher are the following letters and documents:

"J. C. Rosenberger
Attorney and Counselor at Law,
Suite 403 N. Y. Life Bldg.,
Kansas City, Missouri.
Telephone Main 2803.

September 18, 1905.

Mr. C. W. Hastings,
Treas. Guardian Trust Co.,
City.

Dear Sir:

To hand yours of the 18th inst., enclosing Trust Company's check and voucher for $2000 to the order of Shannon
739 C. Douglass, Special Master. Your check has been delivered to Judge Douglass and and the voucher duly receipted is herewith returned to you.

Yours very truly,

J. C. ROSENBERGER."

"J. C. Rosenberger,
Attorney and Counselor at Law,
Suite 403 N. Y. Life Bldg.,
Kansas City, Mo.
Telephone Main 2803.

September 18, 1905.

Dear Sir:

I hand you herewith copy of order made by Judge F. Philips, a few days ago, making provvisional allowance to Judge Shannon C. Douglass, Special Master, of $6000, of which $4000 is ordered to be paid by the Kansas City Southern Railway Company, and $2000 by the Guardian Trust Company. Will you please hand me for delivery to Judge Douglass, Trust Company's check for $2000 in accordance with enclosed order. You will probably want a copy of the order to attach to your voucher. After having such copy made, will you kindly return the enclosed order to my files?

Very ruly yours,
J. C. ROSENBERGER."

"In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

Cambria Steel Company, Complainant,
No. 2468 vs. In Equity
The Kansas City Suburban Belt Railroad Company, Union Terminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Bill

Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

Cambria Steel Company, Guardian Trust Company, and Francis M. Black, its Receiver, Missouri Elevator &
740 Terminal Company and Wash Adams, its Receiver, Central Improvement Company, and Wash Adams, its Receiver, Second Street Improvement Company and Fairmount Amusement Company, Defendants.

Ancillary Bill

Order Granting Provisional Allowance To Shannon C. Douglass, Special Master.

It is hereby ordered by the court, with the consent of the Defendants in the Original Bill and of the Complainants and Defendants in the Ancillary Bill in the above entitled causes, that there be paid at this time to Shannon C. Douglass, Special Master, as a provisional allowance on account of his services as such Master in said causes, the sum of Six Thousand Dollars,—of which, the Receivers of the Kansas City Suburban Belt Railroad Company and the Kansas City Southern Railway Company shall pay the sum of Four Thousand Dollars, and the Guardian Trust Company shall pay the sum of Two Thousand Dollars.

The said division or distribution of this provisional allowance between said parties, is also provisional,—the court reserving the question of how said allowance in favor of said Master, as well as all other items of costs and expenses herein, shall be taxed and charged against said parties until the final determination of said causes; and should then the Court tax and charge the whole or any part of the amount of this allowance paid by one party against the other, the latter shall in such case refund the same to the former.

Dated Kansas City, Mo. ....., 1905.

(Signed) JNO. F. PHILIPS,
Judge.

We consent to the above order:

(Signed) S. W. MOORE and
T. R. MARKS,
Solicitors for Kansas City, Southern Railway Company and Receivers Kansas City Suburban Belt Railroad Company.

(Signed) H. S. MECARTNEY,
J. C. ROSENBERGER,
Solicitors for Guardian Trust Company."

741 Voucher No. 2324, covering Item No. 2, so received in evidence by the Master is a receipted statement from Shannon C. Douglass to the Guardian Trust Company,

dated May 1, 1908, reciting the payment of $1500.00 for provisional allowance of Master's fees in Cambria Steel Company vs. Kansas City Suburban Belt Company, as per order of May 1, 1908, thereto attached. Attached to said voucher is the following order:

"In the United States Circuit Court for the Western Division of the Western District of Missouri.

Cambria Steel Company, Complainant,
No. 2468 vs. In Equity.
The Kansas City Suburban Belt Railroad Company, et al., Defendants.

Bill.

Stuart R. Knott, et al., Receiver, Complainant,
vs.
Cambria Steel Company, et al., Defendants.

Ancillary Bill.

Order Granting Provisional Allowance to Shannon C. Douglass, Special Master.

It is hereby ordered by the Court, with the consent of the Defendants in the Original Bill, and of the Complainants and Defendants in the Ancillary Bill in the above entitled cause, that there shall be paid at this time to Shannon C. Douglass, Special Master, as a Provisional Allowance on account of his serivces as such Master in said causes, the sum of Four Thousand ($4000) Dollars, of which the Receiver of the Kansas City Suburban Belt Railroad Company and the Kansas City Southern Railway Company shall pay the sum of Two Thousand Five Hundred ($2,500) Dollars, and the Guardian Trust Company shall pay the sum of One Thousand Five Hundred ($1,500) Dollars.

The said division or distribution of this Provisional Allowance by the said parties is also provisional—the Court reserving the question of how said Allowance in favor of said Master, as well as other items of cost and expenses herein, shall be taxed and charged against said parties, until the final determination of said causes; and should then the Court tax and charge the whole or any part of the amount of
742 this Allowance paid by one party against the other party, then the latter shall in such case refund the same to the other.

(Signed) JNO. F. PHILIPS, Judge.

We consent to the above order:

S. W. MOORE,
for the Kansas City Southern R. Co. Receiver K. C. Suburban Belt Ry. Co. K. C. Suburban Belt R. Co.

EDWARD P. GATES
JOHN A. SEA and
GEO. H. ENGLISH, JR.,
for Guardian Trust Company.

Approved:
Edward C. Wright.

United States of America,—Set.

I, Adelaide Utter, Clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the foregoing is a true copy of the order granting provisional allowance to Shannon C. Douglass, Special Master in the cause therein named, as fully as the same appears in my office.

Witness my hand as Clerk, and the seal of said Court. Done at office in Kansas City, Missouri, this 1st day of May, A. D. 1908.

(Seal) ADELAIDE UTTER, Clerk."

Said voucher No. 2726 so received in evidence by the Master, covering Item No. 3, is a receipted statement from A. J. Martin, U. S. Marshal, to the Guardian Trust Company, dated December 29, 1910, reciting the payment of $5053.50 for proportion of fees of Shannon C. Douglass in Cambria Steel Company vs. Guardian Trust Company. Attached to said voucher is the following letter:

"Kansas City, Mo. December 29, 1910.

To Guardian Trust Company,
J. F. Downing, President,
John A. Prescott, Vice-
President and Liquidating Agent.

Gentlemen:

Having been directed by Hon. S. C. Douglass, the beneficiary under the Fee bill issued by the Clerk of the United States Circuit Court in and for the 'Western Division of the Western District of Missouri in a cause entitled "Cambria

Company vs. Guardian Trust Company, et al.' dated
743 November 18th, 1910 to levy said fee bill as provided therein upon the goods and chattels, moneys and effects of said Guardian Trust Company, more than thirty (30) days since the demand of payments of same having elapsed, I hereby notify you that unless the amount of $5000.00 with costs be paid before three o'clock on this day to me I shall as directed by said fee bill levy the same upon your goods and chattels, moneys and effects.

A. J. MARTIN,
United States Marshal.
By K. C. Miller, Deputy.

In response to your request and upon payment by you of the amount named in the Fee Bill above referred to, I note at your request that such payment is paid by you under protest and over your objections and with express statement by the Guardian Trust Company that said payment is under protest and involuntary and said payment is to be deemed to be made to me without waiving any rights, which said Guardian Trust Company is entitled to in the premises and is made pursuant to the levy about to be made by me upon the goods and chattels, moneys and effects of the Guardian Trust Company.

A. J. MARTIN,
United States Marshal in and for the Western District of Missouri.
By H. C. Miller, Deputy."

Mr. Rosenberger: I next offer Paragraph 12 of the final decree entered in June, 1910, in the Cambria Steel Company litigation, reading as follows:

"XII. It is further ordered, adjudged and decreed that the costs of this action be paid as follows: one-third thereof shall be paid by the Guardian Trust Company and two-thirds thereof shall be paid by the Kansas City Suburban Belt Railroad Company and its receiver and the Kansas City Southern Railway Company."

I now call upon the Kansas City Southern Railway Company to produce its vouchers showing all payments
744 made to H. A. Jetmore acting as reporter for Special Master Douglass in the Cambria case. The vouchers, if produced, will show as between the Guardian Trust Com-

pany and the Court and other parties to the case as to why advancements for costs were apportioned the way they were.

The Master: Mr. Smith having indicated a willingness to produce those vouchers, they will be produced.

Mr. Rosenberger: I also ask the privilege of calling Mr. Jetmore for further cross-examination in view of the reception by the Master of this document which was not offered when he was on the witness stand but shown to be offered now.

The Master: Well, the Master in view of the full examination of Mr. Jetmore, and the Master not deeming it of any great importance to the information of the court to recall Mr. Jetmore, declines to permit his being recalled for examination after the case has been completed. The Master feels Mr. Jetmore has told all he knows about it.

To which ruling of the Master in declining to permit the recalling of Mr. Jetmore for further examination, the Guardian Trust Company duly excepted.

Mr. Rosenberger: I would like the Master to state in the record that the rectial heretofore appearing in this record on page ..... to the effect that the Kansas City Southern Railway Company's Exhibits "D" and "E" as offered in evidence was not correct but was interpolated after the hearings by the reporter and that no such offer was made while the witness Ford was on the stand. I make the same request as reference to the Jetmore item.

Mr. Smith: I want to say with reference to these exhibits that they were identified and I was acting under the assumption that they had been formally offered. If they were not formally offered, the failure was due to inadvertence and I would like to have them in the record and I asked Miss Parlin to put them in, including them in the letter of which a copy was sent to Mr. Rosenberger and to the Master.

745 The Master: The Master notwithstanding the omission of the formal offer rules that Exhibits "D" and "E" shall be considered in evidence and made part of the transcript, although not previously formally offered in evidence by inadvertence.

Mr. Rosenberger: I object to the Ford exhibits being used for the reason that they were compiled by a witness

who, on his own testimony, is not qualified to compile them or to testify concerning them or to give his conclusions and his whole testimony is the testimony of an office boy giving his conclusions as to what is in the record. He was perfectly incompetent to testify as to the number of sessions before the Master and as to what was done at these sessions, not being trained as a lawyer. Furthermore, said exhibits are not the best evidence, the records being before the Master. I move to strike out Exhibits "D" and "E" for the reasons stated in the objections.

746 Mr. Smith: His testimony shows he was voucher clerk in the office of the law department. I will say in addition to that, he is one of the smartest boys working for the Kansas City Southern Railway Company.

Mr. Rosenberger: Bright boy for his years.

Mr. Smith: Well, he is twenty-two, twenty-three years old.

Mr. Rosenberger: His qualifications show he is not competent.

Mr. Smith: I am willing to stand on his testimony as to what his qualifications showed.

The foregoing objections were, by the Master, overruled, and the motion to strike denied, to which rulings the Guardian Trust Company duly excepted.

Mr. Rosenberger: I now desire to offer some items of evidence which, by inadvertence, I omitted to offer at the time of the hearing. In respect to Item No. 134, a fee of $15,000.00 paid to Fred W. Lehmann, I offer certified copy of petition and order made by the court in the case of Shedd vs. Guardian Trust Company in the District Court of the United States for the Western Division of the Western District of Missouri, authorizing the payment of that $15,000.00 by Henry C. Flower, Receiver.

Mr. Smith: I object to that offer for the reason that neither the Southern Company nor the Cambria Company were parties to that proceeding and any order in that case is not binding upon them, and I object to it for the various reasons that are stated to evidence of that kind as contained in our previous objections. I object to it also for the reasons contained in our written objections and that this peti-
747 tion is purely hearsay evidence so far as the Southern and Cambria Companies are concerned.

The foregoing objections were, by the Master, overruled, to which ruling, the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

Said certified copy of petition and order was thereupon received in evidence by the Master, and is in words and figures as follows:

Petition of F. W. Lehmann for Allowance of Compensation for Legal Services Rendered The Guardian Trust Company.

"In the District Court of the United States in and for the Western District of Missouri.

Edward A. Shedd and Charles B. Shedd, Complainants,
No. 110. vs. In Equity.
Guardian Trust Company, et al., Defendants.

The Petitioner states that he is a citizen and resident of the State of Missouri and is, and for more than forty years has been engaged, in the profession of law and for twenty-seven years of that time in the State of Missouri.

That on or about the 8th day of November, 1914, he was retained by the Guardian Trust Company of Kansas City, Missouri, to represent it in the Supreme Court of the United States in the case of the Kansas City Southern Railway Company vs. the said Guardian Trust Company and others, pending in said Court, on appeal and on writ of certiorari.

That petitioner was retained by said Trust Company as leading counsel in said case and to take responsible charge of the same in said Court.

That said case was one of the greatest importance to the said Trust Company involving a judgment in favor of said Trust Company rendered on June 25th, 1910, for $639,658.56 and the interest on said sum from the date of said judgment, making an amount at the time of the final affirmance of said judgment on February 21st, 1916, of approximately $860,000.00.

748 That the record in said cause was a voluminous one consisting of more than a thousand printed pages.

That important and difficult questions of law were involved, the legal issues presenting questions of both formal and substantive law, as an examination of said record will show.

That the brief, statement and argument in the case, presented on behalf of the Trust Company in said Court was pre-

pared as to most of the questions by petitioner, and involved several months of diligent and painstaking labor by the petitioner in the study of the record, the examination of authorities and the preparation of the brief and argument and preparation for the presentation of the case at the bar of the Court.

That petitioner attended at the hearing of said case by the Supreme Court and made an argument therein on behalf of the Trust Company.

That the work so done was work necessary to be done by petitioner in the discharge of his obligations under his retainer by the said Trust Company, although other counsel appeared in the case with him on behalf of the Trust Company and on behalf of some of its stockholders.

That the questions involved in the case were of the highest importance and numerous briefs were filed by counsel for other parties as amici curiae, such briefs being adverse to the contentions made on behalf of the said Trust Company.

That the determination of said case although not by unanimous judgment of the court was in every respect favorable to the said Trust Company, and the judgment in its favor with interest as provided therein has been paid in full.

That there was no agreement between the petitioner and the said Trust Company as to the amount of his compensation, save that he was to be paid the reasonable value of the services rendered by him.

That he was paid on account when retained the sum of one thousand dollars and has received no other compensation for his services.

749 He respectfully asks an allowance of fifteen thousand dollars additional as reasonable compensation for the services rendered by him.

F. W. LEHMANN

State of Missouri,
City of St. Louis—ss.

F. W. Lehmann being first duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof and the same is true as he verily believes.

F. W. LEHMANN

Sworn to before me and subscribed in my presence this 21st day of November, 1917.

My commission expires .....

....., Notary Public."

"In the District Court of the United States in and for the Western District of Missouri.

Edward A. Shedd and Charles B. Shedd, Complainants,
No. 110. vs. In Equity.
Guardian Trust Company, et al., Defendants.

Order.

Now this 24th day of November, 1917, this cause coming on to be heard upon the petition of F. W. Lehmann for allowance of compensation for legal services to the Guardian Trust Company, filed on November 22, 1917, the complainants appearing by J. C. Rosenberger, their attorney, the defendants by Charles W. German, their attorney, and making no objection thereto, and the Receiver, appearing by Justin D. Bowersock, his attorney, and due notice of the hearing on said petition having been given to the parties to the cause in accordance with the order appointing the Receiver herein dated August 29, 1916, it is now by the court ordered and adjudged that said F. W. Lehmann be allowed the sum of $15,000.00 in addition to what he has already received as compensation for all services heretofore rendered by him to
750 the Guardian Trust Company, and it is further ordered that the Receiver be and is hereby directed to make payment of such allowance out of the funds in his hands belonging to said Trust Company.

ARBA S. VAN VALKENBURGH, Judge.

United States of America—Sct.

I, Edwin R. Durham, Clerk of the District Court of the United States for the Western District of Missouri, do hereby certify that the foregoing is a true copy of the Petition and Order of Allowance of Compensation in the cause therein named, as fully as the same appears in my office.

Witness my hand as clerk, and the seal of said Court. Done at office in Kansas City, Missouri, this 26th day of April, A. D. 1924.

EDWIN R. DURHAM, Clerk,
By E. O'Keefe, Deputy Clerk."

On Monday, May 5, 1924, at ten o'clock A. M. hearings were again resumed before the Master, and the following proceedings were had:

Mr. Rosenberger: In respect to Item No. 127, in relation to fees paid Trimble & Braley, we offer in evidence from the printed volume on file in the Supreme Court of Missouri, entitled: "Abstract of the Record"; entitled

"In the Supreme Court of Missouri, October Term, 1911.

J. McD. Trimble and C. A. Braley, Appellees,
vs.
Guardian Trust Company, Appellant.

Appeal from the Circuit Court at Kansas City, Appellant's Abstract of the Record, all of pages 1 to 31, inclusive, down to the words "second amended answer" appearing on page 31. The reporter, however, being directed to omit copying the petition of Trimble & Braley, the same having already been copied in the record before the Master here and the reporter to use the formula that said petition has already been offered. Again, beginning at page 76, under caption
751 showing proceedings for appointment of Referee and continuing to the end of the Referee's report, page 116. That is all there is from the abstract.

Mr. Smith: We object to this offer of so much of the abstract (pages 135 to 165, or Harkness & Histed's bound volume of brief 51), for the reasons hereinbefore stated in our written objections to it; and, for the additional reason, that the petition in this case has already been offered in evidence over our objections and there isn't anything else in this matter that I can see has any bearing on this case, it merely being a recital that the petition had been filed; and, therefore, I cannot see any point in making the offer.

I want to say in addition that, of course, this objection we make includes the objection that the Kansas City Southern Railway Company and Cambria Steel Company were not parties to this suit and the judgment is neither binding on us nor competent evidence against us; nor is any part of the record binding or competent against us; I also make the further objection that this is an unnecessary encumbering of the record. And I object to the offer of pages 76 to 116, inclusive, being pages 210 to 250 of said Harkness & Histed's volume 51, for the same reasons.

The Master: The objections are overruled.

To which last action and ruling of the Master in overruling the foregoing objections to the introduction of said pages of the record in the Trimble & Braley case, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted, and still except.

Said pages 1 to 31, inclusive, of the Appellant's Abstract of the Record in the Trimble & Braley suit, are in words and figures, as following, to-wit:

752 "In The
Supreme Court of Missouri

October Term, 1911

J. McD. Trimble and C. A. Braley, Appellees
vs.
Guardian Trust Company, Appellant.

Appeal from the Circuit at Kansas City.

Abstract.

On the 30th day of August, 1905, the plaintiffs filed in the Circuit Court of Jackson County, Missouri, a petition in words and figures as follows, to-wit:

(This petition already offered in evidence).

Pages 76 to 116 of said record in said Trimble & Braley suit, are in words and figures, as follows, to-wit:

"Proceedings for Appointment of Referee.

Thereafter on October 3, 1905, being the 5th day of the October, 1905, term of said Circuit Court, the following proceedings were had as appear of record:

'Now come the plaintiffs and file application to refer this cause to a referee'.

On October 14, 1905, being the 6th day of the October, 1905, term of said court, the following proceedings were had of record in said cause as appears from the record, to-wit:

'Now, on this day by agreement of parties, it is by the court ordered that this cause be and it is hereby referred to R. E. Ball to report on the law and facts, said report to be filed on or before the 3rd day of the January term, 1906'.

On January 8, 1906, being the first day of the January, 1906, term of said court, the following proceedings were had as appears from the record, to-wit:

'It being made to appear to the court in the above entitled cause that the time fixed by the previous order of this court in which R. E. Ball as referee was required to file his report in said cause, was too short. Now, therefore, by agree-
753 ment of parties it is ordered that the said R. E. Ball file his report as referee in said cause on or before the 3rd day of the April term, 1906. Defendant is given until on or before January 8th, to file an amended answer and plaintiffs have ten days after the filing of said answer to plead thereto.'

On January 19th, 1906, being the 11th day of the January, 1906, term of said court, the following proceedings were had and entered of record:

'The defendant files amended answer and plaintiffs file reply to amended answer.'

On April 11, 1906, being the 3rd day of the April, 1906, term of said Circuit Court, the following proceedings were had as appears from the record, to-wit:

'Now on this day for good cause shown to the court, the time for filing report of referee is ordered to be and is hereby extended 30 days.'

On May 11, 1906, being the 28th day of the May, 1906, term of said court the following proceedings were had:

'Now on this day by leave of court, defendant files second amended answer herein.'

On May 24, 1906, being the 39th day of May, 1906, term, the following proceedings were had as appears from the record:

'Plaintiffs file reply to defendant's second amended answer.'

On October 6, 1906, being the 76th day of the October, 1906 term of said court, the following proceedings were had as appears of record:

'The plaintiffs herein appearing by their attorney, John A. Eaton, and by themselves, and the defendant appearing by Harkless, Crysler & Histed, and consenting thereto, it is hereby ordered that inasmuch as the time for Judge R. E. Ball, to file his report as referee in the above cause has expired, it is ordered that he be and he is hereby re-appointed and the time for him to file his report is now extended until the first day of the January, 1907 term, and that such report

shall have the same force and effect when filed as if no time had been heretofore fixed for the said referee to file his
754 report.'

There also appears of record the following:

'We hereby consent to the above and foregoing order.

JOHN A. EATON
TRIMBLE & BRALEY
Attorneys for Plaintiffs.

HARKLESS, CRYSLER
& HISTED,
Attorneys for Defendant.

On January 16, 1907, being the 3rd day of the January, 1907 term of said court, the following proceedings were had as appear of record:

'At this day, court orders that referee heretofore appointed is now allowed until the 3rd day of the April, 1907 term, of this court to file his report herein'.

On May 18, 1907, being the 34th day of the April, 1907 term of said court, the following proceedings were had and entered of record:

'At this day, it was ordered by the court that the referee herein be allowed 60 days in which to file report. This order to be as of April 10th, 1907.'

On June 10th, 1907, being the 54th day of the April, 1907 term of said court, the following proceedings were had and entered of record:

'At this day the referee herein is by the court allowed until August 1, 1907, in which to file his report.'

On August 1, 1907, being the 90th day of the April term, 1907, of said court, the following proceedings were entered of record:

'At this day R. E. Ball, referee herein, is by the court allowed 10 days in which to file his report.'

On August 10, 1907, being the 94th day of the April, 1907 term of said court, the following proceedings were had of record:

'At this day, R. E. Ball, Esq., referee herein, files his report.'

The report of the Referee is hereinafter set forth in full in the bill of exceptions, which report is here now adopted in all respects as if set forth in the record at this point, which report recites that it is accompanied by all the evi-
755 dence taken in the case, which evidence is hereinafter set forth in the bill of exceptions, and the report so hereinafter set forth is here adopted in all particulars as if set forth in full at this point.

On August 13, 1907, being the 95th day of the April, 1907 term of said court, the following proceedings were had of record:

'At this day, plaintiffs and defendant each file exceptions to the report of the referee herein,' which exceptions are hereinafter set forth in the bill of exceptions, and adopted as if set out in full at this point.

Trial and Judgment.

On September 26th, 1907, being the 84th day of the April 1907 term of said court, the following proceedings were had:

'Now this cause coming on to be heard, come the parties by their respective attorneys, and by agreement same is continued until Wednesday, October 2, 1907, at 9:30 A. M.'

On October....., 1907, being the 88th day of the April 1907 term of said court, the following proceedings were had of record:

'Now come the parties by their respective attorneys and by leave of the court, defendant files herein declarations of law and defendant's motion to set aside the finding and report of the referee herein is taken up and after hearing a portion of the argument of counsel further hearing of the same is continued until tomorrow morning at 9:30 A. M.'

On October, 1907, being the 88th day of the April, 1907 term of said Circuit Court, the following proceedings were had of record:

'Now again come the parties by their respective attorneys and after hearing the remainder of the argument of counsel, the court takes this matter under advisement.'

Judgment.

On March 28, 1908, being the 66th day of the January term 1908, of said Circuit Court, the following proceedings
756 were had appearing of record:

'Now on this day come the plaintiffs by John A. Eaton, their attorney and the defendant by its attorneys, Harkless,

Crysler & Histed, and Henry S. Mecartney, and this cause came on for further hearing and decision, the same having been heretofore orally argued and submitted to the court upon the exceptions to the report of R. E. Ball, referee herein, and upon the application and motion of the defendant for leave to file the 3rd amended answer herein and the court having heard the argument and read and considered the evidence, doth here now find, consider and adjudge upon all the questions and issues presented in this cause as follows:

'That the application and motion of the defendant for leave to file 3rd amended answer herein made and filed after the hearing and report of the referee and after the hearing in this court upon exceptions to said report, be and the same is denied and overruled, to which ruling and decision of the court, the defendants except.

It is further considered and adjudged by the court that the referee's report herein filed be and the same is herein in all respects approved and confirmed, and that all exceptions thereto filed therein be and the same are overruled and denied.

It is thereupon further considered and adjudged by the court that the plaintiffs, J. McD. Trimble and C. A. Braley, partners, under the firm name and style of Trimble & Braley, have and recover of and from the defendants the Guardian Trust Company, the sum and amount so found and determined in the report of the referee aforesaid, being the sum of $16,265.75, together with interest thereon from August 30, 1905, at the rate of six per cent per annum, being the total sum of principal and interest to this date of $18,780.52, and that the defendant pay the costs herein taxed.

757 It is further considered and adjudged that upon the report of the referee, R. E. Ball, and his application herein for allowance for services as referee in this case, there be and is hereby allowed the sum of $750, to be paid to R. E. Ball in full for his services as referee herein and that said sum be paid by the defendant and taxed as costs herein. For which judgment and costs aforesaid, let execution issue.

To which judgment and decision of the court, the defendants excepted.'

On April 1, 1908, being the 69th day of the January, 1908 term of said court, and within four days after judgment, the following proceedings were had of record:

'Now, defendant files motion for a new trial and rehearing of this cause.'

The motion for a new trial is hereinafter set forth in the bill of exceptions and is here now adopted as correct copy of motion for new trial as if set forth in full at this point.

On April 13, 1908, being the first day of the April, 1908 term of said court, the following proceedings were entered of record.

'Now the defendant's motion for new trial of the cause is by the court overruled, to which ruling of the court, the defendant excepts.'

Appeal.

On April 14, 1908, being the second day of the April, 1908 term of said court, the following proceedings were had:

'Now the defendant makes application and files affidavit for an appeal from the judgment of this court, which application is by the court sustained and appeal allowed to the Supreme Court of the State of Missouri as prayed, and court fixed defendant's appeal bond in the sum of $40,000.00.

758 Thereupon defendant files its appeal bond herein in the penal sum of $40,000 with Commerce Trust Company as security thereon which said bond is by the court approved.

Now defendant is by the court given until on or before the 3rd day of October term, 1908, of this court in which to file its bill of exceptions herein.'

The affidavit in appeal is in words and figures as follows:

'In the Circuit Court of Jackson County, Missouri, at Kansas City, April Term, 1908, J. McD. Trimble and Charles A. Braley, doing business under the firm and style name of Trimble & Braley, Plaintiffs, vs. Guardian Trust Company, Defendants, Number 25346.

State of Missouri,
County of Jackson—ss.

Affidavit for Appeal.

John A. Prescott, being duly sworn upon his oath, states that he is the secretary of the defendant, Guardian Trust Company, and as such is familiar with its affairs and with the subject of this affidavit, and that he makes the same for and on behalf of the Guardian Trust Company and in its

interest, and states that the appeal herein is not made for vexation or delay, but because the affiant believes and the defendant, Guardian Trust Company, believes that it, the appellant, is aggreived by the judgment and decision of the court and referee herein.

JOHN A. PRESCOTT.

Subscribed and sworn to before me, on this 11th day of April, 1909.

My commission expires Sept. 28th, 1908.

(Seal JOHN E. McPHERSON,
Notary Public, Jackson County, Missouri.'

On October 12, 1908, being the first day of the October 1908 term of said court, the following was entered of record:

'Now for good cause shown, it is by the court ordered that the time heretofore given defendant in which to file its bill of exceptions herein be and the same is hereby extended until or or before the 3rd day of January, 1909, term of said court."

759 On January 9, 1908, being the 66th day of October 1908 term of the said court, the following proceedings were entered of record:

'Now on this 9th day of January, 1909, comes the above named defendant and tenders its bill of exceptions which is now approved and signed by the Judge and is by the court ordered to be and the same is hereby filed and made a part of the record in this cause.'

On May 25, 1908, the appellant filed in this court a certified copy of the judgment and order granting an appeal under the short method provision of the statute and the same is now on file in this court.

J. McD. Trimble and C. A. Braley, Partners under the firm name and syle of Trimble & Braley, Plaintiffs, vs. Guardian Trust Company, Defendant, No. 25436.

Bill of Exceptions.

Be it remembered that this cause coming on for hearing at the April Term, 1907, of the Circuit Court of Jackson County, Missouri, at Kansas City, Missouri, and before the Honorable Jas. H. Slover, Judge of said division of said court, on Thursday, the 26th day of September, 1907, the hearing of said cause was by agreement of counsel postponed and continued until the 2nd day of October, 1907.

On Wednesday, October 2, 1907, this cause came on for hearing on the report of the referee filed herein on August 10, 1907, and the exceptions to said report filed herein by the defendant on the 13th day of August, 1907, and on the application and motion of the defendant for leave to file the third amended answer herein. The plaintiffs to sustain the issues on their part offered and introduced evidence as follows:

Plaintiff's counsel offered and introduced in evidence the report of the referee Hon. R. E. Ball, filed herein on the 10th of August, 1907, together with transcript of the evidence taken before said referee and the exhibits filed therewith. The said referee's report and the said transcript of evidence and exhibits filed therewith are in words and figures
760 as follows, to-wit:

Report of R. E. Ball Referee.

Whereas the court did in the above entitled cause on the fourteenth day of October, 1905, make and cause to be entered for record the following order of references to-wit:

'Now on this day by agreement of parties, it is by the court ordered that this cause be and it is hereby referred to R. E. Ball to report on the law and facts, said report to be filed on or before the third day of January term, 1906.'

Which said order was thereafter by the court renewed and the time within which the referee was directed to report was extended until on or before August 10th, 1907.

Now, therefore, I have the honor to report to the court that pursuant to said order of reference and the renewals thereof, and in accordance with the statutes of the state, I did, before proceeding to hear any testimony in the cause, take and subscribe an oath before an officer duly authorized to administer the same, faithfully and fully to hear and examine the cause and to make a just, impartial and true report according to the best of my understanding, which said oath is herewith returned; that on Thursday, February 1st, 1906, at the office of Trimble and Braley, No. 720 Bryant Building, Southwest Corner of Eleventh Street and Grand Avenue, in Kansas City, Missouri, after due notice and by agreement of both parties, I began the hearing of said cause, both parties being represented by their respective counsel, and I herewith return and make a part of this report, a full and complete transcript of all the evidence, including documents and exhibits introduced in evidence, together with the various rul-

ings made by me and a record of the exceptions of the parties taken thereto.

All of the several adjournments of said hearings were had by agreement of the parties and were made and the hearing continued as shown by the transcript of the proceedings aforesaid.

761 After the evidence had all been taken, the cause was argued by the respective counsel and briefs with requests for findings of fact and conclusions of law were presented to me, all of which are returned with this report, together with my rulings on the same, it being understood that each party excepted duly at the same time to all adverse rulings.

Statement of Referee.

It may conduce to a fair and just determination of the issues and aid the court in passing upon this report to briefly and without going into detail, state what the issues are.

Plaintiffs have filed suit on an account for legal services alleged to have been rendered to the defendant at divers times between November 2nd, 1898, and the 16th day of January, 1905, and the items of that account, after allowing the credits conceded in the petition, amount to $20,533.25 for which the plaintiff prays judgment with interest on the unpaid balance claimed.

The defendant, by its second amended answer, joins issue, by general and special denial, and does this in thirty-two printed pages with twenty counts. All of these counts down to and including number fifteen (15) are defensive and contain the assertion of matter claimed by defendant to be a defense against the allowance of the various items against which they are directed.

Counts sixteen (16) to twenty (20), both inclusive, are counterclaims by the defendant against the plaintiffs, in and by which the defendant asks judgment against the plaintiffs as follows:

Count sixteen (16); for $100,000.00, being in the matter of a bill in equity filed in the United States Circuit Court in the Western Division of the Western District of Missouri, for the appointment of a receiver of the defendant, and in which count of the answer the damage alleged is claimed to have resulted to defendant by reason of the want of skill and care on plaintiff's part as defendant's attorneys.

762 Count seventeen (17); for $100,000.00 being in the matter of a bill in equity of the Cambria Steel Company, for an accounting between defendant and the receivers of the Kansas City, Suburban Belt Railway Company, filed in the United States Circuit Court at Kansas City, in which said counter claim it is alleged that by reason of lack of care, skill and vigilance on the part of the plaintiffs, as defendant's counsel, defendant was damaged in the amount named.

Count eighteen (18); for $6000.00, being the amount of a payment for services to attorney Wash Adams, made by defendant but alleged by defendant to be properly chargeable to and recoverable from the plaintiffs, on the ground that such service was part of the services for which plaintiffs were paid an annual salary and that Mr. Adams had in fact been employed by plaintiffs for their own assistance and on their own account in the performance of the duties required of them under the terms of their annual contract.

Count nineteen (19); for $942.37, expenses claimed to have been advanced, and $25,000.00 one half the amount claimed to have been received by the plaintiffs, it being claimed that these amounts are due defendant under a contract with plaintiffs for the collection of certain debts against parties named in said count.

Count twenty (20); for $42.50, being pro rata amount claimed as an expense of attorneys fees paid by defendant and asserted to be so paid for plaintiff's use and benefit.

The plaintiffs reply is a general denial.

On the issues made by the petition, answer and reply, I find as follows:

First: That the plaintiffs as attorneys and counselors for defendant, paid out moneys and performed services for the defendant at its special instance and request, and in the amounts and at the times stated below; that the several sums stated and charged as having been paid out were so paid; that the sums stated and charged for legal services
763 to the defendant were and are the reasonable value of the services rendered by the plaintiff; and that plaintiffs have not been paid or compensated in any way therefor except as stated in the next paragraph of this report.

1908 Nov.	2	To expenses of J. McD. Trimble to Chicago	$ 20.00
Dec.	17	To cash for copy of deed of trust K. C. S. & G. Terminal Co. to M. K. & T. Trust Co.	8.00
1909 Mch.	1	To cash for telegram to J. McD. Trimble from Nathaniel Norton, in re claim against Lay	.98
April	20	To cash for 2 telegrams Norton to C. A. Braley and vice versa in re Lay matter	1.06
Apr.	29	To cash for telegram J. McD. Trimble to W. S. Taylor	.65
May	26	To cash for Mr. Braley's expenses to examine Wentworth mine	5.12
Apr.	1	To advice, time and services other than legal in connection sales of rice and irrigation stock including trip to Chicago to see Oliver Snow, Mansfield, Shedd, Baker, Harris	100.00
July	12	To cash for three telegrams in re purchase Cuban iron properties	2.22
July	19	To cash for seven telegrams in re holding directors meeting of Company in Chicago and change of its name and capital	2.85
July	27	To cash for nine telegrams account Guardian Trust Company in re electric automobile business with Lobdell of Chicago, the collection of claim against Lay and Chicago zinc mining property	5.31
April May, June and July, 1909.		To all advice and services in the matter of suit of Missouri, Kansas & Texas Trust Co., as Trustee of Texas & Ft. Smith Ry. Co. in U. S. Circuit Court for Eastern District of Texas, being a suit to foreclose mortgage on railroad property and secure appointment of a receiver pending the foreclosure proceedings. The services rendered include the preparation of the bills of complaint, the institution of the suit, the securing of appointment and qualification of R. A. Greer as receiver, securing the property to him, the preparation and filing of an ancillary bill in U. S. Circuit Court for Western District of Arkansas, and securing ancillary orders for appointment of the same receiver, the subsequent negotiations resulting in the dismissal of the suit, the discharge of said receiver and settlement of his affairs and costs of suit	2500.00
764			
April, May, June and July, 1909.		To all advice and services in suit of M. K. & T. Trust Company against K. C. Shreveport & Gulf Ry. Co. in Circuit Court of Caddo Parish, at Shreveport, La., being a suit to foreclose a mortgage on the railroad property and secure appointment of the receivers pending the foreclosure proceedings.	

The services charged for include the preparation of the bill of complaint, the institution of the suit, the appointment and qualification of Trimble, Martin, Gillham, Youree and Furnum as receivers, subsequent negotiations which resulted in the dismissal of the suit, discharge of said receivers and the settlement of their affairs and costs of suit $2000.00

(The Kansas City, Shreveport & Gulf Ry. Co. owned all of the lines operated by the K. C. Pittsburg & Gulf Rld. Co. in the State of Louisiana, under a contract or lease from that company. After the appointment of receivers for the Kansas City, Pittsburg & Gulf Rld. Co. it was found necessary to institute suit for appointment of receivers for the K. C. Shreveport & Gulf Rld. Co. interest upon the bonds of which was in default.

Thereupon a bill was prepared and filed in said court and application thereon was made for the appointment of receivers, and the court appointed J. McD. Trimble, E. L. Martin, Robert Gillham, H. L. Youree and Richard Furnum, Receivers, who qualified as such and after the appointment of Fordyce and Withers as receivers of all the property of the defendant companies in the suit of the State Trust Company against the Kansas City, Pittsburg & Gulf Rld. Co. et al., the said suit was dismissed.

For all services rendered in the above entitled suit, and for all services rendered in connection with the appointment of receivers and the conduct of said receivership and the final disposal of said suit, the above charge is made).

Aug. 22	To cash for 2 telegrams in re payment taxes on Surinam property	2.62
Sept. 12	To cash for 2 telegrams between Mr. Stillwell and Judge Trimble about C & Ft. S. & C. K. C. & E. matters	1.00
Sept. 19	To cash for telegram Judge Trimble Sept. 14 in re same matter	.92
Sept. 26	To cash for telegram Judge Trimble Sept. 14 in re same matter	.40
765		
Nov. 4	To time and services preparing and filing amended answer in case Moore et al v Jones	25.00
Nov. 24	To cash for 2 telegrams in re Barnett's proposition of settlement	2.00
Nov. 29	To services and advice in preparing for trial of Lumber Company v Port Arthur & Mexican S. S. Co. whose ship was libeled and Trust Co. indemnified sureties on release bond	50.00

Dec.	8	To cash for 2 telegrams regarding Trust Co. meeting in Chicago	.74
Dec.	8	To advice and services in reference to sale $91900.00 1st mortgage bonds of S. W. Mo. Light Co. and 94200 preferred and 94200 of its common stock	100.00
Dec.	9	To time and services preparing and filing answer of Guardian Trust Co. to the interplea of Jones and Ogelsbay in case of Moore et al v Jones et al	50.00
1900 Jan.	8	To time and services drawing contract appointing company agent for sale of lots at Port Arthur, Texas	15.00
Feb.	3	To cash for 2 telegrams between Mr. Stillwell and J. McD. Trimble	2.52
Feb.	9	To cash telegram J. McD. Trimble to Silas W. Pettit	.56
Mch.	9	To cash for 2 telegrams arranging Trust Co. meeting	1.24
		To cash for certified copy of judgment and order allowing appeal in Jones v Hamm	1.50
Apr.	18	To cash for deposit docket fee Company v. Mo. Water & Light Co.	3.00
Apr.	27	To advice and services in matter of instituting suit against K. C. Suburban Belt R. R. Co. in replevin for $15000 worth of railroad steel and suit for converting $10,000 other steel	150.00
Apr.	30	To docket fee in replevin suit Co. v. K. C. Sub. Belt R. R. Co.	3.00
		To cash for expenses in replevin suit Co. v. K. C. Suburban Belt R. R. Co.	.35
Apr.	30	To all advice and services in preparation for trial and trial of case wherein Jones & Ogelbay on the one side and Guardian Trust Co. on the other claiming money $16000 deposited with Board of Trade in connection with the lease of the Temple Block, case being Moore v. Jones	300.00
Apr.	30	To time and services in negotiations with D. R. Francis and conference with Kennett and reaching agreement for Mr. Martin to be President Crescent Elevator Co.	25.00
766			
May	15	To cash for telegram in re payment Williamson note by Trust Co.	.68
May	28	To cash for telephone message Trimble to Chadbourne in Chicago	4.10
May	3	To retainer and services in instituting suit against the K. C. P. & G. R. R. Co. to recover on certain coupons, including filing petition	150.00

May 4	To one day's services in all advising about and supervising obtaining possession and removal of steel rails and railroad plates involved in replevin issued and sheriff in control	25.00
May 1st 1899 to June 1st 1900.	To all services to date in suit now pending in the M. K. & T. Trust Co. against the Texarkana & Ft. Smith Rld. Co. in U. S. Circuit Court for Eastern District of Texas at Beaumont	375.00
	After the appointment of receivers Fordyce & Withers in the suit of the State Trust Co. v. K. C. O. & G. Rld. Co., et al, it was found advisable to institute suit for the foreclosure of the mortgage of the Texarkana & Ft. Smith Ry. Co. in U. S. Circuit Court for the Eastern District of Texas.	
	Accordingly, a bill was prepared for the foreclosure of the mortgage of the Texarkana & Ft. Smith Ry. Co. and filed in said Court where said suit has since been pending. (For services therein as above specified the charge is made).	
May 1st 1899 to June 1st 1900	To all services in the suit of the MK&T Trust Co. v. K. C. Shreveport & Gulf Rld. Co. et al. in the suit now pending in U. S. Circuit Court for the Western District of Louisiana, at Shreveport, from May 1st, 1899 to June 1st, 1900	250.00
	(After the appointment of receivers Fordyce & Withers in the suit of the State Trust Co. v. K. C. P. & G. Rld. Co. et al, it was found necessary to file a bill for the foreclosure of the mortgage of the K. D. Shreveport & Gulf Rld. Co. covering its railroad and other property in the Western District of Louisiana.	
	For the preparation of the said bill of foreclosure, the filing of the same, and all services in said cause between said dates, the above and foregoing charge is made).	
June 12	To expenses in 2 trips Independence in matter Mo. Water & Light Co. case	1.50
June 13	To services preparing notice of trustees sale of Johana Nerder property at Carthage and having same published	10.00
767		
June 23	To time and service preparing trust deed from Janssen Place Land Co. to Trust Co.	10.00
June 30	To advice and services in preparing 3 powers of attorney to Alonzo Fernandes to effect the necessary acceptance and transfer of Trust Co. concessions, granted by the Republic of Mexico	50.00
	To services and advice in procuring from the Secretary of State, a certified copy of the Articles of Association,	

	including capital stock and change of name, of the Trust Co. and having same certified by Mexican Consul for Mr. Ball's use in Mexico	50.00
July 14	To services preparing motion for new trial and in arrest of judgment, filing and arguing same, getting time off overruling motion within which to file bond and bill of exceptions and to preparing and filing affidavit in appeal and having same allowed in case of Moore v. Jones, et al	150.00
Aug. 17	To cash for car fare to Independence on account of case of Guardian Trust Co. v. Mo. Water & Light Co	.30
Aug. 20	In time, advice and services concerning and in drawing agreement between the Trust Co. and the Air Line for the turning over of money due the Air Line and held as indemnity by the Trust Co. for executing as surety bond in sum of $15000 to Metropolitan St. Ry. Co.	75.00
Aug. 29	To cash for expenses in serving subpoenas in replevin suit, Trust Co. v. Suburban Belt	1.15
Aug. 31	To services in connection with case of Trust Co. v. Mo. Water & Light Co. consisting of advice concerning statement of accounts and the procuring of the books of the defendant company for their examination to ascertain what defendant's counter claim for $32,000 was based on	100.00
	To services in connection with making of demand on K. C. S. B. R. R. Co. for the payment of its notes and giving notice that the Trust Co. would sell the collateral security notes Sept. 7, 1900	75.00
Sept. 1	To time and services examining records of Suburban Belt Rld. Co. office and going over collateral and value of same in connection with collecting the K. C. S. B. R. R. Co. notes held by the Trust Co.	25.00
Sept. 1 to 10th	To services in connection with the taking of Wilcox deposition in case Trust Co. v. Mo. Water & Light Co. including an examination and preparation of all accounts of all dealings between the two companies for nine years	300.00
Sept. 7, 8	To one day's time in preparing for and looking after Trust Co's interests in matter of election of directors of Central Imp. Co.	50.00
768		
Sept. 13	To time and services in going to Carrollton, Mo. to look up records and facts in case of Trust Co. v. Mo. Water & Light Co.	25.00
Sept. 17	To cash for expenses for filing stipulation in case Trust Co. v. Mo. Water & Light Co.	.30
Sept. 18	To cash for expenses going to Carrollton in investigating records in case Company v. Mo. Water & Light Co.	5.00

Sept. 21	To time and services on trip to Webb City, Mo. to take depositions in case Tam-Blyn v. Victoria Zinc Mining Co. in which receiver for Mining Co. was sought	25.00
Sept. 25	To time and services going to and in Chicago, preparing for plea and answer in Cambria Steel Co. v. K. C. Suburban Belt Ry. Co. et al., in U. S. Circuit Court	500.00
Sept. 29	To cash for expenses going to Webb City, Mo. to take depositions in case Tamblyn v. Victoria Zinc Mining Co.	6.10
Oct. 5	To cash for certified copies of the pleadings in case Tamblyn v. Victoria Zinc Mining Co.	4.00
Oct. 3-6	To time and services four days in looking over the minute book of K. C. Suburban Belt Ry. Co. and Consolidated Terminal Ry. Co. and Consolidated Rld. Co., also Journal records and taking extracts from the same to use in suit Cambria Steel Co. v. Trust Co.	200.00
Oct. 8-11	To four days' time and services in Chicago in consultation with Mr. Chadbourne, concerning suit Cambria Steel Co. v. Trust Co. and four foreclosure suits brought by Provident Life & Trust Co. against several parts of the Suburban Belt Rld. Co.	400.00
Oct. 8-11	To four days' time and services of C. A. Braley in Suburban Belt Rld. Office looking up facts to contest the Cambria suit	200.00
Oct. 9	To retainer, time and services in preparing and filing answer of Company in case First Natl. Bank of Kansas City v. Trust Co., a suit on note for $25,000 made by the Suburban Belt Rld. Co. and endorsed by Trust Co. as accomodation for Suburban Belt Co., the answer filed pleading ultra vires	300.00
Oct. 15	To time and services meeting with attorneys of Oglesbay and Jones on various occasions to go over and agree on bill of exceptions in Moore v. Jones and to final agreements thereon and having said bill of exceptions certified and filed	25.00
Oct. 12	To time and service in Chicago taking Mr. Stillwell's deposition in case Trust Co. v. Mo. Water & Light Co.	75.00
769		
Oct. 16	To cash for expressage on package from Byrne at Texarkana	.25
Oct. 17	To cash for certificates in cash Finch v. Company necessary in obtaining this affirmance	10.00
Oct. 17	To cash for certificate in case Finch v. Company to obtain affirmance of judgment	1.00
Oct. 17	To cash for telegram Sept. 25, Trimble & Braley to Chadbourne	1.25

Oct. 17	To cash for telegram Sept. 28th to the Clerk of Circuit Court at Carthage, Mo. in case Tamblyn v. Victoria Mining Co.	.67
Oct. 17	To cash for telegram Trimble to Chadbourne Oct. 5	.36
Oct. 17	To cash for telegram Trimble to Chadbourne Oct. 6	.36
Oct. 20	To cash for expenses of D. W. Eaton to Leavenworth on account of case Provident Life & Trust Co. v. Union Terminal Rld. Co.	1.74
Oct. 22	To cash for copy "Ex. 1" attached to bill in case of Cambria Steel Co. v. Suburban Belt	2.40
	To cash for telegram Trimble & Braley to Clerk United States Circuit Court	1.12
	To retainer and services in preparing and presenting petition of Trust Co. to be made a party to foreclosure suit of Provident L & T Co. v K. C. Suburban Belt Co. so as to resist foreclosure in the U. S. Court	750.00
	To retainer and services in preparing and presenting petition of Trust Co. to be made a party to suit of Provident L & T Co. v. K. C. & Independence Air Line et al., so as to resist foreclosure in U. S. Court	750.00
	To retainer and services in preparing and presenting petition of Trust Co. to be made a party to suit of Provident L & T Co. v Union Terminal Co. et al, so as to resist foreclosure in U. S. Circuit Ct.	750.00
	To retainer and services in preparing and presenting petition of Trust Co. to be made a party in suit Provident L & T Co. v. K. C. Suburban Belt Co. to foreclose mortgage on Consolidated Terminal Co. so as to resist forecolsure in U. S. Court	750.00
June 27	To cash for telephone to Judge McKeighn, St. Louis, about taking company out of hands of receiver	2.00
	To cash for telegram to Judge Amos M. Thayer, St. Louis	.40
July 11th & 12th	To time, services and advice in drawing application of company for discharge of receiver of company	200.00
770		
July 11	To cash for telegram to McKeighan	.37
July 18	To cash for telegram to McKeighan	.33
Aug. 5	To cash for telegram to Judge Thayer	.92
	To cash for telegram to Judge Thayer	3.40
	To cash for cablegram Aug. 13, J. McD. Trimble to Kuhn—London	4.76

Sept.	4	To cash paid for copies of the objections of complainants in Bierce case	5.18
Sept.	13	To cash for copies of documents in Bierce case	.85
Sept.	17	To expenses of J. McD. Trimble to St. Louis and return, to argue exceptions to parts of bill in Bierce case	27.25
Oct.	1	To cash for copies of documents for use in Bierce case	9.20
		To cash for copy of opinion of court in case of Moore v. Jones	1.00
		To expenses of J. McD. Trimble to St. Louis, Oct. 4, in matter of discharge of receiver	26.50
Oct.	20	To cash for copy of order denying applications leave to file amended and supplemental bill	.55
Oct.	22	To cash for telegram Oct. 2 from Judge Thayer	.35
Oct.	25	To all time and services in matter of application of Trust Co. for discharge of receiver and return of its property to the constituted authorities of the company subsequent to filing of application for such discharge	1500.00
Nov.	13	To cash for telegram to Clerk U. S. Circuit Court at Beaumont, Texas	.95
Dec.	3	To cash for telegram Blanchette to Trimble & Braley	.65
Dec.	8	To cash for express on briefs in case of Moore v. Jones	.50
Dec.	31	To cash for telegram Dec. 15 from W. H. Pope, Marshall, Texas	.83
Nov.	19	To one day's time and services in reference to resisting motion filed by Lathrop, Morrow, Fox & Moore to set aside order of Federal Court appointing Wash Adams, receiver of Mo. Elevator & Terminal Co. and of Central Improvement Co.	50.00
Nov.	21	To one day's services and time in taking testimony on behalf of plaintiff in case of Cambria Steel Co. v. Guardian Trust Co.	50.00
771			
Nov.	22	To time and services rendered in same matter	50.00
		To cash for telegram sent Oct. 26, Trimble to McKeighan	.25
		To cash for telegram sent Oct. 26, Trimble to Chadbourne	.54
		To cash for telegram sent Oct. 27, Trimble & Braley to to Guardian Trust at Chicago	.30
		To cash for telegram sent Oct. 30, Trimble to Chadbourne at Chicago	.38
		To cash for telegram sent Oct. 27, Trimble & Braley to Judge Bryant	.34

	To cash for telegram from Judge Bryant to Trimble & Braley	.44
	To half cash for telegram sent Oct. 29 to Judge Bryant	4.6
	To half cash for telegram Oct. 31, to Judge Bryant	.34
	To half cash for telegram Oct. 31 from Judge Bryant	.30
	To half cash for telegram Oct. 31, from Judge Bryant	.34
	To half cash for telegram Eaton to Oglesbay	.50
	To half cash for telegram Nov. 1st, Trimble & Braley to Eaton	.76
	To half cash for telegram Nov. 1st, Braley to W. H. Pope	.32
Nov. 26	To cash for telegram Nov. 14, Trimble to Chadbourne	.38
	To cash for telegram Nov. 16, Trimble to Chadbourne	.80
	To cash for telegram Nov. 22, Trimble to V. Cleveland	1.75
	To half expenses J. A. Eaton going to and at Sherman, Texas, Nov. 1 to 14 on account intervention in Port Arthur Channel & Dock receivership	10.38
	To cash for notary fees acknowledgment of affidavit of Mr. Dean	.25
Nov. 27	To continuous services Oct. 24, to Nov. 27 in case Bierce et al v Guardian Trust Co. for appointment of receiver, preparing evidence and arguing demurrer at Kansas City and resisting application for appointment of receiver at St. Louis	3000.00
Nov. 28	To cash for telegram Nov. 23, Trimble to Chadbourne	.64
	To cash for telegram Nov. 28, Braley to Gilbert	1.00
	To cash for telegram Trimble & Braley to Chadbourne	2.90
772	To cash for telegram to Sharritt	.37
	To cash for telegram to Wing & Chadbourne from Trimble & Braley	.50
	To cash for telegram Trimble & Braley to J. E. McKeighan	.31
	To cash for copy of complaint Provident Life & Trust Co. v. Union Terminal R. R. Co.	4.50
1901 Oct. 11	To cash for ticket to St. Louis and return to take up demurrer in Bierce case	9.50
Oct. 17	To cash for railroad fare and sleeper to St. Louis and return in matter of order in Bierce case	11.50
Oct. 21	To services in arguing demurrer to bill of complaint in case of W. W. Bierce et al v. Trust Co. before Judge Thayer at	

		St. Louis and procuring leave to except to certain parts of bill and answer the remainder	250.00
		To cash for telegram Trimble & Braley to Chadbourne, Chicago, Oct. 17	.52
Oct.	18	To cash for telegram Trimble & Braley to Chadbourne, Chicago, Oct. 18	.40
Nov.	15-25	To services in preparing exceptions to parts of bill in case of Bierce v. Guardian Trust Company and in preparing answer to remainder of bill	300.00
Dec.	3	To cash for expressage on papers in Bierce case	.35
1902 June	23	To cash for telegram A. M. Thayer to C. A Braley	.81
		To cash for telegram to C. A. Braley from Judge McKeighan	.21
Oct.	27	To cash for telephone to McKeighan at St. Louis, Oct. 23, regarding Bierce case	2.00
		To cash for telephone to Chadbourne at Chicago, Oct. 23, regarding Bierce case	2.75
Oct.	29	To cash for telegram Trimble to Chadbourne, Oct. 19	.92
Oct.	30	To cash for certified copies of order in Bierce case	2.25
Oct.	30	To one day's time in investigating books of K. C. Suburban Belt Co. for preparation of Trust Co. defense in Cambria suit	50.00
		To services on preparation of intervening petition in suit of Barnett & Record Co. v. Port Arthur Channel & Dock Co. in U. S. Circuit Court at Beaumont, and obtaining order for filing same from Judge Bryant at Sherman, Texas	200.00
773			
Oct. &		To services and counsel and opinions in injunction suits in Calcasieu Parish, District Court to enjoin railroad and subsidies	50.00
		To services, counsel and opinions in the cases in De Soto Parish, La. to enjoin subsidy tax voted by the town of Mansfield	50.00
Nov.	1	To retainer and services in preparing and filing petition in Trust Co. to be made a party to case of Provident L & T Co. v. Union Terminal Rld. Co. in U. S. Court for District of Kansas so as to be able to resist foreclosure of mortgage	500.00
Nov.	5	To time and services in preparing and filing answer to bill of complaint of Provident Life & Trust Co. to foreclose mortgage on K. C. Suburban Belt Rld.	250.00

		To services in preparing and filing answer to bill of complaint of Provident L & T Co. to foreclose mortgage of Consolidated Terminal Railway	250.00
		To services preparing and filing answer to bill of complaint of Provident L & T Co. to foreclose mortgage of Union Terminal Rld. Co.	250.00
		To services in preparing and filing answer to bill of complaint of Provident L & T Co. to foreclose mortgage on K. C. & Independence Air Line	250.00
		To services in preparing and filing answer in case Cambria Steel Co. v. Guardian Trust Co. et al, in U. S. Circuit Court	750.00
1903 Jan.	12	To cash for expenses on two trips to Jefferson City, Jan. 9 and 12, to argue Jones v. Hamm in Supreme Court	34.60
Feb.	18	To cash for expressage on briefs in Chicago Zinc Mining case	.25
Feb.	21	To cash for copy of opinion in Court in Moore v. Jones	9.50
Feb.	26	To cash for telegram Jan. 26, F. B. Wilcox to C. A. Braley	.50
		To cash for telegram Clerk Supreme Court Feb. 13 to Trimble & Braley in Jones v. Hanmm	.25
Mar.	4	To expenses C. A. Braley and Wash Adams to Sherman, Texas	45.00
Mar.	17	To cash for copy of opinion State Trust Co. v. K. C. Pittsburg & Gulf Rld. Co.	5.35
Mar.	18	To expenses case Mellier v. Trust Co.	.20
Mar.	20	To cash for copies of order a ppointing Judge Black and Wash Adams Receivers	2.70
774			
Mar.	21	To cash paid H. H. Lyon for legal services rendered Guardian Trust Co. in Chicago	10.00
Mar.	27	To cash for expenses of C. A. Braley to Joplin, Mo. Mar. 26 to 28 in Zinc case	17.55
Apr.	4	To cash for expenses verifying affidavit of service of notice of hearing at Sherman, Texas, of supplemental and intervening petitions in Port Arthur Channel & Dock suit	.25
Apr.	6	To cash for telegram Trimble to D. E. Bryant March 13	.50
		To cash for telegram Supreme Court Clerk to Trimble & Braley March 19	.35
		To cash for telegram Mar. 20, Trimble & Braley to Clerk of Supreme Court	.25

		To cash for telegram Mar. 23, Clerk Supreme Court to Trimble & Braley	.71
Apr.	11	To cash for certified copy of order in Moore v. Jones	1.00
Apr.	14	To cash for expenses verifying motion in Moore v. Jones	.75
Apr.	18	To cash for telegram Apr. 8 Clerk of Court to Trimble & Braley in Port Arthur Channel & Dock case	.68
		To cash for telegram Apr. 9 to Clerk of Court from Trimble & Braley	.40
		To cash for telegram Trimble & Braley to Clerk in Port Arthur Channel & Dock Case	.96
		To cash for telegram Apr. 16 Clerk to Trimble & Braley in same case	1.00
Apr.	25	To cash for expressage	.30
Apr.	22	To cash for expenses C. A. Braley to Sherman, Texas	25.68
Apr.	25	To cash for telegram Scott to Trimble & Braley	.61
Apr.	28	To cash for telegram Braley to Jos. Kling	2.63
Apr.	29	To cash for telephone C. A. Braley to Scott in Chicago Zinc Mining case	.90
		To cash for telegram Braley to C. N. Stark	.53
		To cash for telegram Braley to J. A. Cameron	.85
		To cash for telegram Trimble & Braley to Clerk U. S. Circuit Court	.50
Apr.	30	To cash for telegram from Judge Bryant to Trimble & Braley	.50
		To cash for telegram from C. N. Stark to C. A. Braley	
775			
May	1	To cash for two telegrams Trimble & Braley to Clerk U. S. Circuit Court	.96
May	2	To cash for telegram Judge Bryant to Trimble & Braley	.50
May	4	To cash for telegram J. McD. Trimble to C. A. Braley at Sherman, Texas	.96
		To cash for telegram from Trimble & Braley to C. A. Braley at Sherman, Texas	.50
May	6	To cash for telegram C. A. Braley to Jos. Kling	1.20
		To cash for telegram C. A. Braley to C. N. Stark	.92
		To cash for telegram Judge Bryant to Trimble & Braley	.43
May	22	To half cost copy order Provident Life & Trust Co. v. Port Arthur Channel & Dock Co.	1.10

	To half C. A. Braley's expenses to Beaumont, May 13 to 20 account Port Arthur Channel & Dock case	32.50
May 27	To cash for telegram Trimble & Braley to Bates in same case	2.06
May 27	To cash for telegram Trimble & Braley to Bates in same case	.50
June 18	To half C. A. Braley's expenses to Sherman, Texas, June 14 to 18 1903	22.25½
June 19	To cash for telegram Bates to Trimble & Braley	.65
June 30	To cash for telephone to Wilcox at Chicago in Chicago Zinc Mining Case	1.40
	To cash for telegram June 13 to Braley about hearing Port Arthur Channel & Dock case at Sherman, Tex.	.37
	To cash for telegram June 19 to Bates	.50
	To telegram June 23, to Bates	.86
July 11	To cash for telegram E. L. Martin to Heynecker	1.46
July 29	To half cash paid for copy report of commissioner on Provident Life & Trust Co. v. Port Arthur Channel & Dock Co.	3.00
Aug. 20	To cash for telegram to and from C. L. Bates	.70
Sept. 14	To cash for telegram Trimble & Braley to Ivins, Kidder & Melcher, New York	1.01
Oct. 10	To cash for telegram Sept. 3 to Ivins, Kidder & Melcher	.98
Oct. 30	To cash for copy of order appointing receiver of O. K. C. & E. R. R. Co.	1.50
776		
Nov. 21	To cash for telegram from C. L. Bates regarding ruling of Judge Bryant	1.18
Dec. 1	To cash for expressage briefs in First Natl. Bank case	.45
Dec. 10	To half C. A. Braley's expenses to Beaumont, Texas, account hearing before Judge Bryant	41.50
Dec. 11	To cash for acknowledgment to four certificates of E. L. Martin to the plea to Jurisdiction	1.00
Dec. 12	To cash for telegram Trimble & Braley to Bates	.83
1904 Feb. 8	To half telegram Trimble & Braley from C. L. Bates	.43
Feb. 12	To half telegram Trimble & Braley to C. L. Bates	.31
Feb. 13	To half telegram Trimble & Braley from C. L. Bates	.28

Feb.	29	To half telegram Trimble & Braley to C. L. Bates	.52
			$20,302.73

Second. As against the foregoing amount, the defendant is entitled to credit as follows:

Sept. 1900	25	By check on account of services in the case of Cambria Steel Co. v. Kansas City Belt Railway Co. in the United States Court	$ 1,000.00
Nov. 1900	28	By check on account of services in Bierce case in the United States	2,000.00
Jan. 1903	24	By one-half rebate on C. A. Braley's Wabash Ticket on trip to Philadelphia	3.67
Feb. 1903	28	By cash account Port Arthur Channel & Dock Co. expenses	100.00
Apr. 1903	25,	By cash expenses to Sherman, Texas, in Port Arhutr Channel & Dock Co. case	100.00
July 1904	12,	By cash $790.81	790.81
		Total	$ 3,994.48

Third. Such items in the account sued on as are omitted in paragraph one of this report are disallowed.

Fourth. As to the claims sued on for services in what is called the Bierce case and the Cambria case and in reference particularly to the charges of a retainer in each of those cases, I am of the opinion that under the circumstances detailed in evidence such charges ought not to be allowed independently of and in addition to the reasonable value of the services rendered, and I find the reasonable value of those services to be the respective amounts stated in the first paragraph hereof.

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Fifth. On the issues joined by the defendants first counterclaim (being count Sixteen of the answer) and the reply I find for the plaintiffs, and find that there was no such want of care and skill on their part as to render them in any way liable to the defendants, but that they rendered the services in question with great ability and faithfulness.

Sixth. On the issues joined by the defendants second counterclaim (being count Seventeen of the answer) and the reply, I find for the plaintiffs and find as in paragraph five.

Seventh. On the issues joined by the defendants' third counter-claim (being count Eighteen of the answer) and the

reply, I find for the plaintiffs. The claim is for $6000.00 paid by the defendant to Mr. Wash Adams for legal services rendered to the defendant but which defendant claims should be charged against the plaintiffs on the asserted ground that the employment of Mr. Adams was on the plaintiffs' personal account, and the cost of his service should, therefore, be borne by the plaintiffs. There is no sufficient evidence to sustain this contention but abundant evidence from which I find that the fact was not as defendant alleges.

Eighth. The fourth counter-claim of the defendant (being count Nineteen of the answer) alleges a contract between plaintiffs and defendant whereby certain claims were to be prosecuted by plaintiffs, the defendant to advance necessary costs and one-half of the net proceeds derived by the plaintiffs in said causes to be paid to defendant; that under that arrangement, defendants had advanced in that matter $942.37 in the way of costs; that plaintiffs had collected on said claims $50,000.00 and that defendant is en-
778 titled to a judgment against plaintiffs for $250,000.00 and the costs so advanced. The facts from the evidence are that J. McD. Trimble, C. A. Braley, John A. Eaton and W. E. Swensel had made an arrangement for the prosecution of the claims mentioned for 45% of the amount recovered. Mr. Braley made a contract with the defendant on behalf of himself and his associates, whereby the defendant was to advance the expenses and furnish bonds for the conduct of the suits, and in consideration therefor receive 9% of the amount realized. Under this arrangement, prior to the appointment of a receiver of the defendant, it had advanced as costs $942.37 in the cases mentioned. After the appointment of a receiver of the defendants and its assets were taken into the custody and charge of the United States Court, the receiver declined to proceed with the agreement further or to make any additional advances. Whereupon the original four parties named, conducted the business thereafter at their own expense. The details of this business, what the cases were, what the expenses were, what the amount realized, what remains to be done have not been shown in this hearing. Mr. Braley says (Page 533), "I do not know the amount, but think there was recovered for our client, something over Forty Thousand Dollars" and that the expenses amounted to "several thousand dollars". None of the parties nor defendant's receiver presented the matter of the further performance of the agreement to the court for its instruction and direction, but all connection between the defendant and the four parties originally associated terminated

in respect to this matter upon the appointment of the receiver. Under the facts and those detailed in evidence no case on behalf of defendant on this counter-claim has been sustained, in my judgment, for the reason that the contract proven is wholly variant from the one alleged, that it was made with other and additional parties besides the plaintiffs, and that no definite showing has been made as to the extent, if any, to which defendant is entitled to participate in the net amount realized or to be realized in the con-
779 duct of that business. A consideration has been urged, with much fairness, that defendant ought to be at least reimbursed for the amount of expenses which it did advance. That may be so. It may or may not be entitled also to a pro tanto participation in the proceeds recovered, and that may be hereafter recovered, but its rights in that regard are against the four individuals with whom the arrangement was made and not against the plaintiffs only. The cause of action alleged has not been proven and I find the issue on this counter-claim and reply thereto for the plaintiffs, with the recommendation that defendant, if so advised, be allowed to dismiss it.

Ninth: On the issues joined by the defendant's fifth counterclaim (being count Twenty of the second amended answer) and the reply, I find for the defendant in the sum claimed of $42.50 and find the facts as alleged in said count.

Tenth. The defendant presented two series of requests for findings of facts and declarations of law, one printed and the other typewritten. I have marked each of them given or refused and return them herewith and make them part of this report.

Eleventh. The total amount which I find due the plaintiffs from the defendant, exclusive of credits, is $20,302.73.

I find the defendant entitled to credit on this amount in the sum of $4036.98, which includes the amount found for defendant on its fifth counter-claim, count Twenty of the answer. This leaves a balance due plaintiffs from defendant of $16265.75, for which I recommend judgment be entered for plaintiffs, with interest at 8% from August 30th, 1905, the date of filing this suit.

Twelfth. The costs of this hearing consists of the bill of the stenographer who took the testimony, amounting to $443.90, one-half of which has been paid by plaintiffs and one-half by defendant, and the stenographer's bill for writing this report, amounting to $15, and whatever the court may

allow the referee for his services in the hearing and
780 consideration of the case. As to referee's allowance, I am not able to report the time spent. The actual hearing with the various adjournments is shown by the transcript, and the arguments made and time spent in the review of the evidence, the readings of the briefs and consideration of the contention of the parties and preparation of the report, I am not able to state. Whatever the counsel of the parties and the court may determine to be a reasonable allowance will be satisfactory to me.

Respectfully submitted,

E. E. BALL, Referee."

Mr. Rosenberger: I now offer in evidence the final judgment in the Trimble & Braley suit above referred to entered in the Circuit Court of Jackson County, Missouri, on or about the first of August, 1912, and entry of satisfaction thereof.

Mr. Smith: We object to those for the same reasons.

The Master: The objections will be overruled.

To which last action and ruling of the Master in overruling objections to the introduction in evidence of the final judgment, and entry of satisfaction thereof, in the Trimble & Braley suit, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel at the time duly excepted.

Said final judgment, and entry of satisfaction thereof, in the Trimble & Braley suit, last above received in evidence by the Master, are in words and figures as follows, to-wit:

"Be It Remembered that on the 71st day of the regular May Term, 1912, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 5th day of August, 1912, the following proceedings were had and made of record before Hon. W. O. Thomas, Judge of Assignment Division in the cause entitled

J. D. McD. Trimble and C. A. Braley, partners as Trimble & Braley, Plaintiffs,

No. 25346 vs.

Guardian Trust Company, Defendant.

Now on this day come the plaintiffs by John A. Eaton,
781 their attorney, and the defendant by its attorney, Edward C. Wright, and this cause came on for final hear-

ing and decision and by agreement of the parties and in accordance with the mandate of the Supreme Court of the State of Missouri, it is, by the court, considered and adjudged that the plaintiffs J. McD. Trimble and C. A. Braley, partners under the firm name and style of Trimble and Braley, have and recover of and from the defendant, the Guardian Trust Company, the total sum of principal and interest, to this date of $12,580.41, and that the defendant pay the costs herein taxed, for which judgment and costs let execution issue. Thereupon plaintiffs acknowledge satisfaction of said judgment in open court.

State of Missouri,
County of Jackson—ss.

I, W. H. Harper, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the above and foregoing is a full, true and complete copy of the decree in the cause wherein J. McD. Trimble, et al, are plaintiffs and Guardian Trust Company is defendant as the same appears of record in my office.

In Witness Whereof, I have hereunto set my hand and affix the seal of said Circuit Court, at office in Kansas City, this 7th day of May, 1924.

W. H. HARPER, Clerk,
By Wm. M. Anderson, Deputy."

(Seal)

Mr. Smith: Mr. Rosenberger, at the last session, demanded we produce certain vouchers of the Kansas City Southern Railway Company showing bills rendered by Mr. Jetmore and amounts paid to him by the Kansas City Southern Railway Company. I offer in evidence, the first three bills that were made by Mr. Jetmore, being Voucher 421, issued in March, 1923, No. 262 in April 1903, and No. 86 issued in May, 1903, covering the first ten volumes of the original transcript of the record.

Mr. Rosenberger: That is objected to for the reason that it is not within the province of the stenographer by any form of bills which he may render to determine for himself
782 the arrangement and order of the court touching the payment of stenographic fees by the Master.

This objection was by the Master overruled, to which ruling the Guardian Trust Company duly excepted.

Said vouchers 421, 262 and 86 were thereupon received in evidence by the Master and were marked by the Reporter as

Kansas City Southern Railway Company's Exhibits 11, 12 and 13, respectively, and, omitting the captions, are in words and figures as follows:

Kansas City Southern Railway Company's Exhibit No. 11
(Paid by Voucher 421)

"Hearing of Testimony Before Hon. Shannon C. Douglass, Special Master.

Kansas City, Mo. March 26th, 1903.

To H. A. Jetmore, Shorthand Reporter, Dr.

To taking and transcribing testimony in above entitled cause, on hearings before Hon. Shannon C. Douglass, Special Master, covering period from Thursday, January 15th, 1903, to Saturday, March 14th, 1903,—Transcript pages 1 to 314, inclusive. Original and two carbon copies.

606 folios at 15c per folio $90.90"

Kansas City Southern Railway Company's Exhibit No. 12.
(Paid by Voucher 262.)

"Hearing Before Hon. Shannon C. Douglass, Special Master.
Kansas City, Mo., April 29th, 1903.

To H. A. Jetmore, Shorthand, Dr.

To transcript of testimony, pages 314 to 506, both inclusive, 672 folios at 15¢ $100.80

Partial payment on transcript of vouchers 399.20

Total $500.00"

Kansas City Southern Railway Company's Exhibit No. 13.

(Paid by Voucher 86).

"Hearing Of Testimony Before Hon. Shannon C. Douglass, Special Master
Kansas City, Mo., May 20th, 1903.

To H. A. Jetmore, Shorthand Reporter, Dr.

To transcript of testimony and vouchers in above entitled cause—Vol. 1 to Vol. 10, both inclusive, Testimony, Vol. 1 and Vol. 2,—pages 1 to 508, inclusive, 2926-2/5 pages at 50¢ per page $ 1463.20

Mar. 31-1903	Credit by voucher in my favor for	$90.90	
Apr. 29-1903	Credit by voucher in my favor for	500.00	590.90
	Balance due		872.30"

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783 Mr. Smith: I want the record to show that all the vouchers we were able to find covering those Jetmore bills have been handed to Miss Parlin and are subject to inspection by Mr. Rosenberger if he cares to offer any others.

Mr. Rosenberger: I will offer in evidence the balance of the bills rendered by Mr. Jetmore which had been produced here this morning by Mr. Smith, being seventeen in number, together with five copies of vouchers which have been produced in lieu of the original bills of Mr. Jetmore, which Mr. Smith states he was unable to find.

Mr. Smith: I object to the introduction of these statements and copies of vouchers in evidence for the reason that it is unnecessarily encumbering the record.

The foregoing objection was by the Master overruled, and said statements and copies were thereupon received in evidence by the Master, to which ruling, the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

Said seventeen statements and copies of vouchers, marked Guardian Trust Company's Exhibit 4½ to 25, inclusive, are, omitting the captions, in words and figures as follows:

Guardian Trust Company's Exhibit 4½

"Hearing of Testimony Before Hon. Shannan C. Douglass, Special Master,

Kansas City, Mo., Oct. 7th, 1903.

To H. A. Jetmore,
Shorthand Reporter, Dr.

To transcript of Exhibits to testimony in above entitled cause, on hearing before Hon. Shannon C. Douglass, Special Master, as follows:

K. C. & N. C. R. R. Bond Ledger—70¢ pages at 50¢	$ 35.00
Union Terminal R. R. Bond " 80	40.00
K. C. Suburbon Belt RR " " 77	38.50
" " " " Stock Register 56	28.00
Cons. Term. Ry. " " 24	12.00
Union Ter. R. R. " " 50	25.00
K. C. & I. A. Line Co. Bond Ledger 41	20.50
Journal Vouchers of Guardian Trust Co., #5249, etc.,—27 vouchers—12-½ pages at 50¢	6.75
Willey's Letter to Judge Black, 12 "	6.00
Extract of Minute Book of Guardian Trust Co., 7 pages at 50¢	3.50
Articles of Association & By-Laws of Guardian Trust Company, 10 pages, at 50¢	5.00

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Willey's Statement of K. C. Term'l Const. Co. account with M. K. & T. Trust Co., 21 pages at 50¢	$ 10.50
Willey's Statement—account—Trust Funds of M. K. & T. T. Co., as applies to K. C. T. C. Co. 14 pages at 50¢	7.00
Willey's Statement—account—Trust Funds, M. K. & T. Trust Co., as applies to 2nd St. Imp. Co., 10 pages at 50¢	5.00
Statement and Petition, regarding 1st Mtg. K. C. & N. C. Bonds and Coupons held by Guardian Trust Co. as collateral behind Sub. Belt notes, 6 pages at 50¢	3.00
Willey's statement—a/c of K. C. Terml. Con. Co. with M. K. & T. Co., —Ledger #2. pp 222, 225, 233, 18 pages	9.00
	$254.75
To Printer's Bill, for printing vouchers, in May, 1903	58.50
Total	$313.25"

"Hearing Of Testimony Before Hon. Shannon C. Douglass, Special Master.

Kansas City, Mo., Oct. 7, 1903.

To H. A. Jetmore,
Shorthand Reporter, Dr.

1903.

To Shorthand work in above entitled cause, as follows:

Sept.	9	Abstract of Minutes, etc.	12 pages at 50¢	$ 6.00
"	10	" " " "	9 "	4.50
"	12	" " " "	6 "	3.00
"	12	List of Officers & Directors:		
		Guardian Trust Company,	12 "	6.00
		Union Terminal R. R. Co.	4 "	2.00
		K. C. & Ind. Air Line Co.	4 "	2.00
		2nd St. Improvement Co.	4 "	2.00
"	14	Abstract of Minutes, etc.	3½ "	1.75
"	15	" " " "	3½ "	1.75
"	17	" " " "	15 "	7.50
"	19	" " " "	18 "	9.00
"	19	" " " "	10 "	5.00
"	19	" " " "	23 "	11.50
"	20	" " " "	4 "	2.00
		Total,		$64.00"

Said last two bills, attached to Voucher No. 710, dated October 8, 1903, are receipted for by Mr. Jetmore on October 12, 1903.

Guardian Trust Company's Exhibit 5.

"Hearing of Testimony Before Hon. Shannon C. Douglass, Special Master.

Kansas City, Mo. Nov. 25, 1903.

To H. A. Jetmore,
Shorthand Reporter, Dr.

To transcript of testimony and exhibits in above entitled cause, on hearing before Hon. Shann C. Douglass, Special Master, Balance of charge for Volume 11 and Volume 12,—page 5678 to 6679.
504 pages at 50c per page $ 252.00

785 Oct. 9, 1903.
To shorthand work, preparing statement as to K. C. & N. C. R. R. Co. for counsel.
27 pages at 50¢ per page $ 13.50

Oct. 20, 1903.
To shorthand work, preparing statement as to property in name of Central Improvement Co., for counsel,
9½ pages at 50¢ per page 4.75

Total $270.25"

Said bill, attached to Voucher No. 160, dated November 27, 1903, is receipted for by Mr. Jetmore on December 3, 1903.

Guardian Trust Company's Exhibit 6.

"Hearing Of Testimony Before Hon. Shannon C. Douglass, Special Master.

Kansas City, Mo. October 25th, 1904.

To H. A. Jetmore,
Shorthand Reporter, Dr.

To transcript of Testimony in above-entitled cause on hearing before Hon. Shannon C. Douglass, Special Master.
Part 3 of Volume 15:—Pages .... to .....
140 pages at 50¢ per page $ 70.00

Said bill is attached to Voucher No. 228, dated October 25, 1904, and receipted for by Mr. Jetmore on October 29, 1904.

Guardian Trust Company's Exhibit 7.

"The Kansas City Southern Railway Company
to H. A. Jetmore, Dr.
Shorthand Reporter,
Kansas City, Mo.

1905
Feb. 28 For transcript of testimony in Guardian Trust Company Accounting case; as per bill hereto attached, dated Feb. 27, 1905, as follows:
806 pages at 50¢ per page $403.00"

Guardian Trust Company's Exhibit 8.

"Hearing Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo., March 28, 1905.

To H. A. Jetmore,
Shorthand Reporter, Dr.

To transcript of Testimony in above-entitled cause, on hearing before Honorable Shannon C. Douglass, Special Master:
Continuation of John C. Telfer's testimony—
192 pages—Volume "16"
830 pages—Volume "18"—Johnson's testimony

1025 pages at 50¢ per page $512.50

Said bill is attached to Voucher No. 481, dated March 29, 1905, and receipted for by Mr. Jetmore on March 31, 1905.

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786 Guardian Trust Company's Exhibit 9.

"Hearing Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo., April 17th, 1905.

To H. A. Jetmore,
Shorthand Reporter, Dr.

To transcript of testimony in above-entitled cause on hearing before Honorable Shannon C. Douglass, Special Master.
23 pages —Testimony of Col. Sam'l F. Scott
772 " " " H. B. Johnson

795 " at 50¢ per page $397.50"

Said bill is attached to Voucher No. 77, dated April 19, 1905, and receipted for by Mr. Jetmore on April 21, 1905.

Guardian Trust Company's Exhibit 10.

"The Kansas City Southern Railway Company

To H. A. Jetmore, Dr.,
Kansas City, Mo.

1905
May 15 For bill dated May 10, 1905, transcribing testimony in Guardian Trust Accounting case, as per bill attached, 743½ pages at 50¢ per page $371.75"

Guardian Trust Company's Exhibit 11.

"Hearing Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo. June 12th, 1905.

To H. A. Jetmore,
Shorthand Reporter, Dr.

To transcript of testimony in above-entitled cause, on Hearing before Hon. Shannon C. Douglass, Special Master:

Indexes and Title Covers, Vol. 16 to 21, incl.
1 page —Volume 16,
1 page Volume 17,
12 pages Volume 18,
11 pages Volume 19,
17 pages Volume 20,
11 pages Volume 21,

53 pages,
30 pages, Johnson Exhibit '820—2nd Mtge. Air Line
5 pages, Johnson Exhibit '721'—Commissioners' Award—Vol. 20, pages; 0652 to 10656, incl.
2020 pages, Belt, Belt Constructing—K. C. Terml. Constg. Co. Air Line,—Consolidated Terminal,—Fairmount Amusement Co., Central Imp. Co. and Northern Townsite Co.—Journal and Cash Vouchers and Cash Tickets

Total 2108 pages, at 50¢ per page $1054.00"

Said bill is attached to Voucher No. 42, dated June 13, 1905, and receipted for by Mr. Jetmore on June 16, 1905.

787 Guardian Trust Company's Exhibit 12.

"Hearing Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo. July 10th, 1905.

To H. A. Jetmore,
Shorthand Reporter, Dr.

To Transcript of Testimony in above-entitled cause, on hearing before Hon. Shannon C. Douglass, Special Master.

1655 pages—Balance of Vouchers of K. C. S. B. R. R. Co.
185½ " Testimony—balance of Volume No. 25, Index &c.

1840½ " at 50¢ per page $920.25"

Said bill if attached to Voucher No. 33, dated July 11, 1905, and receipted for by Mr. Jetmore on July 15, 1905.

Guardian Trust Company's Exhibit 13.

"Hearing Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo. August 4th, 1905.

To H. A. Jetmore,
Shorthand Reporter, Dr.

To Transcript of Testimony in above-entitled cause, on hearing before Hon. Shannon C. Douglass, Special Master.
2 pages,—Johnson's Exhibit '197',—Vol. 15, p. 8219½
65½ pages,—Additional Vouchers, Vol. 33
36½,—Transcript of account of 2nd Street Improvement Co. with Trust Co. (from Cambria)
46 pages,—Letters showing domination of Belt Company by Trust Company.
1 page—Certificate of Normon & Robertson, Abstractors.
3½ pages,—Deed of Release,—Trust Co. to Belt Company.
13 pages,—Letters and Time Cards in regard to K. C. & N. C. R. R. Co. (Tronsonhauser's Testimony)
263½ pages,—Ingel's Exhibits.
110 pages,—Subscription Contracts for Consolidated Terminal Railway Company bonds.
314 pages,—Bolman's Exhibit—Profit & Loss Account of Trust Company's and vouchers covering same.
177½ pages, F. B. Wilcox, Testimony—(part 1).
15 pages,—Calls made for books, papers, etc. in the record by Complainant's of Trust Company.

1047½ pages at 50¢ per page $533.75"

Said bill is attached to Voucher No. 7, dated August 4, 1905, and receipted for for Mr. Jetmore on August 5, 1905.

Guardian Trust Company's Exhibit 14.

Kansas City, Mo. Sept. 8th, 1905.

To H. A. Jetmore,
Shorthand Reporter, Dr.

To Transcript of Testimony in above-entitled cause, on hearing before Hon. Shannon C. Douglass, Special Master,
303 pages,—F. B. Wilcox Testimony

788 146 pages,—Vouchers to E. V. Ingel's Exhibits—(2nd Testimony)
118 pages —Additional Vouchers and Letters, showing Domination.
680 pages —Vouchers covering Johnson's Stock and Bond Statement
304 pages —Minutes of Belt, Consolidated Terminal, etc.
466 pages —Stock Ledgers of Belt, Consolidated Terminal, etc.
541½ pages—Stock Certificates of Belt, etc.
458 pages,—Francis A. Wright's Exhibit '1', '2', '3', '4', '5', '5½' and '6',—two carbon copies.
2 pages —Master's Order for examination of P. & G. Books regarding Central Improvement Company matters.

4 pages —Master's Order for examination of K. C. Southern Ry. Co. books regarding Reorganisation Committee.
11 pages,—Argument by Complainant's Counsel in support of Motion for order to close Defendant's Proofs.
5 pages,—Extracts from Francis A. Wright's Testimony.

3038½ pages at 50¢ per page $1519.25"

Said bill is attached to Voucher 77, dated September 8, 1905, and receipted for by Mr. Jetmore on September 12, 1905.

Guardian Trust Company's Exhibit 15.

"Hearing Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo., Oct. 3rd, 1905.

To H. A. Jetmore,
Shorthand Reporter, Dr.

To Transcript of Testimony in above-entitled cause, on hearing before Hon. Shannon C. Douglass, Special Master.
95 pages —Additional Vouchers and Book Entries covering Johnson's Exhibit '844',—Stock and bond statement.
170 pages —Vouchers and Book entries covering Johnson's Exhibit '840'—Bonus, Comm'n & Tr. Fee Statement
40 pages —Additional Vouchers and Book Entries covering Ingel's Statements—(2nd Time)
45 pages —Witness Lane's statement.

350 pages at 50¢ per page $175.00
364 pages —Minutes of Reorganisation Committee (2 carbon copies)—364 pages at 25¢ 91.00

$266.00"

Said bill is attached to Voucher 817, dated October 4, 1905, and receipted for by Mr. Jetmore on October 7, 1905.

Guardian Trust Company's Exhibit 16.

"Hearing Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo. Nov. 13th, 1905.

To H. A. Jetmore, Shorthand Reporter, Dr.

1 Large Page —Wright's Exhibit '9'
11 " " Wright's Exhibit '10'

789 (Two carbon copies)
12 pages at 25¢ per page, $3.00 x 2 $ 6.00

48 pages —Testimony of E. S. Swinney.
159 pages —Direct Examination of E. L. Martin
71 pages —Part of Cross examination of Francis A. Wright —9/8-05 & 10/7/05—by Barnett.

278 pages	—(2 carbon copies) 278 at 16-2/3¢ $46.33-1/3 X 2	92.66-2/3
7½ pages	—Book entries covering Ingel's last Exhibit (2nd time) (Part 1, Volume 35, pp. 18453 to 18760, inclusive. (Testimony—George C. Ward, (Testimony H. B. Maynard, (Testimony J. T. January, (Testimony James H. Pickering (only part)	
298 pages	Vouchers and book entries covering 2nd Street Improvement Company Statement of Account, on Trust Company's books.	
1000 pages		
1305½ pages at 50¢ per page		$652.75
	Total	$781.41
21 pages,	Central Improvement Company Stock Certificates.	
21 pages at 50¢ per page		10.50
		$ 781.91"

Said bill is attached to Voucher 101, dated November 13, 1905, and receipted for by Mr. Jetmore on November 17, 1905.

Guardian Trust Company's Exhibit 17.

"The Kansas City Southern Railway Company

To H. A. Jetmore, Dr.
% T. R. Marks, Building.

Dec. 9 For Bill dated Dec. 7, 1905;
Shorthand reporting and copying papers as per bill attached in the Guardian Trust Company Accounting Case $564.00"

Guardian Trust Company's Exhibit 18

"The Kansas City Southern Railway Company,
To H. A. Jetmore, Dr.,
Shorthand Reporter,
Kansas City, Mo.

1905
Dec. 28 For Bill dated Dec. 26th, 1905, Transcript of testimony in case of Guardian Trust Company Accounting on hearing before Hon. Shannon C. Douglass, Special Master.

As per bill atached $ 813.25"

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790 Guardian Trust Company's Exhibit 19.

"The Kansas City Southern Railway Company.
To H. A. Jetmore,
% T. R. Marks.

1906
Jan. 17 For bill dated Jan, 15, 1906, Transcript of testimony in the case of Cambria Steel Co. v. The Kansas, City Suburban Belt Railroad Company, etc.
As per bill attached $ 313.50"

Guardian Trust Company's Exhibit 20.

"Hearing Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo. Feb. 12, 1906.

To H. A. Jetmore, Shorthand Reporter, Dr.

Minutes of Old Belt Company. (Defendant's Case)
65 pages (two copies) 65 at 16-2/3c X 2 21.66-2/3
(Statement of Account of K. C. S. B. R. R. Co. Month of
(June, 1898.
(Statement of Account of K. C. S. B. R. R. Co. month of
(October, 1899. (Defendant's case)
132 pages (two copies) 132 at 16-2/3c X 2 44.00
Exhibits offered by Defendant.
7-1/2 pages—(two copies) 7-1/2 at 16-2/3¢ X 2 2.50
122 pages—(122 at 50¢) 61.00
Voucher Record of Central Improvement Company, offered in Defendant's case.
93 pages—(two copies)—93 at 16-2/3¢ X 2 31.00

Transcript of Testimony—Vol. 48—pages
28736 to 29305, both inclusive.

570 pages.

Less Tromanhauser Exhibits, 13 pages, charged for
13 in bill of Aug. 4, 1905.
Release of K. C. S. B. R. R. Co. Mortgage, charged
3½ for in Bill of August 4, 1905/.
Ingels Exhibits and vouchers charged for
263½ pages—in Bill of Aug. 4, 1905.
7½ pages—in Bill of Nov. 13, 1905.
40, pages in in Bill of Oct. 3, 1905.
146 pages in Bill of Sept. 8, 1905.
473½—(These deducted from Vol. 48 and 49)

96-2/3 pages.

Transcript of Testimony—Vol. 49, pages 29306 to 30250,
both inclusive.

945 pages,
10 pages,—Index & Cover—Volume 48.
16 pages —Index & Cover—Volume 49.

1067-2/3

38 pages—Less McCarty Testimony, pages 30198 to 30235, inclusive, charged in Bill of Dec. 26,/05.

1029-2/3 pages.
187-1/3 pages deducted for blank and short pages.

842-1/3 pages at 50¢ per page $421.16-2/3

Total $581.33-1/3"

791 Said bill attached to Voucher 49, dated February 12, 1906, is receipted for by Mr. Jetmore on February 14, 1906.

Guardian Trust Company's Exhibit 21.

"Hearing Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo. Feb. 20, 1906.

To H. A. Jetmore, Shorthand Reporter, Dr.

To Transcript of testimony—Vol. 48 and 49.
Hastings Exhibit '43, '44', '45', '46', '47', '48', '51', '52', '70', '71', '72', '74' and '75'.
12½ pages at 50¢ per page $ 6.25
Volume 50,—pages 30251 to 30571, both inclusive.

Defendant's Case.

321 pages.
5 pages—Index and cover.

326 pages.
12 pages off, for short pages

314 pages. Two carbon copies.
314 pages at 16-2/3¢ per page, times 2 104.66-2/3

$110.91-2/3"

Said bill is attached to Voucher 267, dated February 20, 1906, and receipted for by Mr. Jetmore on February 24, 1906.

Guardian Trust Company's Exhibit 22.

"Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo. March 9th, 1906.

To H. A. Jetmore, Shorthand Reporter, Dr.

1 page—Johnson Exhibit '855'—entry on K. C. So. Journal No. 2 page 550, page 13647½ of record.
11 pages—Ingels Exhibit '...' last time on stand, regarding amounts paid by K. C. So. Ry. Co. and Reorganization Committee for P & G
81½ pages—Vouchers of Central Improvement Co. and Belt Company, offered in connection with testimony of witness Francis A. Wright

93½ pages,
60 pages,—Correspondence passing between Trust Company and Reorganization Committee—Rebuttal.

153½ pages at 50¢ per page $ 76.75

Volume 51,—pages 30572 to 31227, inclusive.

656 pages
6 pages—Index and cover.

662 pages.
132 pages, Less,—Annual Statements of K. C. S. B. R. R. Co. for month of June, 1898, and October, 1899, paid for in bill of Feb. 12, 1906.

530 pages.
27 pages. Less for short pages, etc.

503 pages.

792 Volume 52,—pages 31228 to 31500, inclusive.
273 pages.
65 pages Less,—Old Belt Company Minutes, paid for in Bill of Feb. 12, 1906.
157½ Pages Less—New Belt Company Minutes,
222½ paid for in Bill of Dec. 7/05

50½ pages
8½ Less

42 42 pages, Minutes of Consolidated Terml. Ry. Co. and cover.

545 pages—two carbon copies—16-2/3¢ X 545 X 2 $181.66-2/3

Total $ 258.42"

Said bill is attached to Voucher 69, dated March 20, 1906, and receipted for by Mr. Jetmore on March 20, 1906.

Guardian Trust Company's Exhibit 23.

"Hearing Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo. March 29th, 1906.

To H. A. Jetmore, Shorthand Reporter, Dr.

To Transcript of testimony in above-entitled cause, on hearing before Hon. Shannon C. Douglass, Special Master, Volume 53, —pages 31501 to 32867, both inclusive.

1367 pages
14 pages—Index and Cover

1381 pages.

Less
7½ pages,—paid for in bill of Feb. 12, 1906.
11 pages—Remarks on Motion to Close Defendant's Proofs-paid for in Bill Sept. 8, 1905.
93 pages—Voucher Record of Central Improvement Company, paid for in Bill of Feb. 12, 1906.
289 pages—Francis A. Wright's Testimony taken by Mr. L. Knight, paid for in bill of Jan. 15, 06.
40 pages—Francis A. Wright's Testimony taken by Mr. F. Barnett, —paid for in Bill of Nov. 13., 05.
48 pages—E. S. Swinney's Testimony, taken by Mr. R. Adams, paid for in Bill of Nov. 13, 05.
159 pages—E. L. Martin's Testimony taken by Jetmore and Adams, —paid for Bill Nov. 13, 05.

647½

733½ pages.
38½ pages,—Less for short pages, etc.
Two carbon copies.
695 pages at 16-2/3¢ X 2 $ 231.67"

Said bill is attached to voucher 533, dated March 29, 1906, and receipted for by Mr. Jetmore on March 21, 1906.

Guardian Trust Company's Exhibit 24.

"Hearing Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo. April 21st, 1906.

To H. A. Jetmore, Shorthand Reporter, Dr.

To transcript of Testimony in above entitled cause, on hearing before Hon Shannon C. Douglass, Special Master.

793 Volume 54

Volumes 54, 55 and 56—pages 32868 to 34614, inclusive.

563 pages—32868 to 33430, both inclusive.
8 pages—Index and Cover.
2 pages—33322½ and 33322¾

573 pages
Less:
31 pages—Cross examination of Francis A. Wright, (pages 33018 to 33051), paid in Bill of Nov. 13-05.

81 pages—Central Improvement Company Vouchers,—(pages 33325 to 33411) paid for in Bill of Mar. 9, 06.
138½ 26 pages—Discount for short pages, etc.

434½ pages.
21½ pages, Journal Entries in Central Improvements Company's Journal offered in Rebuttal—(pages 33268 to 33288)
21½ pages at 50¢ per page $ 10.75

413 pages
413 pages at 16-2/3¢ X 2 137.66-2/3

$148.41-2/3

Volume 55.

702 pages—33431 to 34132, inclusive.
4 pages—33758½, 5/8, 6/7, and ½.
5 pages—Index and cover

711 pages.
Less:
42½ pages-Willey's Exhibits 95, 98, and 99, commencing at pages 33543, 33558, 33596. These paid for in Bill of Dec. 7,-05.
148-2/3 pages—Letters in Letter Impression Books of K. C. S. B. R. R. Co.—pages 33927 to 34125.
237-2/3 These paid for in Bill of Dec. 7-05/.

473-1/3 pages.
473 ½ pages at 16-2/3¢ X 2 157.77-2/3

$306.19-1/3

Volume 56.

482 pages—34133 to 34614, inclusive.
12 pages—Index and cover

494 pages.
Less:
122 pages of Copied Exhibits—paid for in Bill of Feb. 12/06.
60 pages of Correspondence passing between Reorganization Committee and Guardian Trust Company, paid for in Bill of March 9/06.
223 41 pages, Discount for short pages, etc.

271 pages.
271 pages at 50¢ per page $135.50
1 page,—Wright's Exhibit 'A-12', at 16-2/3¢ X 2 .33-1/3
Franklin Hudson Publishing Company—Binding Master's Copy of Record—56 Volumes—2 large—$36.00.
Complainant's one-half of same. 18.00

Total $460.03"

Said bill is attached to Voucher 294, dated April 25, 1906, and receipted for by Mr. Jetmore on April 27, 1906.

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794 Guardian Trust Company's Exhibit 25.

"Hearing Before Honorable Shannon C. Douglass, Special Master.

Kansas City, Mo. August 20th, 1906.

To H. A. Jetmore, Shorthand Reporter, Dr.

Part 1, Volume 37—pages 34615 to 35401, both inclusive.	
4 pages—Certified copy original petition, Cambria case.	
17 pages—Certified copy report of sale by S. C. Douglass, Special Master, of K. C. Sub. Belt Rld. et al.	
11 pages—Certified copy order confirming report of sale of K. C. Sub. Belt Rld. et al.	
9 pages—Certified copy of Report of sale by S. C. Douglass, Special Master, of Union Terminal Rld.	
5 pages—Certified copy order confirming Report of Sale of Union Terminal Rld.	
11 pages—Certified copy of Agreement between Reorganization Committee and K. C. Southern Rld. Co., Oct. 19, 1900, and exhibits thereto.	
57 pages—Less 2½ pages—54½ (2 carbon copies)	
54½ pages at 16-2/3¢ X 2	$ 18.16
300 pages—Minutes of K. C. Southern Ry. Co.—Stockholders and Directors Meetings, March 20, 1900. (2 carbon copies)—(charge for only one)	
300 pages at 16-2/3¢ per page	50.00
81 pages—Mortgage K. C. Southern Railway Company. (2 copies—but charge for only 18 pages)	
18 pages at 50¢ per page	9.00
23 pages—Supplemental Indenture—Mortgage K. C. Southern Railway Company. (2 copies).	
Less: 1½ pages—21½ pages at 50¢ per page	10.75
200 pages—Testimony in Port Arthur Channel & Dock Company case pages 34954 to 35053, inclusive.	
2 pages—Stipulation filed Feb. 7, 1905—35055-6	
2 pages—Stipulation filed May 1, 1905—35058-9	
28 pages—Stipulation filed July 2, 1906—35061-88.	
232 pages—Less 10 pages—222 pages	
222 pages at 50¢ per page	111.00
Total	$198.91"

Said bill is attached to Voucher 510, dated August 24, 1906, and receipted for by Mr. Jetmore on August 30, 1906.

On Friday, the 13th day of June, 1924, at ten o'clock A. M. at the request of the Kansas City Southern Railway Company and the Cambria Steel Company, the Master reopened the case and the following proceedings were had:

795 Mr. JAMES E. ANDERSON, produced as a witness on behalf of the Kansas City Southern Railway Company and the Cambria Steel Company, first being duly sworn, testified, in substance, as follows:

I originally made a check of the amount paid by the Kansas City Southern to the Guardian Trust Company, in April, 1916, when something like $878,000.00 was paid. Recently, I make a check of the amount of that payment to see whether the total amount to be paid had been correctly figured. I was advised at that time that the Trust Company claimed that we had under-calculated the amount paid to them and that the calculation was inadequate by about $144.35. In April, or some time in 1916, I made a check of the Trust Company's books with reference to an item of $40,001.25 growing out of the sale of certain Northern Connecting bonds that had been sold under the order of court. I found from the books of the Trust Company that interest on that amount of $40,001.25 was received by the Trust Company over a period from November 1, 1901 to October 25, 1902, to the amount of $737.02, and interest from October 25, 1902, to March 20, 1905, in the amount of $3874.47, and from March 20, 1905 to April 15, 1916, in the amount of $17,295.89, making a total of interest actually received of $21,907.38. When the payment was made on April 15, 1916, the amount of interest credited on this item of $40,001.25, was only $17,268.01, whereas the amount of interest actually received by the Trust Company, as stated, was $21,907.38. No interest was received by the Southern Company in excess of $17,268.01. The Southern Company has never been paid anything on account of the item of interest of $737.02 received by the Trust Company on October 25, 1902, and $3874.47 received March 20, 1905.

Mr. Smith: Let the record show, if the Master please, that the Southern Company is now asking the Master to require the Trust Company at this time, and before you, to make a full and complete showing as to what has been done
796 with the collateral in its hands held by it and described in the final decree in this case of June 25, 1910, and that it account to you today and explain to you any income, cash or dividends, that it received out of that collateral, and what disposition it has made of it.

The Master: The Master will not make that order at the present time.

To which ruling of the Master, the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

Mr. Smith: I want to offer in evidence, if the Master please, a copy of a letter that was written by Mr. F. H. Moore, to Mr. S. B. Willey, representative of the Guardian Trust Company, March 28, 1917, asking for an agreement as to the figures to go into the final decree in the Guardian Trust Company case. Mr. Bowersock replied to that letter. And another letter of August 16, 1918, in which Mr. Bowersock acknowledges receipt of a form of tentative decree in this case.

Said three letters last above offered in evidence by counsel for the Kansas City Southern Railway Company are here marked by the reporter, Kansas City Southern Railway Company's Exhibits 14, 15 and 16.

Mr. Rosenberger: Those will be objected to as wholly irrelevant to any issue in the case. If received they might call for quite an extensive collateral inquiry as to what Mr. Bowersock did, and other counsel for the Trust Company, in an effort to get this final decree rendered; and also as to the calling of various hearings before the court which resulted in the appointment of the Master. I don't see what they have possibly got to do with this case.

The Master: I can't see that they have any relevancy.

Mr. Smith: I am offering them, if the Master please, on the theory that the question of the claims for interest, claims for prompt disposition of this matter, is evidenced by the fact of Mr. Bowersock's acknowledging letters showing that we tried to do that very thing.

797 The Master: I think we would open up a very large inquiry. That objection will be sustained.

To which last action and ruling of the Master in sustaining said last foregoing objections, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted.

Mr. Smith: I would like to have them copied into the record.

The Master: All right.

Said Southern Railway Company's Exhibits 14, 15 and 16 are in words and figures as follows, to-wit:

Kansas City Southern Railway Company's Exhibit 14.

"March 28, 1917.

File

Mr. S. B. Willey,
301 Fidelity Trust Company Building,
Kansas City, Missouri.

Dear Sir:

Referring to conference with you on January 19th, with a view to agreeing on the amount of the judgment in the suit of the Guardian Trust Company against The Kansas City Southern.

Will you kindly advise whether you have finished checking over the statement which was left with you, and whether you have found it to be correct.

Yours very truly,

Kansas City Southern Railway Company's Exhibit 15.

"Law Offices
Justin D. Bowersock,
Fidelity Trust Building.

G. T. Aughinbaugh
Robert B. Fizzell

Kansas City, Mo. April 5, 1917.
(File No. .....)

Mr. S. W. Moore,
General Solicitor, K. C. S. Ry. Co.,
Kansas City, Missouri.

(Received Apr. 7, 1917.)
(Legal Department)
(The Kansas City Sou. Ry. Co.)

Dear Sir:

Your favor of March 28th addressed to Mr. Willey has been referred to me for reply. The Receiver's office has been so busy with other matters that your statement relative
798 to the judgment in favor of the Guardian Trust Company against the Kansas City Southern Railway Company has not had attention. I will see that this matter is taken up at once and disposed of.

Very truly yours,

JUSTIN D. BOWERSOCK,
Attorney for Receiver."

JDB-G

Kansas City Southern Railway Company's Exhibit 16.

"Law Offices
Justin D. Bowersock
Fidelity Trust Building.

G. T. Aughinbaugh
Robert B. Fizzell Kansas City, Mo. August 16, 1918.

Mr. S. W. Moore,
General Solicitor, K. C. Southern Ry. Co.,
Kansas City, Missouri.

Dear Sir:

I have received your letter of July 28, enclosing tentative draft of decree in the Kansas City Southern-Guardian Trust Company litigation. My duties with the District Board have prevented my getting to this as promptly as I should have liked, and I am now leaving the city for two weeks' absence. I will take the matter up with you immediately on my return, and endeavor to dispose of it finally.

Very truly yours,

JDB-LJ JUSTIN D. BOWERSOCK."

Mr. Rosenberger: I offer in evidence all of the court files in Equity case No. 2483, entitled Bierce and others against the Guardian Trust Company.

Mr. Smith: I object to that, if your Honor please, as grossly unfair and improper way to get the matter into this case. It requires the inclusion of a huge amount of documents that probably have no bearing on this case at all and to make the offer is not only improper, but going into something here at the last moment after we have had a great argument of this matter that we know nothing about or
799 have had no opportunity to see these individual documents in the evidence offered.

Mr. Rosenberger: Counsel is in error about a great mass of material going into any record. Only that will be in the record, the Master's record, which counsel have expressly asked to be copied, and request is here made by us that we not copy, but insert merely by call. It will not be a part of any record on appeal unless brought in by praecipe; any party may bring any portion of the matter into the record by praecipe. Furthermore, the party doing that will be subject

to all of the penalties for doing that, both by way of costs and otherwise. But I want this record available on appeal.

The Master: What is the purpose of it?

Mr. Rosenberger: The purpose is as bearing on the claim here for interest on the item which has been refered to in the testimony offered by the witness Anderson.

The objection to such offer was, by the Master, sustained, to which ruling the Guardian Trust Company duly excepted.

Mr. Rosenberger: I next offer in evidence the printed record on appeal, No. 4859, filed in the United States Circuit Court of Appeals, in the case of E. A. Shedd, et al., vs. Guardian Trust Company, et al, consisting of three printed volumes, and the opinion of the Court of Appeals in said cause, reported in 240 Fed. 689.

Mr. Smith: I object to that offer, if your Honor please, for the same reasons as were given before and state in support of that objection, that the Southern Company was not a party to the Shedd case and counsel who are now representing the Southern Company on this hearing I think I can say—certainly for myself and I think I can say it for the others—have no knowledge of the case at all; never were parties to it and the only knowledge they have of it is as it has been referred to on this hearing and as they have gotten it from newspaper accounts possibly in the past. As for myself, I didn't know about the Shedd case until I got into this
800 matter here.

The Master: The objection will be sustained.

To which last action and ruling of the Master, in sustaining the foregoing objections, the Guardian Trust Company, by its counsel, at the time duly excepted.

Mr. Rosenberger: I next offer in evidence, as Exhibit 6, appellant's abstract of the record in the case of H. S. Mecartney vs. Guardian Trust Company, on appeal to the Supreme Court of Missouri, and on file in said court.

Mr. Smith: I object to that offer for the reason that on the hearing of this case before your Honor on the issue of costs, counsel on both sides, offered parts of the record in the Mecartney case, including all parts that were deemed by counsel to have any material bearing on the issues herein involved; that this present offer in this omnibus form is unfair, improper and putting into the case a huge mass of record—that

record containing 1447 pages, each page containing a great deal more than the ordinary page of printed record; that no showing is made as to how this record could have any bearing upon the issues now under consideration; and for the reason that it is improper to offer it at this time and improper to offer it at all in such a huge, unreasonable form.

The Master: I understand you don't expect the reporter to copy it at all?

Mr. Rosenberger: No; it will be copied merely as called for.

The Master: The objection is overruled.

Mr. Smith: If the Master please, when you make up this record how are you going to get that into the record?

The Master: The notes of the reporter will show a call for it. That makes it accessible to every party in the case.

Mr. Smith: If the Master please, I further object to it because of the very proposition that your Honor has
801 ruled that you are not going into the Mecartney case and you are now putting into this record by this ruling all of the facts in that case and making an issue now by which Mr. Rosenberger can contend in the Appellate Court that the evidence has been examined by you and that you have found on the evidence in this Mecartney case that the judgment in his favor was a correct amount, when your Honor has said you are not going to do that. I object for the further reason that so far as it goes to the merits of the Mecartney case, it was evidence taken in a proceeding in which we were not parties and we have had no opportunity to appear and cross-examine those witnesses; and it puts it in a form by which counsel can make the contention that you have heard the evidence, or seen the evidence, in the Mecartney case and presumptively you have concurred in the decision in that case. It makes it improper and grossly unfair to us, not giving us a proper hearing according to the rules of equity; no reason has been stated here for making the offer of this transcript or what bearing it has upon any question involved in the case.

The Master: I will admit the Mecartney case record with the explanation that the reporter is not to copy it except as called for.

To which ruling of the Master, the Kansas City Southern Railway Company and the Cambria Steel Company duly excepted.

802 Mr. Smith: Just a moment: On this ruling of your Honor now made I ask that the Master re-open this Mecartney case and let us re-try that case in a proceeding in which we will have the opportunity to cross-examine the witnesses.

The Master: The Master is not going to try the Mecartney case and does not, as a matter of fact, intend to read the entire Mecartney record.

Mr. Smith: Just a moment, if the Master please: I have already stated in this record I think the Master is trying most scrupulously to be absolutely fair in this case, but I think the ruling the Master has just made is made inadvisedly. I think when you say you are not going to read the entire record that that does not give any protection to us in the case, because it cannot be told what you have read. I think if your Honor is going to overrule this motion—and I think you shouldn't, of course—I think your Honor ought to say—if you read any part of that record—ought to specify in your report what part you read, because there is no way, other than that, by which it can be told what you have examined, unless you do that. We are going up there to the other court on a hearing and there is no other way in the world by which we can determine what you have read.

The Master: I certainly want to be fair with you.

Mr. Smith: I know you do. I know you do.

The Master: The Master is somewhat disappointed at Mr. Rosenberger's offer at this time.

Mr. Rosenberger: How is that?

The Master: I am very sorry that out of abundance of precaution you have seen fit to bring this whole thing in again.

803 Mr. Rosenberger: The Master has ruled on that no less than three times, now shall we go forward with the evidence or continue the argument?

The Master: Go forward.

H. B. LEAVENS recalled as a witness on the part of the Guardian Trust Company, testified in substance as follows:

I have brought with me the original promissory notes enumerated and described in Paragraph 4 of the final decree in

the Cambria case entered in June, 1910. Page 1051 of the printed record on appeal, No. 3489 and 3490, in the United States Supreme Court of Appeals. I have compared the original notes with the description of them as set forth in Paragraph 4 of that decree and have checked them as regards their dates and amounts, rate of interest, and the credits endorsed on the notes.

Mr. Rosenberger: I call your attention to the following description of one of those notes as it appears in Para-
804 graph IV of said decree, to-wit: "One note dated October 23, 1899, due on demand for $7182.40, with interest at six per cent per annum from date, which with interest at this date amounts to $11,748.70." Is that note correctly described in that decree?

Mr. Smith: Just a moment: I object to that question and any evidence along that line, for the reason that this case has gone to final judgment or this issue was tried before Judge Douglass and Judge Douglass made a finding with reference to the amount due on the note herein described and made report of the same; no exception was taken to the Master's report in reference to that note. The case went to final decree and the amount found due on that note was ascertained in that decree; no assignment was based upon such finding of the Circuit Court, the case proceeded to the Court of Appeals and the judgment of the Court of Appeals fixed and determined the amount that was to be paid in that case on those notes the Southern Company was held to owe, and I object to any evidence with reference to that note, for the reason that it is now too late for the Trust Company to undertake to make any change with reference to that judgment or the notes described in that judgment or amount to be paid thereunder, including this note that is the subject of the present inquiry.

The Master: Whatever my view will be as to the right of the Trust Company to re-open the question of the interest figured on that note, I will admit the evidence. The objection is overruled.

To which last action and ruling of the Master, the Kansas City Southern Railway Company and Cambria Steel Company, by their counsel, at the time duly excepted, and still except.

Mr. Leavens: It is not.

Mr. Rosenberger: In what respect is it inaccurately described in the former decree referred to?

Mr. Leavens: The note bears eight per cent intrest
805 and not six per cent as in that record. I have made a mathematical computation of the amount due under the decree of June, 1910. I segregated all of the various amounts, some of which bear 6% interest, some 7% and some 8% and computed the interest on all of those notes and figured the interest on the totals at those various rates up to April 15, 1916. The total, principal and interest, is $882,634.46. For convenience, I have numbered those notes 1 to 8, in the order of the date of the notes. Note No. 1, at six per cent, $65,848.67; Note No. 2, at six per cent, $327,423.90; Note No. 6, $38,225.00; Note No. 8: six per cent, $16,664.26. The total of those four notes at six per cent, $448,161.83; added to that amount, the amount of that account referred to in the decree which is to bear six per cent and referred to by the Court as $50,412.62, making a grand total of $498,574.45. And I deducted from that amount a credit referred to in the decree of $36,599.56, which left an amount, $461,974.89 as the amount of the judgments bearing six per cent interest. That amount at six per cent interest to April 15, 1916, or rather the interest on that amount at six per cent to April 15, 1916, is $160,918.82. So much for the six per cent. Now for the eight per cent items: I took note No. 3, judgment on which was $42,905.50; note No. 4, that is the note over which the original interest is in dispute, and I made the amount of that note $13,276.91. Note No. 5, $70,715.87; note No. 7, $5748.14; those four bearing eight per cent interest total $132,646.42 and eight per cent interest on that amount from June 25, 1910, to April 15, 1916, is $61,605.14. The one amount bearing seven per cent interest [if] $46,565.76 in the decree and seven per cent interest on that amount from June 15, 1910, to April 15, 1916, $18,923.43; and those three items of interest total $241,447.39. That amount added to the total of the judgments on which they were figured makes $882,634.46 that I mentioned.

Mr. Rosenberger: Now that computation carries you to April 15, 1916, does it not?

Mr. Leavens: Yes, sir.

806 Mr. Rosenberger: How much has been paid to the Guardian Trust Company by its receiver on account of that decree?

Mr. Leavens: There was paid April 15, 1916, in money, $821,623.28.

Mr. Rosenberger: How was that amount arrived at?

Mr. Leavens: I do not know.

Mr. Leavens: I have stated that there was paid to the Guardian Trust Company, on April 15, 1916, $821,623.28. I find on the books of the Trust Company under that date a new account headed "Kansas City Southern Railway Judgment" and this amount is credited to that account. This is the only record I find on the books of the Trust Company of this payment. There is no other credit to that account on that date or any other date. I have made an examination of the books of the Guardian Trust Company for the purpose of ascertaining how the Trust Company or its Receiver handled and disposed of a certain fund of $40,001.25.

At the time that fund was established through the sale of certain securities, the Guardian Trust Company was in receivership, Judge Black was receiver. The receiver opened a separate set of books as receiver. That same set of books was carried through, continued in Wash Adams' receivership. Under date of November 1, 1901 on the books of Judge Black, receiver, there is a credit on bills receivable account of Suburban Belt notes, $38,238.75; and there is a credit the same date to an account named "Open Accounts"—whatever that is—on account of Suburban Belt, note $17,062.50. And I will explain right here that the $38,238.75 came from the asle of certain bonds and the $1762.50 came from the sale of coupons of the same company.

Mr. Rosenberger: Pardon me, Mr. Leavens, you said seventeeen thousand, did you mean seventeen hundred?

Mr. Leavens: $1762.50. Those two amounts—

Mr. Rosenberger: (Interrupting) Wait a minute: making a total of how much?

807 Mr. Leavens: $40,001.25. On that date that amount was deposited in the Union National Bank, or rather it was deposited in the Union National Bank. I am not quite sure whether certificates of deposit were issued or not. I think it was a straight deposit charged to an account headed "Union National Bank". That account of the Union National Bank was charged from time to time with interest. I think monthly charges were made of interest. I haven't got those in detail. And that continued right through the Wash Adams' receivership, which ended October 25, 1902. And on that date a check was made to the Guardian Trust Company by the receiver closing that account. That check was $40,752.45 and the difference between that and the original $40,-

001.25 was $751.20 and that $751.00—no; that is the amount that was received by the Trust Company at that time. Now at that time, when the property of the Trust Company came back to the Trust Company from that receiver, Wash Adams, a new set of books was opened up. The handwriting in the new book is Mr. Willey's. And in the setting up of those books these amounts are taken into account and on the same date, Otcober 25, 1902, a certificate of deposit was taken out, was issued by the Bank of Commerce, for $40,801.27. Now that $800.02, which was added in that certificate of deposit, added to the original $40,001.25, was the interest for six months at four per cent on that deposit. They added the interest of those C. D.'s in advance. When they would issue a C. D. they would issue it for the total amount of the fund with interest six months in advance added—that was the practice in those days. At the end of six months the certificate of deposit was surrendered and a new one issued for the larger amount, which included interest on the whole business for another six months, interest on the original $40,000.00 and the interest compounded. That ran along for a time or two, but under date of November 19, 1903, the practice was changed and one certificate of deposit was issued for the original amount, $40,001.25, and another, a separate certificate, issued for the accumulated interest up to that
808 time. And thereafter for a time the certificates of deposit were renewed from time to time for that amount. Under date of March 20, 1905, the old certificate was cancelled and a new one issued for $40,001.25, but the other C. D. which then amounted to $3874.47, was surrendered and that amount went into the cash of the Guardian Trust Company. No dispute about that amount. Thereafter at six months periods, the C. D. for $40,001.25 was re-issued and on March 20, 1905, a C. D. for $800.02 was issued. That was interest on the $40,000.00 fund for six months at four per cent and each six months that interest—C. D. if you want to call it that—was re-issued and interest for the succeeding six months on both the original $40,000.00 and interest C. D. was added to it and that was continued clear down to April 3, 1917, when both the C. D.'s were surrendered and cancelled and the total of the interest C. D. at that time was $18,968.46 and that added to the $40,001.25 made $58,969.71 and on that date that amount was deposited as cash to the credit of the Guardian Trust Company.

Mr. Smith: Just a moment, Mr. Leavens, let me interrupt: that was in 1917?

Mr. Leavens: And, as I started to say, took the fund clear past this date of April 15, 1916, when you paid that amount. Now going back to April 15, 1916—

Mr. Smith: (Interrupting) 1916?

Mr. Leavens: April 15, 1916, the next C. D.—if I may call it that—that was due April 3, 1916, was $17,235.22 and computing the interest on that amount and on the $40,000.00 item to April 15, 1916, which was $57.24—oh, I don't know what that total was, but added to $40,001.25 made the total amount at that date $57,293.71. Mr. Anderson and I agree on that amount, with the exception that the Southern didn't seem to get on their books this $751.20 at that exact amount, but about twelve, fourteen dollars less than that amount. That accounts for the difference between his figures and mine on the whole business.

809 The fund of $40,001.25 was, from November 1, 1901 to April 15, 1916, at all times held separate and apart from other funds and was, at all times, put out on interest or carried in the form of certificates of deposit which bore interest. $17,292.46 represents all the interest accruing and earned on the fund from March 20, 1905 to April 15, 1916. On two occasions prior to March 20, 1905, the Trust Company having received interest on that fund of Forty Thousand odd dollars, placed that interest in its general fund, the first occasion being on October 25, 1902 and the second occasion being on March 20, 1905. On the latter date, $3,874.47, being the interest which had accrued between October 25, 1902 and March 20, 1905, was placed in its general fund. On October 25, 1902, the amount of interest accrued and placed in its general fund, is shown by the books of the Trust Company to be $751.20. There is an error in that amount. Mr. Anderson and I have agreed that the correct amount is $737.02, so that if, on April 15, 1916, the Guardian Trust Company had allowed under the decree of June 25, 1910, all of the interest which had actually been received by the Trust Company on the $40,000.00 fund, it would have allowed the Southern Company by way of interest, over and above the sum of $17,289.89, the sum of $4611.49, being the totals of $3874.47 and $737.02. The Trust Company did not, to my knowledge, earn any interest on said amount so placed in its general fund. I have not seen nor found no evidence of anything of the sort.

On cross-examination by Mr. Smith, Mr. Leavens testified, in substance, as follows:

Those two items of $737.02 and $3874.47 went into the cash of the Trust Company, into its general account, and so far as I know, was spent for its own purposes, the same as any other money it had. My figures as to the amount of interest earned from March 20, 1905, to April 15, 1916, are $17,292.46. The Kansas City Southern voucher was figured at $17268.01.

810 Mr. Rosenberger: As bearing upon the contention now made by the Kansas City Southern Railway Company, as to interest on the items of interest from the forty thousand odd dollar fund, amounting respectively, to $737.02 and $3874.47, we renew our offer to put in evidence the files of the court in the case of Bierce vs. Guardian Trust Company.

Those files will show that on complaint of Bierce in November, 1900, acting through the same attorneys as those who brought this Cambria suit, a receiver was appointed in November, 1900, for the Guardian Trust Company. They will show the extent of the liquidation of the Guardian Trust Company by that receiver. Those files will further show that upon discharge of that receiver in 1902 the Trust Company was ordered to continue the liquidation and to make no distributions to its stockholders without application to and order of the court. Those files will further show reports of the receiver made at three months intervvals during the entire period from the time the assets were turned back to the Trust Company in 1902 until Mr. Flower was appointed receiver in August of 1916. They will will show that no dividends were paid and the property was practically in custodia legis all of that time; and those files will further show the order made by Judge Thayer touching the sale of the collateral here in question and the realization of the fund of $40,001.25; will show the instructions of Judge Thayer with respect to holding of that fund. Now those matters are clearly relevant to this controversy, if the Master please, and I don't quite understand on what theory they are excluded.

The Master: I wonder whether it wouldn't be possible to expedite and shorten this up. Do you say those statements are correct?

The Smith: I certainly won't. Mr. Rosenberger has answered it himself. He says thereafter quarterly statements about the financial transactions of this company were made which show beyond any question, this company was doing business; matter of fact in liquidation, but doing business. The evidence offered here shows immediately after

the discharge of the receiver fixed salaries of $6,000.00
811 a year for the president and vice-president, and $3,-
000.00 a year for the secretary were paid. And you
speak of this as a defunct organization, that was in custodia
legis. The evidence already heard in this case necessarily
excludes that. In addition to that, if he wants to prove the
condition of things, let him get somebody who is familiar
with it and prove those conditions, on proper notice to us so
we can meet that evidence. And, secondly, if there is any or-
der Judge Thayler made, let him introduce that and if it is
not contrary to the order of the Court of Appeals, let that go
in the evidence. But to say that because he contends that
this company was in liquidation and, therefore, should not
pay interest that, for that reason, the original petition asking
for the appointment of a receiver and all of the orders made
in that case are competent evidence, is a perfect absurdity.
He isn't undertaking to get the proof, but shoveling in this
complete record.

The foregoing offer of evidence was, by the Master, denied and said files excluded, to which ruling of the Master, the Guardian Trust Company duly excepted.

The following statement was produced by the witness Leavens after he left the stand and by agreement of counsel, is made part of his testimony, the same being marked Guardian Trust Company's Exhibit 7, and is is words and figures as follows, to-wit:

Guardian Trust Company's Exhibit 7.

"Securities held by the Guardian Trust Company as collateral for the payment of notes of the Kansas City Suburban Belt Railway Company: 67 & 900/1000 K. C. & N. C. R. R. Second Mortgage Bonds.

25 Shares Fairmount Improvement Company.

1120 shares Central Improvement Company.

$15,000.00 K. C. & N. C. R. R. Company Second Mortgage Bonds.

812 425 Shares Missouri Elevator and Terminal Co.

439 Shares Northern Townsite Company.

June 14, 1924.

(Signed) H. B. LEAVENS.

Northern Townsite Company

Stockholders:

Guardian Trust Company	537 shares	
Kansas City Sub. Belt R. R. Co.	439 shares	
A. E. Stilwell	24 shares	
	1000	
Cash in Fidelity National Bank & Trust Company, August 31, 1920		$ 231.87
Cash in First National Bank		18,497.34
		$18,729.21
Liquidation Dividend $18.00 per share.		
Paid August 17th, 1920—Guardian Trust Co.	$ 9,666.00	
Paid Sept. 7, 1920—A. E. Stilwell	432.00	
		10,098.00
		$ 8,631.21
$18.00 per share on 439 shares		7,902.00
		$ 739.21
Jan. 24, 1921 Paid Mo. State Treas.	$252.25	
Oct. 25, 1921 Paid Collector Taxes Jackson Co.	229.40	
Jan. 17, 1922 Paid Collector Internal Revenue	10.00	
		491.65
		$ 237.56
Share Guardian Trust Company	$127.57	
Share K. C. Sub. Belt R. R. Co.	104.29	
Share A. E. Stilwell	5.70	
	$237.56	
Proportion for distribution of interest accumulated.		
Guardian Trust Company	$127.54	
K. C. Sub. Belt R. R. Co.	8,006.29	
A. E. Stilwell	5.70	
	$8,139.53	
Total cash on hand June 13th, 1924,	$9,114.26	

Interest is received monthly."

JAMES E. ANDERSON, recalled as a witness on behalf of the Kansas City Southern Railway Company and the Cambria Steel Company, testified, in substance, as follows:

I have figured the interest on those amounts of $737.02 and $3874.47 from October 25, 1902 and March 20, 1905, respect-

ively, first at straight 6% up until April 5, 1916, and
813 then during the same period at 8%, and then at 6% compounded on June 25, 1910, and then at 8% compounded on the same date. Six percent on $737.02, from October 25, 1902 to April 15, 1916, is $595.96. Straight 6% interest on $3874.47 from March 20, 1905 to April 15, 1916, is $2574.35. 8% interest on $737.02 from October 25, 1902 to April 15, 1916, is $794.61. 8% interest on $3874.47 from March 20, 1905 to April 15, 1916, is $3432.43. Interest at 6% on $737.02 from October 25, 1902 to June 25, 1910, and compounded from that date to April 15, 1916, including principal, is $1467.23. Interest at 6% on $3874.47 from March 20, 1905 to June 25, 1910, compounded at that rate to April 15, 1916, is $3747.30. No, I seem to be mixed up.

Mr. Rosenberger: It might be more satisfactory for Mr. Anderson to get up a tabulation as to this interest.

Mr. Smith: Mr. Rosenberger has suggested that you make a tabulation on a sheet and cover this matter. That is satisfactory to us and the Master. While we are on that, I want to ask in this connection, if you made a calculation of the interest on the note for $7162.40 at 6% without compounding, at 8% without compounding and at 6% and 8% with compounding at June 25, 1910?

Mr. Anderson: Yes, I made those calculations.

Mr. Smith: Now will you put on the same paper, the result of that calculation and make it a part of the same exhibit?

Mr. Anderson: Yes, sir.

Thereupon the Guardian Trust Company rested its case and the Kansas City Southern Railway Company and the Cambria Steel Company rested their case.

(Approval of Condensed Statement of Testimony by District Judge and Counsel.)

The above and foregoing is hereby approved as a true, complete and properly prepared, Condensed Statement
814 of all the material testimony taken in the above entitled cause before Special Master Henry D. Ashley, and it is ordered that said statement be filed herein and made a part of the record in this cause for the purposes of

the appeal heretofore allowed to the United States Circuit Court of Appeals for the Eighth Circuit.

ARBA S. VAN VALKENBURGH
Judge.

JUSTIN D. BOWERSOCK
Attorney for Henry C. Flower, Receiver.

Feb. 25, 1927.

Approved:
F. H. Moore
Cyrus Crane
A. F. Smith
Attorneys for Kansas City Southern Railway Company and R. E. Ball by A. F. Smith Atty for Cambria Steel Company.

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815 (Order, February 28, 1927, further extending time to file Transcript.)

In the District Court of the United States for the Western Division of the Western District of Missouri

Cambria Steel Company, Complainant,
vs.
Kansas City Suburban Belt Railroad Company, et al., Defendants.

Bill In Equity.

Edward F. Swinney, as Receiver, Complainant,
No. 2468 vs.
Cambria Steel Company, et al., Defendants.

Ancillary Bill

The Kansas City Southern Railway Company, Complainant,
vs.
Guardian Trust Company, et al., Defendants.

Intervening Petition.

For good cause shown, it is ordered that appellant shall have until on or before the 31st day of March, 1927, to file its transcript of the record in the above entitled cause.

ARBA S. VAN VALKENBURGH
Judge.

Dated this 26th day of February, 1927.

Filed in the United States District Court, February 28, 1927.

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816 Memorandum Upon Motion For Entry of Final Decree

In the District Court of the United States for the Western Division of the Western District of Missouri

Cambria Steel Company, Complainant,

vs.

Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, Kansas City Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill In Equity

Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Company, Complainants,

No. 2468 vs.

Cambria Steel Company, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, its Receiver, Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill

The Kansas City Southern Railway Company, Complainant,

vs.

Guardian Trust Company, Kansas City Suburban Belt Railroad Company and Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, Central Improvement Company and T. T. Crittenden, its Receiver, Cambria Steel Company, Northern Townsite Company and its Receiver, Fairmount Amusement Company, and Missouri Elevator & Terminal Company, Defendants.

Intervening Petition

817 This matter comes up upon application of the Guardian Trust Company, and its Receiver, for the entering of a final decree in the above entitled cause in accordance with the directions given to this court by decree of the United States Circuit Court of Appeals for the Eighth Circuit pur-

suant to the opinion filed by said Court of Appeals December 2nd, 1913, and in accordance with the mandate of the Supreme Court of the United States affirming said decree. Said proposed decree, as an incident thereto, carries with it the very important incident of the taxing of costs; a matter which involves some serious considerations, undoubtedly the most serious of any involved in the final adjustment of this litigation. The judgment of the Circuit Court of Appeals was in favor of the Guardian Trust Company, and parties who must be decreed to pay such costs, as may be duly adjudged against them are the Kansas City Southern Railway Company, hereinafter called the Southern Company, and the Cambria Steel Company, hereinafter called the Cambria Company. While the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, through the ancillary bill filed by its receiver is in-
818 volved in like manner, nevertheless the obligations of that company, through ownership, are merged in those of the Southern Company for all the practical purposes of the questions now before us.

The Trust Company prays that the costs be taxed as between solicitor and client. The Southern Company insists that they be limited to such as are taxable between party and party. This is the substantial controversy presented to the court in this application.

In addition to the application of the Trust Company, and its receivers, a stockholder and representatives of a deceased stockholder have filed in this case a supplemental petition directed to the same end. The Southern Company moves that this supplemental petition should be dismissed under Equity rule 27, and because no ground for the intervention of stockholders is disclosed. These same stockholders were permitted to be heard in the Circuit Court of Appeals upon the ground asserted and entertained that the then counsel for the company were failing to assert against the Southern Company certain rights of recovery which were alleged and found to subsist. With respect to the issue now before us the receiver and his counsel have always recognized, and are now asserting, the taxation of costs of the nature
819 claimed in the supplemental petition of the minority stockholders. The delay in entering the decree and taxing costs has been due to a number of substantial causes; among them, the fact that substantially all of the money judgment involved in the decree has been paid; that receiver and counsel have been engaged in matters of administration of the estate and in the prosecution and defense of litigation,

some of it but recently determined, which has a potential bearing upon the issue here involved, and that the business of this court, for some time past, has been so congested that delays of this nature have been unavoidable. It has been at all times in the mind of receiver and counsel to press for the allowances here claimed. In this state of fact no necessity appears for stockholders to intervene in the prosecution of this motion, nor can the legal standing of their bill be sustained if challenged. The motion of the Southern Company that the supplemental bill of these stockholders be dismissed is accordingly sustained.

The right to tax costs as between solicitor and client depends upon one, or both, of two theories recognized in the law.

820 First. Where gross charges of fraud and misconduct have been made and not sustained, and where the main ground of the suit is shown to be false, unjust, vexatious, wanton or oppressive. In other words, where charges amounting to scandal and a misuse of the courts are made and not sustained, but found to be baseless and unwarrantable.

Second. Where a fiduciary relation exists between the parties, such as trustee and cestui que trust, or pledgor and pledgee, or principal and agent, and where the fiduciary is put to expense in the defense of an unfounded suit brought against him by such cestiu que trust, or pledgor or principal, especially where charges of gross fraud and misconduct have been made against a fiduciary and have been found baseless and unwarrantable.

The Southern Company contends that the right to tax costs, as between solicitor and client, does not exist in this country under the rule established by its courts in cases falling under class one, supra; and it further contends that the fiduciary relation essential to class two does not exist in the case at Bar, and that, in any event, a fund must be presented out of which such allowances may be paid, and that
821 there was no such fund to which such allowances, if made, could attach.

With respect to claim one, counsel for the receiver freely recognize the serious consideration which should be given to the utterance of the Supreme Court in Oelrichs vs. Spain, 15 Wall. 211, wherein it was said:

"In debt, covenant, and assumpsit, damages are recovered, but counsel fees are never included. So in equity cases,

where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both counsel and client know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy".

In that case the point under consideration was whether counsel fees paid in attending to an injunction were recoverable on the injunction bonds. The court held to the contrary, and in so doing make the general declaration above quoted. In that case the question here involved was not in issue. It does not appear that the litigation was re-
822 garded as baseless, unwarranted or oppressive. Ordinarily, as we know, utterances of a court are construed with reference to the nature of the case before it when the pronouncement is made. Anything beyond that is dictum; nevertheless, any sweeping statement of this nature by the Supreme Court of the United States may, and generally does, indicate an intimation of the policy to which that court inclines. This case has been so generally accepted in cases in equity strictly between party and party.

(Tullock vs. Mulvane, 184 U. S. 497; Missouri, Kansas & Texas R'y. Co. vs. Elliott, 184 U. S. 530; Gilbert vs. American Surety Co., (C. C. A.) 121 Fed. 499)

But in all such cases the issue was almost precisely the same as in Oelrichs vs. Spain, supra, and the consideration here presented was neither present nor discussed.

Much doubt is cast upon the intended scope of the quoted language in Oelrichs vs. Spain by other declarations of the Supreme Court which have not been thought to be in conflict therewith.

In State of Pennsylvania vs. The Wheeling & Belmont Bridge Co., 18 Howard 460, the court said:

"In the character of the suits in this court of original jurisdiction, we perceive nothing that should lead us
823 to distinguish, on the question of costs, between this court and the circuit courts. * * *

Original jurisdiction in equity, in a particular class of cases, conferred by the constitution on this court, has been interpreted to impose the duty to adjudicate according to such rules and principles as governed the action of the court of chancery in England, which administered equity at the time of the emigration of our ancestors, and down to the period when our constitution was formed".

In the United States vs. Waters, 133 U. S. 208-212, the court said:

"Both before and since the enactment of the statute of 1853, courts in the exercise of their discretion have allowed counsel fees in many cases without question when reviewed by this court".

Now, under the chancery practice of England, referred to by Mr. Justice Nelson in Pennsylvania vs. Bridge Company, there can be no doubt that costs, as between solicitor and client, are allowed in cases of the nature embraced within class one, supra. In Turner vs. Collins, Law Reports, Equity Cases, Vol. 12, it was held:

"The court will direct costs to be taxed as between solicitor and client where a fiduciary relation exists between the parties or where there is something in the nature of scandal, as where gross charges of fraud have been made and not sustained; and the court may direct an unsuccessful party to pay the costs of a trustee as between solicitor and client whether there is or not any fund out of which they may be paid".

This is and was at the period specified by Mr. Justice Nelson, the established rule in the English Chancery courts, and my attention has been directed to no statute which
824 necessarily, or even plausibly, limits the discretion lodged in the equity courts of the United States.

In Cuyler vs. Atlantic & N. C. R. Co., 132 Fed. 570, it is held that section 823 Revised Statutes does not regulate allowances by courts of equity for counsel fees to the complainant, for the court to make such allowances has been recogniz-

ed as a general power of a court of equity. It is true that this case involved a situation other than that here presented under this phase of the discussion; nevertheless, it did further recognize that statutes imposing restrictions upon fees have not been generally understood as limiting the discretionary powers of courts of equity. The rule prevailing in state jurisdictions is not controlling.

"Where contract rights are settled by the law of the state, that law does not determine the procedure of courts of the United States sitting as courts of equity, or the costs which are taxable there, or control the discretion exercised in matters of allowances. Those courts acquire their jurisdiction and powers from another source than the state".

(Dodge vs. Tulleys, 144 U. S. 451-457)

It would seem that the power of a national court of equity to tax costs and expenses as between solicitor and client, in cases falling under class one, as above stated, should not be considered as foreclosed, but, on the contrary, that some express decision of the Supreme Court in a case involving essential facts is greatly to be desired.

On the second point, to-wit, where a fiduciary relation exists between the parties, as defined in class two, the decisions are not in substantial conflict. The rule is well stated in Trustees vs. Greenough, 105 U. S. 527, wherein it is said:

"One jointly interested with others in a common fund, who, in good faith, maintains the necessary litigation to save it from waste and secure its proper application, is entitled in equity to the reimbursement of his costs as between solicitor and client, either out of the fund itself, or by proportionate contributions from those who receive the benefit of the litigation".

And it is further said:

"Of course, it is well understood that costs as between solicitor and client include all reasonable expenses and counsel fees, and are not like costs as between party and party, confined to the taxed costs allowed by the fee-bill".

Attention is called to the common practice that has prevailed in this respect in the vast amount of litigation which has arisen in this country upon railroad mortgages, and the doctrine is restated that allowances of this kind "if made with moderation and a jealous regard to the rights of those who

are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice". While the prevailing party in this case was not strictly a trustee,
826 but rather a creditor interested in a common fund, it was adjudged that he had at least acted the part of a trustee in relation to the common interest, and that this was sufficient to entitle him to enlarge costs and allowances.

"Upon an accounting against a trustee he is entitled to credit for attorney's fees and court costs properly expended by him for the defense and preservation of the trust fund; and he is also entitled to credit for the costs and expenses attending the defense of an unfounded suit brought against him by the cestui que trust".

(39 Cyc. 480; Clark vs. Anderson, 13 Bush (Ky) 111; Lycan vs. Miller, 56 Mo. App. 79)

"Where the charges of fraud, collusion and misconduct against the defendants, which formed the main ground of the suit, were proved to be false, unjust and vexatious, it was dismissed with costs as to the defendants not liable to account, and the defendant who was accountable as trustee, was allowed all his taxable costs and exact charges and expenses out of the fund, before distribution."

(Minuse, et al vs. Cox, et al, 5 Johnson's Chancery Reports 441, (N. Y.).

"Where a beneficiary brings a groundless suit against his trustee, the solicitor's fees and expenses of the trustee in defending the suit should be charged against the share of the complainant in the trust estate and not against the estate generally or against a trust fund by which the co-beneficiaries would have to contribute. So, also, where another beneficiary is joined with the trustee he is entitled to have his fees and expenses charged against the share of the beneficiary bringing the suit."

(Patterson vs. Northern Trust Co., 286 Ill. 564).

However, under the laws of Illinois it was held that such fees and expenses could not be included in the costs in any class of cases and taxed against the unsuccessful
827 parties as such. It will be observed that the same result was reached, in substance, by taxing such expenses against the specific shares of the parties charged with the payment of such fees and expenses. However, in the courts of the United States no prohibiting statute is found to prevent direct taxation of such costs. See also, (Kit-

tredge vs. Race, et al, 92 U. S. 116-121; Central R. R. & Banking Co. of Georgia vs. Pettus, et al, 113 U. S. 116).

In the great majority of cases the court has a fund out of which such payments may properly be made. In some cases, where this would work injustice, such costs are charged against the individual share, which is the substantial equivalent of a direct charge against the party. Under the English rule, at least, the court may direct an unsuccessful party to pay the costs of a trustee as between solicitor and client whether there is or not any fund out of which they may be paid. (Turner vs. Collins, supra).

The same doctrine is extended to pledges.

"The pledgee has a lien on the property for any expenses, including the attorney's fees, reasonably incurred by him in keeping and caring for the property pledged, protecting it against liens, taxes, and assessments, or otherwise
828 protecting the pledgor's rights, in making sale for the enforcement of the pledge, in collecting choses in action, and other expenses incurred in rendering the pledged property available for the payment of his debt, although not for any expenses incurred by reason of his own wrongful act'.

(31 Cyc. 826, and cases cited).

The situation in this respect is entirely analogous to that of a trustee against whom an unfounded suit is brought by his cestui que trust. (39 Cyc. 480, supra, and cases cited).

It remains to determine whether this case falls under either, or both, of the classes wherein taxation of costs as between solictior and client has been, or may be, recognized. To determine this it is unnecessary to open and try new issues either before a Master or otherwise. This issue may, and must be, determined from the finding of the Circuit Court of Appeals upon the issues of this litigation already presented to them. The duty devolves upon this court to exercise no independent judgment in this regard, but to give effect to the express findings of a court of superior jurisdiction. There is no escape from the conclusion that the Circuit Court of Appeals was of opinion, and in substance so found, that a plan was formed by the then guiding and controlling powers of the Southern Company to de-
829 spoil the Trust Company of its property, to deprive it of the moneys due to it from the Belt Company, to reclaim the collateral pledged to secure that indebtedness and to

recover a judgment over against it for a very large sum of money; that this was to be accomplished by the suits entitled in the caption hereto, the creditors' bill of the Cambria Company, the ancillary bill of the Belt Company, and the intervening petition of the Southern Company, and also by certain bills for foreclosure filed by the Provident Life and Trust Company, as substituted trustee in the railroad mortgages, including that of the Belt Company. The Circuit Court of Appeals characterizes the Provident Life & Trust Company as "the representative of the Southern Company". The Belt Company, by virtue of the foreclosure and otherwise, was owned by the Southern Company, and is characterized by the Circuit Court of Appeals as "the hand of the Southern Company". Of the Cambria Company that court says:

"It is difficult to wink so hard as not to see that the Cambria suit was in reality the suit of the Southern Company".

So, that, the responsibility of the Southern Company is judicially fixed for the initiation of all this successive litigation against the Trust Company, and the objects of that litigation are also clearly defined. The court then finds
830 that the Cambria suit, so inspired by the Southern Company, was wholly baseless and unwarranted. For the alleged foundation of these suits against the Trust Company reference must be had to the bills filed by the Southern Company and its representatives. The Cambria bill charges that said Trust Company did

"Assume the position of trustee and agent in managing and disposing of the bonds, stocks, funds, and other assets of said railroad companies and auxiliary companies, in trust and for the use and benefit of the parties who might become concerned or interested therein: * * * including particularly creditors thereof and your orator".

An accounting is asked for, which it is charged the Trust Company "has failed and still fails and refuses to make". It further charges that the Trust Company has gathered and appropriated unto itself stocks, bonds, and other assets and property of the Belt Company and has caused the same, under various pretenses and because of various false and unfounded claims and demands to be delivered to the Trust Company to be held by it as alleged collateral security for various pretended claims and demands which it has fraudulently asserted to exist in its favor as against the Belt Company; that these claims and demands are in the form of pre-

tended negotiable promissory notes aggregating about
831 the sum of $500,000. The prayer was for a receiver, for an accounting, for an injunction to restrain the Trust Company from realizing upon its collateral, and for a subjection of said collateral to the alleged lien claim of the Cambria Company. This is the suit which the Circuit Court of Appeals characterized as "baseless and unwarranted, and, in effect, the suit of the Southern Company". The ancillary bill of the Belt Company, which was the pledgor, reiterates, in large measure, the charge of fraud made in the Cambria Bill. It characterizes its notes to the Trust Company as "pretended notes" and its pledged collateral as a "pretended pledge", which it attacks and seeks to have set aside. The intervening petition of the Southern Company in the Cambria suit attacks the Trust Company as trustee and for misconduct, fraud and various breaches of duty as such. It seks to deprive the Trust Company of its collateral and to charge the Trust Company with a liability of nearly $1,000.00 for alleged misconduct as trustee. The intervening petition abounds with charges amounting to gross fraud and with much reiteration of the trust relationship which is alleged to have been betrayed. The Circuit Court of Appeals found all such charges to be unwarranted and without
832 foundation. It is unnecessary to make further reference to the pleadings or the opinions of the court, in which these matters appear more fully than it is deemed necessary to state in this memorandum.

It is claimed by the Southern Company that the fiduciary relationships stated in the pleadings are not of the nature essential to make this a case against the trustee in its representative capacity and thus the foundation for special allowances flowing from those relationships. It is asserted that this was in reality a suit between party and party,—the Belt Company claiming that the Trust Company was indebted to it, and the Trust Company claiming that the Belt Company was indebted to the Trust Company. Such, however, was not the true character of this litigation, as revealed both by the pleadings and by the findings of the Circuit Court of Appeals, as affirmed by the Supreme Court.

If these cases presented issues so narrow as those contended, the jurisdiction of this court in equity could hardly have attached. It will be recalled that the Cambria bill charged the Trust Company with fraud and misconduct, and prayed an accounting with the object of reclaiming the collat-

eral pledged for what it alleged to be a fictitious in-
833 debtedness, and to that end it secured an injunction prohibiting the sale of the pledged securities, to which the Belt Company gave formal assent.

The Belt Compny in its bill in large measure reiterates the charges of fraud made in the Cambria bill and also attacks its notes to the Trust Company as fictitious and the pledge as fraudulent and pretended. The intervening petition of the Southern Company was in re-enforcement and amplification of the two preceding bills, seeks to deprive the Trust Company of its pledged collateral, and takes the forward step of charging the Trust Company with liability for about $1,000,000 for alleged misconduct as trustee, making charges of gross fraud. Under the express finding of the Circuit Court of Appeals these three forms of action, together with the foreclosure proceeding by the Provident Life & Trust Company, as trustee, must be read toegther and regarded as proceeding from a common source, to-wit, the Southern Company. The Trust Company being assailed both as trustee and as pledgee and the integrity for the pledge to it being threatened, and a judgment of $773,246 prayed against it on account of an alleged breach of trust for wrongfully di-
verting the proceeds of bonds secured by mortgage
834 or deed of trust in which it was trustee, was compelled to defend against these charges, and as an incident thereto to seek recovery upon the debt due it from the Belt Company for which the collateral in controversy was pledged. The Trust Company did not initiate this litigation, as the court finds, but was drawn into it by force of the proceedings instituted against it. Its cross-claim was an incident,—a natural and necessary incident to be sure, but nevertheless an incident and not the gist of the litigation. The suits in question involve far more than cross-claims for recoveries in money; they involve the conduct of trust estate and the disposition of securities and funds pledged and held in trust. The fact that an ultimate recovery inhered in the defense of the Trust Company could not, and should not, alter its status.

The right of a trustee or pledgee to recover its legitimate costs and expenses is not, in my opinion, confined to actions on its part for the preservation and [and] augmentation of an estate for the benefit of beneficiares or pledgors. They may be allowed because of unjust attacks involving want on, wilful and oppressive charges of misconduct, such as the Circuit

Court of Appeals has found present in this litigation.
835 (Turner vs. Collins; Minuse, et al. Cox, et al; Patterson vs. Northern Trust Co.; Clark vs. Anderson; Lycan vs. Miller; 31 Cyc. 826 and 39 Cyc. 480. (All cited supra).

It may well be doubted whether the existence of a fund under the control of the court is essential to such relief, but if it be essential, both the pleadings and the opinions of the Circuit Court of Appeals recognize the existence of such fund. In the last opinion of that court, Central Improvement Company vs. Cambria Steel Company, 210 Fed. 696, the court says:

"In case the Southern Company shall pay its debt to the Trust Company and the costs of this suit adjudged in this suit by a day to be named in the decree, then all the collateral security described in paragraph 5 of the former decree which has not then been disposed of, and all the proceeds of such security which has not then been disposed of or applied, shall be surrendered and delivered to the Southern Company; that in case the Southern Company fails to pay its debt to the Trust Company and the costs of this suit by a day to be named by the court in the decree, then the said property of the Central Company and the property of the Belt Company which was transferred to the Southern Company as aforesaid, and the collateral security then remaining in the possession of the Trust Company, or such part or all said property as it shall be necessary to sell in order to pay the debt and costs out of the proceeds of the sale or sales to which the Trust Company * * * shall be equitably entitled be applied to the payment of the debt and of the costs after as well as before the decree until they are completely paid; and that the remainder of the proceeds, if any, be paid to the Southern Company or to such other party as may be equitably entitled thereto."

Furthermore, in the form of decree proposed by the Trust Company this section appears:

836 "The Guardian Trust Company shall forthwith deliver to The Kansas City Southern Railway Company all the collateral security described in paragraph V of the Original Decree, and all the proceeds of such security, which shall not have been disposed of or applied on said judgment."

Under the pleadings the court drew into the possession of its receiver the collateral and funds which were made the primary issue in the Cambria suit and recognized in all the

subsequent litigation by the Circuit Court of Appeals, and now by the parties themselves.

It is suggested that this conclusion on the part of this court must necessarily lead to the results which the Circuit Court of Appeals anticipated and sought to discourage, to-wit, to open and try new issues, and to prolong this litigation through several years more. That court did, however, direct this court to tax the costs under the principles, rules and practice in equity. This the court must do by whatever process and instrumentalities are essential thereto. So to do does not involve the trying of new issues, nor undue prolongation of the litigation. This court is passing no new and independent judgment upon the issues already litigated. The Circuit Court of Appeals, as it says, practically tried the case de novo, and made distinct findings. This court
837 adopts those findings and bases its action upon them, and them alone. If its conception of the powers of a court of equity, and the principles, rules and practice in equity in taxing costs are correct, then to do otherwise than it has done would be to disregard the decision of the Circuit Court of Appeals to a degree amounting practically to contumacy. The fees, costs and expenses that may be charged are such as have already been liquidated and determined; the former almost entirely at the end of contested litigation in courts of last resort. Their ascertainment involves no more than a brief accounting before court or master; and reference to a Master amounts to no more than to relieve the court of the hearing which it must always necessarily have in ascertaining and determining costs of this nature. The form of the decree must, of course, conform to the substantial directions of the mandate. If such be observed to all reasonable intent and purpose, the direction of the Appellate Court is satisfied. It is obvious, of course, that the language of the first five paragraphs of the former decree must be modified as indicated in the opinion of the Circuit Court of Appeals, and, in general, made to conform to the views therein expressed.

This hearing to this stage has served to determine the
838 initial question presented, to-wit, the basis upon which costs are to be taxed, whether as between solicitor and client, or between party and party. Having decided this issue in favor of the Trust Company it remains to settle the items to be taxed; this involves an investigation in the nature of an accounting, the rules governing which are practically well settled. There are also in dispute, or at least not determined, some matters involved in the principal judgment which counsel thought might be substantially settled by

agreement. The court deems it best that the entering of the decree should await the findings upon all the items above referred to. All such matters of accounting are, therefore, referred to Henry D. Ashley, Esq., the Special Master heretofore appointed and acting in this cause, with directions to report his findings and conclusions with all reasonable dispatch.

Kansas City, Missouri, June 20th 1923.

ARBA S. VAN VALKENBURGH
District Judge.

Filed in District Court of the United States June 20th, 1923.

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839 (Opinion on Exceptions to report of Special Master on Motion to Tax Costs.)

In the District Court of the United States for the Western Division of the Western District of Missouri.

Cambria Steel Company, Complainant,
vs. In Equiy
Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, Kansas City Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainant,
No. 2468 vs.
Cambria Steel Company, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, its Receiver, Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill

The Kansas City Southern Railway Company, Complainant,
vs.
Guardian Trust Company, Kansas City Suburban Belt Railroad Company and Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, Central Improvement Company and T. T. Crittenden,

its Receiver, Cambria Steel Company, Northern Townsite Company and its Receiver, Fairmount Amusement Company, and Missouri Elevator & Terminal Company, Defendant.

Intervening Petition

840 By this motion the court was moved to tax the costs in this action under the principles, rules and practice in equity as directed by the Circuit Court of Appeals (210 Fed. 696-723). It was the contention of the movant that these costs should be taxed as between solicitor and client. The Kansas City Southern Railway Company contended that they could be taxed only as between party and party. Upon hearing, this court was of opinion that the prayer of the Trust Company should prevail and the matter was referred to the Master for ascertainment of costs upon that theory. There were also some matters of accounting incidental to the settlement of the final decree which required such an examination.

It was recognized that the right to tax costs, as between solicitor and client, depends upon one, or both, of two theories:

First. Where gross charges of fraud and misconduct have been made and not sustained, and where the main ground of the suit is shown to be false, unjust, vexatious, wanton or oppressive. In other words, where charges amounting to scandal and a misuse of the courts are made and not
841 sustained, but found to be baseless and unwarranted.

Second. Where a fiduciary relation exists between the parties, such as trustee and cestui que trust, or pledgor and pledgee, or principal and agent, and where the fiduciary is put to expense in the defense of an unfounded suit brought against him by such cestui que trust, pledgor or principal, especially where charges of gross fraud and misconduct have been made against a fiduciary and have been found baseless and unwarranted.

As to the nature of the Cambria suit, its purpose, and the responsibility of the Southern Company therefor, this court conceived itself bound by the finding of the Circuit Court of Appeals; the only question being the interpretation of the language "under the principles, rules and practice in equity." From the briefs and arguments adduced at the initial hearing, which resulted in the appointment of the Mas-

ter, the court reached no final conclusion respecting the rule stated under class one, supra. It said:

"It would seem that the power of a national court of equity to tax costs and expenses as between solicitor and client, in cases falling under class one, as above stated, should not be considered as foreclosed, but, on the contrary, that some express decision of the Supreme Court in a case involving essential facts is greatly to be desired."

On the second point, to-wit, where a fiduciary relation
842 exists between the parties, and defined in class two, the court was of opinion that the situation presented, as disclosed by the briefs and arguments, warranted the taxation of costs as between solicitor and client. The matter was referred and the Master has made his report on that theory. Upon exceptions the case has been more exhaustively presented; with marked ability and industry counsel on both sides have left nothing undone to acquaint the court with the doctrine prevailing both in this country and in England. The importance and far reaching effect of the principle involved and the earnestness and learning brought to bear by counsel upon that question have demanded and received very exhaustive and critical examination on the part of the court, greatly impeded and delayed because of the insistent demands of current matters in the district court and later in the Circuit Court of Appeals. Language may be found in the cases which lends plausibility to many contentions of counsel, and it is only by careful analysis and extended examination that the true rules may be deducted.

There can be little doubt, I think, that in the Chancery Court of England discretion and power is lodged to tax costs as between solicitor and client in a case like that before us.

That original jurisdiction in equity in a particular
843 class of cases conferred by the Constitution on this court has been interpreted to impose the duty to adjudicate according to such rules and principles as governed the action of the Court of Chancery in England has been repeatedly stated by the Supreme Court.

(Russell vs. Farley, 105 U. S. 433-445; Dodge vs. Tulley, 144 U. S. 451; 25 Corpus Juris 802; and cases cited; Pennsylvania vs. Bridge Co., 18 Howard 521).

Rule 90 of the Supreme Court, adopted at a very early date, is as follows:

"Practice—In all cases where the rule prescribed by this court or by the Circuit Court do not apply, the practice of the

Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, as far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

It has been held that though this rule was not carried forward into the present equity rules, adopted in 1912, it still continues in force and effect; its omission from the present rules being due to the fact that it has become so imbedded in the jurisprudence of the federal courts as to make its inclusion no longer necessary.

(Individual Drinking Cup Co. vs. Union News Co., et al., (C. C. A. Second Circuit) 250 Fed. 624; Lindley vs. Denver, (C. C. A. Sixth Circuit) 259 Fed. 83.)

It is, of course, recognized that state statutes cannot re-
844 strict or limit the equity powers of the federal courts.

(Missouri Pacific R'y. Co. vs. Larabee, 234 U. S. 459; Guffey vs. Smith, 237 U. S. 102-114; Kirby vs. Lake Shore & Michigan Southern R. R., 120 U. S. 130; Payne vs. Hook, 7 Wall. 425).

If we were to stop here it would seem that the power of this court to tax costs as between solicitor and client must be undoubted; but we are not permitted to rest our conclusion upon literal definition however applicable the language may be as applied to the case in which it was used. The case of Pennsylvania vs. Bridge Company was concerned with the right of a court of equity to impose costs at all, and for precedent resort was had to the practice of the Court of Chancery in England. The rule in Russell vs. Farley was announced to prevail in the absence of any statute to the contrary. In Dodge vs. Tulleys it is said that the federal courts proceed according to the general rule in equity except so far as such rules are changed by the legislation of Congress. It is undoubtedly true that we still look to the chancery practice of England, where our own has not in some particular become well settled, whether by statute, by express rule of court, or by long established practice in the absence of such express rule. Former Rule 90, to which reference has been made, recognized the practice of the High Court of Chancery
845 of England with this reservation:

"As far as the same may reasonably be applied consistently with the local circumstances and local conveniences

of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice".

It becomes necessary then to examine not only the legislation of Congress, but the practice recognized and reiterated by the courts of the United States through a long period of years, to determine whether we have departed, and to what extent, from that of the English courts in this particular. It is, of course, not claimed that modifications have not been made and the policies have not been announced in many particulars by reason of which the equity practice in this country presents material differences from that prevailing in England. In order to settle the confusion then existing in the national courts with respect to the taxation of costs involving the allowance of counsel fees as an element thereof, Congress passed an Act limiting the amount of compensation that should be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States. (Rev. Stat. 823; Compiled Stat. Section 1375). The amount thus allowed was nominal. In Trustees vs. Greenough, 105 U. S. 527, the court had under consideration the allowance of counsel fees
846 of a trustee to be taxed as costs. Mr. Justice Bradley entertained doubt whether it was in his power, under the Act of 1853, to make such allowance. He says:

"My doubt was of my power in the premises under the fee-bill of 26th February, 1853, (10 Stat. 161), which does not appear to sanction it, and does appear to be intended to cover the whole ground of taxation of costs at law and in equity and admiralty; and by the general orders, these petitions follow the rule of cases in equity in all matters of costs. Upon reflection I have concluded that the fee-bill is probably intended to reach only taxable costs commonly so called, and may have its full effect without being construed to take away the power of a court of equity to permit counsel fees to be taxed in those cases where a fund is in court upon or to which different parties have distinct rights or claims".

The distinction drawn by the learned Justice is clearly one which does not apply to the case at Bar unless a fiduciary relation existed and there is present a fund to which different parties have distinct claims out of which such an allowance can be made. Of course, it has been held in many cases that the fee-bill statute does not control the discretion of a court of equity in all cases. Allowances may be made and paid out of a fund to trustees and their counsel and to those generally who have, by their efforts, augmented or preserved such a fund; and in a case of a true trusteeship where the trustee

has no interest in the property other than to administer it faithfully for the benefit of others, his costs and expenses, including counsel fees, it would seem may be charged against a beneficiary even in the absence of a fund.

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And, of course, a court of equity, unlike a court of law, may apportion costs in furtherance of justice without regard to the winning or losing party in a technical sense, but it will be found, I think, that almost without exception the right of the court to depart from this statutory prohibition has not been further extended.

On the other hand, in a practically unbroken line of decisions, the Supreme Court and the inferior courts of the United States, have set their faces firmly against the allowance of counsel fees and expenses in excess of taxable costs between party and party no matter how unwarranted or vexatious the litigation may be.

(Arcambel vs. Wiseman, 3 Dallas 306;

the Baltimore, 8 Wallace 377;

Oelrichs vs. Spain, 15 Wallace 211;

Day vs. Woodworth, et al, 13 Howard 362;

United States vs. Waters, 133 U. S. 208;

Tullock vs. Mulvane, 184 U. S. 497;

M. K. & T. R'y. Co. vs. Elliott, 184 U. S. 530;

Missouri Pacific R'y. Co. vs. Larabee, 234 U. S. 459;

Ex Parte Peterson, 253 U. S. 300;

Adams vs. Kehlor Milling Co., et al (D. C.) 38 Fed. 281;

Fidelity, etc. Safe-Deposit Co. vs. Roanoke Iron Co., (D. C.) 91 Fed. 19;

Gilbert vs. American Surety Co., (C. C. A. 7th Circuit), 121 Fed. 499;

McIntosh vs. Ward, et al, (C. C. A. Seventh Circuit), 159 Fed. 66;

Doddridge County Oil & Gas Co. vs. Smith, (D. C.) 173 Fed. 386;

Michigan Aluminum Foundry Co. vs. Aluminum Co. of America, et al, (D. C.) 190 Fed. 903;

New York Central R. R. Co. vs. Bank of Holly Springs, (C. C. A. Fifth Circuit) 195 Fed. 456;

Motion Picture Patents Co. vs. Steiner, (C. C. A. Second Circuit), 201 Fed. 603;

Bone vs. Walsh Const. Co., (D. C.) 235 Fed. 901;

Grant vs. Fletcher, (D. C.) 283 Fed. 243).

848 Citations throughout the circuits, as well as in the Supreme Court, to the same effect might be greatly extended, but the foregoing is deemed sufficient to indicate the trend of decision. It is true that the cases involved differ widely in character; not all of them are in equity, nor do many of them involve a state of facts exactly, or even closely, similar to those here presented, but all contain language, interpretative of the American policy respecting the taxation of costs, of such a nature as clearly to indicate the rule that has become firmly established in the American courts.

The facts in Arcambel vs. Wiseman, 3 Dallas 306; are not stated. It is evidently an equity case because the judgment appealed from, in which counsel fees of $1600 had been allowed, is referred to as a decree. The court said:

"We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, until it is changed, or modified, by statute".

Oelrichs vs. Spain, 15 Wallace 211, concerned the allowance of counsel fees on an injunction bond. The case of Arcambel vs. Wiseman was quoted with approval. Mr. Justice Swaine said:

"In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injuction bond, only the taxable cost
849 are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large and expensa litis to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more [that] others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a Master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted

litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy".

It will be seen that this statement covers all equity cases, however unjust the litigation on the losing side may be, and however large the expense of the litigation to which the winner may have been subjected. It pointed out that in this country there is no fixed standard by which the honorarium can be measured. The decision is based not only upon the analogies of the law, but upon sound public policy. In the respects pointed out the ruling exactly fits the situation with which we are dealing. The same principle is recognized in Flanders vs. Tweed, 15 Wallace 450. Oelrichs vs. Spain was decided in 1862, and may be taken as having the Act of 1853 in mind, although the Act is not mentioned. In Tullock vs. Mulvane, 184 U. S. 497, Rule 90 was quoted and considered. It is there stated that:

"Proceedings in courts of equity of the United States
850 are regulated by rules promulgated by this court deriving their force from statutory authority".

The court quotes approvingly from Oelrichs vs. Spain, supra, and the following language taken from Day vs. Woodworth, 13 How. 370-371:

"In actions of trespass where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is no more entitled to them, if he succeed, than is the defendant if the plaintiff be defeated. Why should a distinction be made between them? In certain actions ex delicto [vindicitive] damages may be given by the jury. In regard to that class of cases this court has said: 'It is true that damages assessed by way of example may indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees cannot be taken as the measure of punishment of a necessary element in its infliction".

The same principles are restated in Missouri, Kansas & Texas Railway Co. vs. Elliott, 184 U. S. 530.

In The Baltimore, 8 Wall. 377-392, it is said:

"Attorneys, solicitors, and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as costs against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated".

Reference is made to the Act of February 26, 1853, and while this was an admiralty case that Act is thus broadly construed.

In Missouri Pacific Railway Company vs. Larabee, 234 U. S. 459-471, it was stated that the action of the trial court in assessing against one party to a suit a sum for attor-
851 ney's fees for services rendered in that court as against another party to the suit was not only not authorized by the law of the United States, but was in conflict with the settled rule in the Supreme Court of the United States.

In Day vs. Woodworth, et al, 13 How. 362, the reason for the policy adopted by the courts of the United States is thus further stated:

"The expenses of the defendant over and above taxed costs are usually as great as those of plaintiff; and yet neither court nor jury can compensate him, if the verdict and judgment be in his favor, or amerce the plaintiff pro falso clamore beyond tax costs. * * * There is no reason, therefore, why the law should give the plaintiff such an advantage over the defendant in one case, and refuse it in the other."

In Hauenstein vs. Lynham, 100 U. S. 483, the Supreme Court says:

"It is the settled rule in this court never to allow counsel on either side to be paid out of the fund in dispute".

In Doddridge County Oil & Gas Co. vs. Smith, 173 Fed. 386-388, it is pointed out that:

"To this general rule there has been certain exception made in cases where a plaintiff has in his own interest and that of others impounded a fund for the mutual benefit of all. In such cases the solicitors of plaintiff have been allowed their fees out of the funds so impounded and decreed to those in the same class as their client. Such cases arise where suits are brought to set aside conveyances for the benefit of creditors, for the administration of decedents' estates, for appointment of receiver and to wind up insolvent estates, to enforce stockholders' liability, and in bankruptcy".

In Motion Picture Patents Co. vs. Steiner, 201 Fed.
852 63-65, Judge Coxe, speaking for the Court of Appeals for the Second Circuit, says:

"The question here is not what the law should be, but what it is. Unquestionably the laws of New York are much more liberal in the matter of costs and allowances than those of the United States, where the costs are hardly more than nominal. In Isolated cases the inability of the court to make an adequate allowance may produce hardship. But, on the other hand, the federal system has advantages which are obvious to all who have practiced in the courts of the United States".

In Adams, et al, vs. Kehlor Milling Co., et al, 38 Fed. 281-282, Judge Thayer said:

"It is well settled that when, under a bill filed by one beneficiary in a trust, in behalf of himself and all other beneficiaries, a fund is recovered and brought into court for distribution, the court may tax a reasonable solicitor's fee as costs, and order it to be paid out of the fund so recovered. Trustees vs. Greenough, 105 U. S. 527; Banking Co. vs. Pettus, 113 U. S. 116. This rule rests upon the ground that where one litigant has borne the burden and expense of a litigation that has inured to the benefit of others as well as himself, those who have shared in the benefits should contribute to the expense. In that class of cases it is customary to tax against the fund realized a fee in favor of complainant's solicitor, before any distribution is ordered. For even this rule would not authorize the court to tax the costs as between solicitor and client against the defendants. Defendants are liable for a fee of $20, taxed under section 824, Rev. St. U. S. If any further fee is taxed, it must be taxed against a fund actually or constructively in the custody of the court for the purpose of distribution".

In Fidelity Insurance Trust & Safe-Deposit Co. vs. Roanoke Iron Co., 91 Fed. 19-21, the rule is thus stated:

"The general principle is that a litigant must pay his own counsel fees, and he cannot recover them in the shape of costs from his adversary, nor can he put the burden of their payment upon others entitled to participate in a fund under the control of a court of equity. An exception is made where he has by his services produced the fund, and where his interest is the same as that of others who are benefited by his efforts".

853 Mr. Michie, in his Encyclopedia of United States Supreme Court Reports, volume 4, page 817, states the rule thus:

"Although under the federal statutes and those of the various states, the legal taxed costs are far below the real expenses incurred by the litigant, yet it is all the law allows as expensa litis."

One cannot escape the conclusion, whatever he may think the law ought to be, that under the statutes of the United States, and the policy announced by its courts from highest to lowest, costs as between solicitor and client cannot be taxed against the losing party, however unjust and expensive the litigation, in the absence of the existence of a fiduciary relation, with the necessary incidents which create an exception of this rule, and that, in this respect, the practice which may prevail in the Chancery Courts of England can have no controlling effect.

The next inquiry is whether this case falls within the second class; that is to say, where a fiduciary relation exists between the parties, such as trustee and cestui que trust, or pledgor and pledgee, under circumstances which raise an exception to the general rule. It is recognized generally that where the fiduciary is put to expense for the protection of the property and estate in his custody, or in defense
854 of the title of his pledgor, he is entitled to be compensated for his out-lay out of the fund or property in his hands, and in some instances, it would appear, by the cestui que trust or pledgee where a fund is not available. This doctrine applies almost, if not quite, exclusively to true or naked trustees, and the reason involved in the rule is that such trustees have no beneficial interest in the trust property. It may be well at the outset to state some of the principles recognized by the authorities and in the decisions by which this distinction is made clear.

The general rule is that trustees shall have their costs out of the trust fund or from the cestui que trust personally. If there is a fund within the control of the court they may have their costs as between solicitor and client. Where there is no fund within control of the court, if the cestui que trust bring the trustees before it to obtain a direction as to the rights of the parties, or the mode of administration, and the trustees are free from all blame or fault, they are entitled to costs against the cestui que trust personally, to be taxed as between solicitor and client.

(Perry on Trusts, 6th Edition, par. 894 and note).

Trustees will be allowed all the expenses of litigation concerning the fund, and all costs which they are ordered
855 to pay to strangers, if the litigation was forced upon them, or was necessary for the protection of the estate.

(Ibid, section 910).

But a trustee cannot recover as between solicitor and client if he has a personal interest in the fund or litigation. The general rule is, that if trustees bring suits against strangers, or strangers bring suits against trustees respecting the trust fund, costs will be awarded againt the losing party, as in other suits. In all cases where trustees are compelled to pay costs in suits with strangers, the costs are taxed as between party and party, and not as between attorney and client. Where plaintiffs bring a bill against defendants for the purpose of creating a trust fund,—as if they bring a bill to convert defendants into trustees under a constructive trust, or to compel the defendants to hold certain property in their hands in trust for the plaintiffs,—the defendants can have costs only as between party and party, if the plaintiffs fail; for the suit in such case turns out to be between strangers.

(Ibid, par. 896).

If a trustee sets up a claim of his own to the trust property, and fails in his claim, he must pay all costs. So if a
856 trustee has some private interest of his own, separate from and independent of the trust, and he compels the cestui que trust to come into a court of equity, merely for the purpose of procuring a decision, at the expense of the estate, upon some point relating to his own private interest, the court will decree him to pay the whole costs.

(Ibid, section 900).

The general rule is that counsel fees are not recoverable as costs by a successful party in actions either at law or in equity. Of course, it is generally recognized that where any party, such as a creditor, augments an estate by his own efforts and expenditure, he should be reimbursed out of that with which he enriches the claimants to that estate; and where a trustee is put to necessary expense, including the fees of counsel, in protecting an estate which he holds under order of court, or otherwise, for the benefit of others, as well as himself, he should be reimbursed therefor out of that estate. Trustees vs. Greenough, 105 U. S. 527, upon which counsel for the Trust Company strongly rely, and Dodge vs. Tulleys, 144

U. S. 451, to which reference is commonly made to sustain allowances to such trustees, go no further than this. And the general trend of decision is that the exception to the
857 rule as to taxation of costs in federal jurisdictions and allowances to trustees and their counsel is based upon some fund or estate which has been conserved or augmented by those who have either no interest therein or a joint interest with other parties entitled thereto.

(Adams, et al, vs. Kehlor Milling Co., 38 Fed. 281; Doddridge, etc. Gas Co. vs. Smith, 173 Fed. 386; New York Cent. & H. R. Co. vs. Bank of Holly Springs, 195 Fed. 456; Cuyler vs. Atlantic & N. C. R. Co., 132 Fed. 570; Lottery Co. vs. Clark, 16 Fed. 20; Malcomson vs. Wappo Mill, et al, 97 Fed. 225).

The familiar application of this rule is to be found in railroad receiverships and the like where an estate comes into the control of the court through a receiver. So, also, in the case of trust estates established by will or deed. It would be impracticable to extend this memorandum by quotations from the great number of citations available wherein these principles and the distinctions herein drawn are pointedly expressed and reiterated.

The original debt of the Belt Company to the Trust Company was about $360,000; to secure this it received securities of the Belt Company, which are referred to in this controversy as a trust fund or pledge. Of course, this transaction did not constitute the Trust Company a trustee in a true sense except in so far as such a depositary always holds the
858 property, in excess of that required to satisfy its debt, in trust for the debtor. The real relationship existing is that of creditor and debtor. Any suit between the parties, at law or in equity, whereby the indebtedness is denied or a counter-claim or off-set is interposed, is, in effect, a suit between party and party. The contest here was ultimately between the Southern Company and the Guardian Trust Company; the latter was defending in its own right and seeking a recovery in its own right. It is true that in the intervening petition of the Southern Company the Guardian Trust Company is referred to as a trustee, and it is claimed that in its administration of matters other than those immediately in controversy, it has assumed, in legal effect, the position of a trustee, and that because of certain acts, claimed to be unlawful, it had made itself liable to respond to the estate to which the Southern Company has succeeded; but this, upon analysis, was no more than seeking to convert the Trust Com-

pany into a trustee under a constructive trust, and to compel it to hold certain property in its hands in trust for the plaintiffs in that sense. In such cases, as we have seen, a defendant can have costs only as between party and party. The allegations of fraud and misconduct add nothing to the rights of the party in this respect. The recovery in a large amount in excess of the original debt of $360,000 was due en-
859 tirely to the natural increase of the principal amount over a long period of years. In the end of the Trust Company recovered from the Southern Company its debt with interest and the counter-claims of the Southern Company were rejected. The claim of the Trust Company, as a pledgee, stands upon the same plane. If a pledgee has been put to expense in order to protect the property pledged against strangers and to vindicate the pledgor's title, the gross proceeds available for the payment of the debt must be reduced to the extent of the expenses thus incurred. The rule in such cases goes no further than that.

(Work vs. Tibbits, 87 Hun. 352; Wolf vs. American Trust & Savings Bank, 214 Fed. 761; Smith vs. Equitable Trust Co., 215 Penn. 413; Willard vs. White, 56 Hun. 581).

In as much as in this case the entire debt of the Southern Company to the Trust Company has been, and will be, paid in cash upon the settling of this decree, the sufficiency of the property pledged to satisfy it is not of moment. The Trust Company has not brought into the estate anything apart from its own claim as a party litigant, directly and exclusively interested in the outcome of the litigation. In such cases the right to costs as between solicitor and client does not exist.

It will thus be seen that I have been forced, upon ful-
860 ler investigation, to revise the view originally entertained. The Master has made his report pursuant to the directions contained in the reference, as was his duty. The exceptions of the Southern Company to his report in the particulars mentioned must be sustained as a result of the view which the court now takes of this issue.

I am persuaded, upon reflection, that the conclusion I have reached accords with the judgment of the Circuit Court of Appeals, as disclosed in its opinion, (210 Fed. l. c. 723) wherein it said:

"As directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules, and practice in equity".

Evidently it was felt that further action in this court should be confined to such taxation of costs and that the recovery of the Trust Company should be limited thereto. I have endeavored to make that taxation in accordance with the principles, rules, and practice in equity as I now understand them, and it results that it should be made as between party and party. It remains then to consider the items of which such costs are made up, as disclosed by the report of the Master, because necessarily they are included within those taxable between solicitor and client.

861 As between party and party the Master allowed items 1, 2, and 3 in the sum of $8,553.50; also items 4 to 32 in the sum of $2,725.77; also costs taxed by the Court of Appeals and clerk of the Circuit Court of Appeals in the sum of $1,791.20; also item 34 for copy of document in the sum of $1.15; also an item for separate copies of documents, etc. in the sum of $180.45; making a total of $13,252.05. These allowances are not contested by the Southern Company. Item 33, for a stenographer who did some work in place of Mr. Jetmore, was disallowed by the Master. I can see no reason why this item should not be included; this would raise the allowances thus far to $13,274.10. In addition the Master takes up, properly, some matters in dispute and undetermined, involved in the principal judgment. He finds that upon a note for $7,162.40, dated October 23, 1899, in the computation heretofore made before final decree, but six per cent interest was allowed, whereas the note bore eight per cent. This was undoubtedly an inadvertence, and the Master finds that two per cent additional should be added from October 23, 1899 to the date of entry of final decree without compounding. In this conclusion I think the Master is right.

862 This would amount, as the court figures it, to $3,724.24, which, added to the foregoing items, makes a total of $16,998.34.

The Master also finds that the Southern Company was not credited with interest actually earned on special deposit in the aggregate of $4,611.99; $737.02 of this was earned October 25, 1902 and $3,874.47 was earned April 15, 1916. The Master allowed interest on the aggregate of these sums from April 15, 1916. It is my judgment that interest should be allowed on the first item from October 25, 1902 and on the second item from April 15, 1916. The amount of the interest thus allowed would be $3,154.42 and the aggregate would be $7,764.91; subtracting this from $16,998.34 would leave a net allowance of $9,233.43. The receiver files exceptions to the

disallowance by the Master of $3,948.93 paid to Jetmore for carbons. The Master allowed the amount paid for the originals and disallowed the amount paid for carbons because furnished for convenience of counsel. Counsel for the receiver argue, with much plausibility, that these carbon copies, in view of the tremendous size of the record, were essential to enable counsel properly to present the case in aid of Master and court. I do not think in principle, however, that this case can thus be differentiated from those coming under the established rule in the absence of an order of court
863 which clearly contemplated and recognized the necessity of these carbons as taxable items.

Ex Parte Peterson, 253 U. S. 300, had to [to] with the allowance of the expense of an auditor and the original of the stenographer's minutes. The court said that in cases where copies have been disallowed they were made for the benefit of the party as distinguished from expenditures incurred under order of the court to make possible or to facilitate its consideration of the case. I do not find that the court made any order susceptible of this construction.

In Stallo vs. Wagner, (C. C. A. Second Circuit), 245 Fed. 366, the court gave exhaustive consideration to the cases and struck from the bill of costs an item alleged to have been paid by the defendant for a copy of the stenographer's minutes. It construed Rule 50 of the Supreme Court as unavailable for the allowance of such fees, and this case was approved in Ex Parte Peterson, supra. To the same effect is The William Branfoot, 52 Fed. 390, opinion by Chief Justice Fuller. In Newton vs. Consolidated Gas Co., 265 U. S. l. c. 85, the desirability of a rule permitting such allowances is voiced, thereby, by implication, holding that such authority does not exist in the absence of rule, or, at least, special order.
To the same effect is Atwood vs. Jaques, 63 Fed. 561,
864 opinion by Judge Philips in this district. The ruling of the Master on this point must, I think, be sustained.

I have taken up these matters in order that counsel might be advised of the court's ruling upon the contested points respecting costs as between party and party. It is quite possible, in view of the great complexity of the items discussed in the briefs, that I may have overlooked some matters; also, the computations may not be exact and it is not intended by this memorandum to foreclose the parties from calling such omissions and inaccuracies, if any, to the attention of the

court for correction when the final decree is presented and settled.

Kansas City, Missouri, March 22, 1926.

ARBA S. VAN VALKENBURGH,
Judge.

Filed in the District Court of United States, March 23, 1926.

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865 (Clerk's Certificate to Transcript.)

United States of America, Set:

I, Edwin R. Durham, Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the foregoing, consisting of two volumes—Vol. 1 pages 1 to 430, Vol. 2 pages 431 to 865 inclusive—is a full, true and complete copy of the record, assignment of errors and all proceedings called for in the praecipes filed herein and made a part hereof in the cause wherein the Cambria Steel Company, et al., are Complainants, and the Guardian Trust Company, et al., are Defendants, as fully as the same appears on file and of record in my office.

I further certify that the original Citation is prefixed hereto and returned herewith.

Witness my hand as Clerk and the seal of said Court. Done at office in Kansas City, Missouri, this 10th day of March, A. D. 1927.

Seal
U. S. Dist. Court
West. Div.
West. Dist.
of Missouri.

EDWIN R. DURHAM
Clerk U. S. District Court.
By H. C. Spaulding
Deputy Clerk.

Filed Mar. 21, 1927. E. E. Koch, Clerk.

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721 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellants.)

United States Circuit Court of Appeals, Eighth Circuit.

Guardian Trust Company, Henry C. Flower, Receiver, Appellant,

No. 7784. vs.

Kansas City Southern Railway Company.

The Clerk will enter my appearance as Counsel for the Appellant.

JUSTIN D. BOWERSOCK,
Fidelity Trust Bldg., Kansas City, Mo.

HARRY S. MECARTNEY,
105 W. Monroe St., Chicago, Ill.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 21, 1927.

(Appearance of Mr. Cyrus Crane as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

CYRUS CRANE,
304, 1st. Nat. Bank Bldg.,
Kansas City, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 16, 1927.

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722 (Appearance of Mr. S. W. Moore, Mr. F. H. Moore and Mr. A. F. Smith as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

S. W. MOORE,
F. H. MOORE,
A. F. SMITH.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 17, 1927.

(Order of Submission.)

December Term, 1927.

Monday, December 12, 1927.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Justin D. Bowersock

for appellants, continued by Mr. Samuel W. Moore and concluded by Mr. A. F. Smith for appellee.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

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723 (Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, A. D. 1928.

Guardian Trust Company, Henry C. Flower, Receiver, Appellant,

No. 7784. vs.

The Kansas City Southern Railway Company, Appellee.

Appeal from the District Court of the United States for the Western District of Missouri.

Mr. Justin D. Bowersock (Mr. Harry S. Mecartney was with him on the brief), for appellant.

Mr. S. W. Moore and Mr. A. F. Smith (Mr. F. H. Moore and Mr. Cyrus Crane were with them on the brief), for appellee.

Before Sanborn and Booth, Circuit Judges, and Munger, District Judge.

Booth, Circuit Judge, delivered the opinion of the court.

This is an appeal from a decree which granted to appellant (defendant below) relief as to principal matters involved, but failed to allow as costs a certain class of items to which appellant claimed to be entitled, but which the court held it had no authority to allow. The assignments of error all relate to the failure of the court to allow these costs as claimed by the appellant.

For brevity, the Guardian Trust Company will be called Trust Company; and the Kansas City Southern Railway Company, the Southern Company.

724 The litigation out of which these costs arose was commenced against appellant in September, 1900, and has continued to the present time. The history and details of the litigation may be gathered from the opinions reported in 146 F. 337; 171 F. 43; 201 F. 811; 210 F. 696; 240 U. S. 166. See

also 240 F. 689; 280 F. 64. The character of the litigation will be presently stated.

This court by its decree of December 2, 1913, reversed the decree of the trial court on the merits of the case, and directed that court to render a decree for the Trust Company in accord with the views expressed in the opinion of this court. In the opinion it was stated that application had been made to this court by certain stockholders of the Trust Company to direct the court below to find the amount of attorney's fees, expert accountant's fees and stenographer's fees incurred by the Trust Company in the litigation, and to render a decree therefor in favor of the Trust Company. In reference to that application this court said:

"'A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them, and as the evidence upon the issues tried in this case was not brought to this court, it would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them, and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules, and practice in equity.'' 210 F. 696, 723.

The decree of December 2, 1913, was affirmed by the Supreme Court (240 U. S. 166), and the mandate of that court carried the case back direct to the trial court.

Thereafter, a motion was made in the trial court that a final decree be entered, and that costs and expenses of the litigation be allowed and adjudged in favor of the Trust Company. The Trust Company prayed that costs be taxed in its favor "as between solicitor and client". The appellee,
725 Southern Company, insisted that the costs be limited to such as were taxable "between party and party". After considering the matter the court filed a memorandum, in which it was held,—

"The right to tax costs as between solicitor and client depends upon one, or both, of two theories recognized in the law.

"First. Where gross charges of fraud and misconduct have been made and not sustained, and where the main ground of the suit is shown to be false, unjust, vexatious, wanton or oppressive. In other words, where charges amounting to scandal and a misuse of the courts are made and not sustained, but found to be baseless and unwarrantable.

"Second. Where a fiduciary relation exists between the parties, such as trustee and cestui que trust, or pledgor and pledgee, or principal and agent, and where the fiduciary is put to expense in the defense of an unfounded suit brought against him by such cestui que trust, or pledgor or principal, especially where charges of gross fraud and misconduct have been made against a fiduciary and have been found baseless and unwarrantable."

The court further held that costs "as between solicitor and client" might properly be taxed in the instant suit under the second theory. Thereupon a special master was appointed,—

" * * to ascertain, take, and state an itemized account of all costs and expenses paid or incurred by the Guardian Trust Company or its various Receivers for and on account of court costs and other expenses incurred by said Trust Company and its Receivers in and about its resistance of and defense against this litigation, and in defending against the various original and dependent bills and petitions filed herein against the Guardian Trust Company or its Receiver, by or at the instance of Kansas City Southern Railway Company, Cambria Steel Company, Kansas City Suburban Belt Railroad Company or its Receivers, or its subsidiary companies or their Receivers, parties to this cause, and in defending, maintaining, protecting, and preserving therein the right, equity, title, and lien of the Guardian Trust Company of its Receivers as pledgee of the property described in paragraph V. of the former decree of June, 1910, or in the property of any corporation whose stock was so held in such pledge, and the right
726 to dispose of and realize upon said pledged property in accordance with the terms of the pledges under which said property was pledged, including, among other expenses, those for attorneys' fees, counsel or solicitors' fees, stenographers' fees, expert accountants' fees, printing fees, traveling expenses, and other expenses incurred in the premises".

On September 15, 1924, the special master filed his report wherein he set out at length the items of expense incurred by the Trust Company in the litigation, and specified those which

he allowed and those which he disallowed. Fourteen exceptions to this report were filed by the Trust Company; thirty-nine were filed by the Southern Company.

On March 23, 1926, the trial court filed a memorandum in which it was stated that upon fuller investigation the court was forced to revise its former views, and that it now held that no costs were allowable to the Trust Company "as between solicitor and client". Final decree was accordingly entered May 15, 1926, in which costs were allowed to the Trust Company only as "between party and party". The present appeal followed:

The Character of the Litigation.

In any inquiry whether costs "as between solicitor and client" should be allowed a litigant in an equity suit, the character of the litigation is one of the main determining factors. It becomes necessary, therefore, in the instant suit to examine into the character of the litigation.

The bill filed by the Cambria Steel Company (hereafter called the Cambria Company) September 6, 1900, against the Kansas City Suburban Belt Railroad Company (hereafter called the Belt Company) and various other corporations, including the Guardian Trust Company, purported to be a creditor's bill against the Belt Company. In addition to the usual allegations, however, the bill alleged that the Trust Company had caused the incorporation of the constituent companies which afterward became the Belt Company, and absolutely dominated and controlled their affairs; that it had caused several other corporations to be formed for the purpose of building railroads, caused them to issue bonds to pay for the same, and completely dominated their affairs; that the Trust Company had caused the stocks and bonds of these various companies to be delivered to it, had sold the same, and had applied the excess of the proceeds over the cost of the railroads in the payment to itself of commissions
727 and for services; that the Trust Company had assumed the position of trustee and agent in managing and disposing of these stocks and bonds, and had failed and refused to make an accounting therefor; that the Trust Company by reason of these transactions was owing the Belt Company a large amount of money. The bill alleged further that the Trust Company had caused the legal title to properties necessary to be used by the railroad companies, including the Belt Company, to be placed in certain "dummy" companies with the fraudulent intent and purpose of preventing the proper-

ties being reached by the creditors of the railroad companies; that the Trust Company caused the Belt Company to enter into a pretended contract for the building of a certain link of railroad, which resulted in a loss of several hundred thousand dollars; that the contract for the construction in reality belonged to the Trust Company, and the resulting loss was its loss; that the Trust Company had charged up the loss to the Belt Company and was claiming the same as a liability in its favor against the Belt Company; that this action by the Trust Company was fraudulent in fact and in law; that the Trust Company had caused the Belt Company to transfer to it bonds, stocks and other property as collateral for various pretended claims which it fraudulently asserted to exist in its favor against the Belt Company; that the Trust Company fraudulently caused pretended notes to be given to it by the Belt Company as representing debts owing to it by the Belt Company; that the Trust Company had fraudulently appropriated to itself a large amount of the property of the Belt Company, consisting of stocks, bonds, and other securities; that the domination of the Trust Company over the Belt Company ceased in April, 1900.

The relief asked included: that the Trust Company be adjudged to hold the said stocks of various companies and certain bonds in trust for the creditors of the Belt Company; that receivers be appointed for the Belt Company with power to institute proceedings to recover the assets of that company; that an injunction issue restraining the Trust Company from disposing of the property held by it as alleged collateral to indebtedness of the Belt Company. Receivers were appointed for the Belt Company, and a restraining order was issued against the Trust Company.

On November 20, 1901, the receivers of the Belt Company filed an ancillary bill in the Cambria Company suit. The Trust Company was made one of the defendants. This
728 ancillary bill alleged largely the same facts as the Cambria Company bill, to-wit, the formation of corporations by the Trust Company and the domination of them, including the Belt Company; the retention by the Trust Company of proceeds of sale of the stocks and bonds of said companies under the fraudulent pretenses that it was retaining them for the payment of commissions and services; the causing by the Trust Company of the signing by the Belt Company of pretended promissory notes, payable to the Trust Company, and causing stocks and bonds to be delivered to it as collateral to the notes. It was further alleged that the

execution of the promissory notes and the delivery of the collateral were fraudulent and void.

The prayer of this ancillary bill asked for an accounting by the Trust Company as a trustee and agent for the Belt Company; that the notes be cancelled as fraudulent; and that the Trust Company be restrained from transferring the collateral securities.

March 22, 1905, an amended and supplemental ancillary bill was filed by the receivers of the Belt Company. This bill reiterated to a large extent the charges made in the two preceding bills. It also charged conversion by the Trust Company of property of the Belt Company; also that the Trust Company occupied a fiduciary relation to the Belt Company, and by reason thereof had no right to charge any sums as profits; that the Trust Company in pursuance of a fraudulent plan sold worthless securities to the Belt Company; that the Trust Company fraudulently made overcharges on its books against a subsidiary company of the Belt Company, which charges afterward became charges against the Belt Company; that the Trust Company made sales of stocks and bonds for the Belt Company and reported the same as made at less than the actual figures, thereby securing for itself a profit; that the Trust Company caused the Belt Company to declare and pay dividends when is was insolvent, and that the Trust Company as a stockholder in the Belt Company received such dividends; that the Trust Company caused the Union Terminal Company, whose stock was owned by the Belt Company, to issue bonds and deliver the same to the Belt Company contrary to the provisions of the mortgage in which the Trust Company was trustee; and further caused the Belt Company to deliver said bonds to the Trust Company, which company thereupon sold them and kept the proceeds, crediting the amount to the account of the Belt Company,—all in violation of the duties of said Trust Company as trustee under said mortgage;
729 that the Trust Company sold bonds belonging to the Belt Company, and fraudulently refused to account for the proceeds; that the Trust Company fraudulently appropriated several hundred shares of stock belonging to the Belt Company.

The prayer for relief in this amended ancillary bill was that the Trust Company account as trustee and as agent for the Belt Company; that the promissory notes of the Belt held by the Trust Company be found to have been fraudulently executed and for fraudulent purposes.

On the 2nd of July, 1906, the surviving receiver of the Belt Company filed a second amended and supplemental ancillary bill. This bill also contained charges against the Trust Company of dominating over the Belt Company and its subsidiary and allied corporations; of causing fraudulent execution of the promissory notes of the Belt Company held by the Trust Company; of fraudulent delivery of the collateral by the Belt Company to the Trust Company; of fraudulent appropriation of bonds in connection with the construction of the railroad of a company known as the Suburban Company; of appropriation and conversion to its own use by the Trust Company of stocks and bonds of the companies subsidiary to the Belt Company. The bill also alleged that the Trust Company occupied a fiduciary relation to said companies; and that any contracts providing for trustee fees for the Trust Company were unlawful; that the Trust Company sold stocks and bonds of the Belt Company and reported to the Belt Company amounts of sales at less figure that the actual sales, and retained the balance. The bill also reiterated the charges against the Trust Company of violation of its duties as trustee under the Union Terminal Company mortgage.

The prayer of this bill also was for an accounting by the Trust Company; that the promissory notes executed by the Belt Company and held by the Trust Company be declared fraudulent, and be cancelled; and that the Trust Company be restrained from disposing of the stocks and bonds held by it as alleged collateral to the promissory notes of the Belt Company.

Meanwhile, on February 27, 1905, the Southern Company filed an intervening petition in the Cambria Company suit;
and on May 1, 1905, it filed an amended intervening
730 petition. Among other things the amended petition alleged: the foreclosure suits of the several mortgages, heretofore mentioned, on property of the Belt Company or its subsidiary companies, and sale of the properties to the Southern Company December 31, 1901; the foreclosure of the mortgage on the Kansas City, Pitsburg & Gulf Railroad Company, and sale of the property to a committee acting for the Southern Company; that the Trust Company was either sole trustee or co-trustee under each of said mortgages; that the Trust Company had caused each of said companies to be formed, and thereafter dominated their affairs; that the Trust Company claimed to hold as collateral to an alleged indebtedness of the Belt Company to it, a large

amount of stocks and bonds of a number of companies which were subsidiary to the Belt Company; that these securities had been owned by the Belt Company; that they had become included in the mortgage of the Belt Company by reason of an after-acquired property clause; that at the foreclosure sale under that mortgage these securities had been acquired by the Southern Company; that the Trust Company as trustee under the mortgage made by the Belt Company did not in any degree or in any way carry out the duties imposed upon it as trustee in said mortgage, but exercised its powers and duties at trustee in said mortgage in its own interest and in violation of its trust; that the Trust Company had also violated its duties at trustee in the several mortgages of the subsidiary companies of the Belt Company and the Gulf Company by appropriating to itself as collateral to an alleged indebtedness of the Belt Company to it, large amounts of stock and bonds of said companies. The petition further alleged that the Trust Company as co-trustee nnder the mortgage of the Union Terminal Railroad Company (one of the companies allied with the Belt Company) wrongfully and fraudulently and contrary to the terms of the mortgage, caused a large amount of the bonds to be sold and the proceeds to be applied on the alleged indebtedness of the Belt Company to the Trust Company.

The prayer of this petition was that the Trust Company be required to account for and pay over to the Southern Company the value of the stocks and bonds which it had wrongfully appropriated as set forth in the petition.

To these various bills and petitions the Trust Company answered. It denied among other things, that it had caused the Belt Company and its allied or subsidiary com-
731 panies to be incorporated, or had dominated any of them; denied that it occupied any fiduciary relationship to the Belt Company or its allied or subsidiary companies, except that it had acted as trustee under mortgages executed by them; denied any wrongful or fraudulent action on its part, either as trustee or otherwise; alleged that the transactions between it and the Belt Company were shown upon the books of both companies, and that the books of the Trust Company had been repeatedly examined by the expert accountants of the Belt Company; admitted that it held collateral given to it by the Belt Company as security for the debts owed to it by that company; alleged that the collateral was given in good faith and to secure just debts evidenced by promissory notes and an open account, amounting to up-

wards of $300,000; denied that the securities held by it as collateral had become included in the Belt Company mortgage by virtue of the after-acquired property clause, or had been sold to the purchaser at the foreclosure sale under said mortgage, or had been acquired by the Southern Company; alleged that at the request of the Belt Company, it had acted as financial agent for several of the subsidiary companies, and sold their stocks and bonds and received compensation therefor, all the facts relative to which were known and approved by the officers of the respective companies and of the Belt Company; alleged that all financial transactions of the Trust Company with or for the Belt Company or its allied or subsidiary companies were fully and fairly accounted for and approved by the officers of those companies.

In its answer to the amended and supplemental ancillary bill of the receivers of the Belt Company, the Trust Company prayed for judgment against the Belt Company and its receivers on the indebtedness owing by the Belt Company; and prayed further that the court protect and enforce the interest of the Trust Company in and to the stocks, bonds, and other property held by it as collateral.

In its answer to the amended intervening petition of the Southern Company, the Trust Company also alleged that the Southern Company, by virtue of its acquirement of the properties of the Belt Company under the reorganization plan set out, had become liable for the debts of the Belt Company, including the debt owing to the Trust Company.

From the foregoing analysis of the pleadings it will be seen that among the issues raised were:

732 Whether the Trust Company had been guilty of fraud in its dealings with the Belt Company and with its allied and subsidiary companies;

Whether the Trust Company had occupied a fiduciary relation with said companies or any of them, except in so far as it had acted as trustee in several of the mortgages made by those companies; and if so, whether it had violated that relationship;

Whether the Trust Company, while acting as trustee in said mortgages or any of them, had violated its trust;

Whether the Belt Company was indebted to the Trust Company;

Whether the Trust Company was entitled to hold the collateral which it claimed had been pledged to it by the Belt Company in connection with the debt;

Whether the said collateral came under the mortgage of the Belt Company and had been acquired by the Southern Company through the foreclosure sale under that mortgage;

Whether the Southern Company was liable to the Trust Company for the indebtedness of the Belt Company.

These issues were first passed upon by the special master. He found as follows:

"No stockholder, has at any time objected to any of the transactions complained of in the bill."

"The transactions in dispute were open, not secret or concealed, and were either known to the stockholders, or could have been, if they had been at all diligent in trying to understand such transactions, which are spread with much explanatory detail, not only on the books of the Trust Company, but also on the books of the railway companies; and the very nature of the transactions, their magnitude and the long period of time over which they extended, tend thoroughly to negative the idea of ignorance on the part of any stockholders."

"The transactions now attacked in the bill, were expressly ratified by the stockholders, as shown by the minutes of the corporate meetings".

733 "The transactions in question are executed contracts, closed and consummated years before the original bill was filed, and, as the accounts between the Trust Company and these other companies were settled, from time to time, the Belt Company gave its notes for the balances due, and which notes were also paid off, from time to time."

"It is shown by the record that the book-keeping was full, complete and accurate as to all original entries, and otherwise, and that the accounts between the companies were regularly stated and audited each month by formal certificates exchanged by their respective auditors, and that the books tallied to a cent."

"The Belt in the transactions, which are now attacked, received therefrom certain benefits and advantages, which the complainants have never offered to return, and, in the nature of things, cannot return. The status quo cannot be restor-

ed, which fact, if true, becomes a most important one in the final determination of the issues involved in the bill, and, especially so, in the absence of fraudulent intent, or actual fraud, on the part of the Trust Company, which is not shown by the proofs in the record."

"The Trust Company did not dominate and control the Belt Company, or any of the other companies involved in this controversey, as claimed by complainants in their bill".

"* * the Trust Company was under no such duty to the Belt bondholders as would prohibit it from taking collateral security to secure an indebtedness to it from the Belt Company, nor was there any express convenant in the mortgage creating such duty, nor was there any such duty by implication of law."

The master held further that the Trust Company was entitled to hold all of the collateral mentioned in the Southern Company's petition in intervention; that the collateral did not become included under the Belt Company mortgage; and that the Southern Company had not acquired any right, title, or interest therein by virtue of the foreclosure sale under that mortgage.

The master recommended that the Cambria Company bill be dismissed for want of equity, and that the injunction restraining the Trust Company from disposing of its collateral be dissolved. The master recommended further that the second amended and supplemental ancillary bill of the receiver of the Belt Company be dismissed as without
734 equity, except as regards three small items of account, two of which had been admitted in the answer of the Trust Company. The master recommended further that the amended petition of intervention of the Southern Company be dismissed as being without either law or equity, except as to one paragraph in regard to certain lands standing in the name of the Central Improvement Company, one of the subsidiary companies; and that the Trust Company was entitled to hold and subject to the payment of the debt to it from the Belt Company all of the collateral mentioned. The master recommended further that the Southern Company be held not liable for the indebtedness of the Belt Company.

The trial court approved and confirmed the report of the special master, and entered a decree adjudging:

(a) That there was no equity in the bill of the Cambria Company, and that it be dismissed; and that the injunction issued in said cause against the Trust Company be dissolved;

(b) That the allegation in the ancillary bills of the receivers of the Belt Company as to the three items above mentioned were true and that the Belt Company should have credit therefor; that as to all of the other allegations in said bills, the bills were without equity and were dismissed;

(c) That the allegations of the Trust Company touching the indebtedness of the Belt Company to it were true, and that there was due the Trust Company from the Belt Company $639,658.86 with interest;

(d) That the Trust Company was entitled to subject all the securities pledged to it (setting them out as claimed by the Trust Company) to the debt owed by the Belt Company;

(e) That the Southern Company was entitled to a conveyeance from the Central Improvement Company of the lands standing in the name of that company;

(f) That the Southern Company was not liable for the debt of the Belt Company to the Trust Company.

Upon appeal, this court held with the trial court as to provisions of the decree set out in (a), (b), (c), and (d), supra; overruled the trial court as to provisions (e) and (f), supra; held further that the Trust Company as pledgee of
735 the stock of the Central Improvement Company had a right in the lands of the Central Improvement Company superior to the right of the Southern Company; and held further that the Southern Company was liable for the debt of the Belt Company to the Trust Company; and that the Trust Company was entitled to judgment against the Southern Company for $639,658.86 and interest,—the amount of the debt of the Belt Company to the Trust Company.

From the foregoing synopsis of the pleadings, findings, and decree in the litigation, it is clear that the charge that the Trust Company had committed fraud against the Belt Company was adjudged not true; the charge that the Trust Company had violated fiduciary relations with the Belt Company and its subsidiary companies was adjudged not true; the charge that the Trust Company had violated its duty as trustee under mortgages of the Belt Company and its subsidiary companies was adjudged not true. On the other hand, the claim of the Trust Company that the Belt Company was indebted to it in a large amount was adjudged true; the claim of the Trust Company that it held securities pledged by the Belt Company as collateral to the debt, and that it had a right to subject said securities to the payment

of the debt, was adjudged true; the claim of the Trust Company that the Southern Company by it acquirement of the assets of the Belt Company had become possessed of property which in equity constituted a fund for the payment of the creditors of the Belt Company, including the debt of the Trust Company, was adjudged true.

It may not be amiss at this point to note also that this court after the fullest consideration reached the conclusion that all of the foregoing bills, ancillary bills, and petitions against the Trust Company, were in reality sponsored by the Southern Company. This court characterized the Cambria Company suit as "baseless" and "unwarranted".

In reference to the existence of a trust fund for the payment of creditors of the Belt Company, which fund had been disclosed in the litigation, this court said (210 F. 703-708):

"Moreover, the property of the Belt Company was a trust fund. The stockholders of that company were trustees charged with the duty to apply that property to the payment of the claims of the trust company and of the other creditors of the Belt Company before they took to themselves
736 any share in or benefit therefrom. When the Southern Company took their stock and gave them $4,750,000 par value of its stocks and bonds for their interest in the property of the Belt Company, it stepped into their shoes and became a trustee for the creditors of the Belt Company with plenary notice that the interest of those creditors in the property was at least as much as the value of the stocks and bonds it was giving for the interest of the stockholders, for the rights of the creditors in the Belt property were prior and superior to those of the stockholders."

"If the Southern Company had been the owner of the bonds of the Belt Company only, and knowing the condition and indebtedness of the Belt Company, as it did, had paid to the stockholders of that company $475,000 to the exclusion of the creditors for a conveyance of its property by the Belt Company to the Southern Company, it could not have escaped liability to the creditors of that company for that amount. Much less can it do so when it became owner of nearly all the Belt Company's stock, and in equity a trustee for its creditors. Story's Equity Jurisprudence, Secs. 1261, 1262; Grenell v. Detroit Gas Co. 112 Mich. 70, 70 N. W. 413; Camden Interstate Ry. Co. v. Lee (Ky.) 84 S. W. 332, 333; Central of Georgia Ry. Co. v. Paul, 93 Fed. 883, 884, 35 C. C. A. 639; Luedecke v. Des Moines Cabinet Co., 140 Iowa 223, 118 N. W.

457, 458, 32 L. R. A. (N. S.) 616; Hibernia Ins. Co. v. St. Louis & N. O. Trans. Co. (C. C.) 13 Fed. 516, 119."

" • • the Southern Company became liable to the Trust Company to the extent of its claim for the value of the $4,750,000 of its stocks which it issued to the stockholders of the Belt Company to secure the property of the Belt Company and divert it from its creditors. Central of Georgia Ry. Co. v. Paul 93 Fed. 883, 884 35 C. C. A. 639; Camden Interstate Ry. Co. v. Lee, (Ky.) 84 S. W. 332 333."

" • • the transaction was a conveyance of the property of the Belt Company in fraud of creditors and a breach of trust by the Southern Company, which company, with full knowledge of all the facts, actively participated in the entire transaction and thereby acquired the property of the Belt Company, so that that property and the improvements the Southern Company has made thereon, free from the $1,000,000 Belt Mortgage and free from any charge for the
737 expenses which the Southern Company has made thereon, stands in its hands charged with a trust to pay the claim of the Trust Company against the Belt Company which the court may execute by a seizure and sale by its master or receiver. Railroad Co. v. Soutter, 80 U. S. (13 Wall.) 517, 522, 524, 20 L. Ed. 543; Guckenheimer v. Angevine, 81 N. Y. 394, 397; Globe v. O'Connor, 43 Neb. 49, 61 N. W. 131, 132."

Such was the character of the main litigation and the outcome.

We have not deemed it necessary for the purposes in hand to review such suits as the two unwarranted injunction suits brought by the Southern Company against Trust Company which were subordinate to the main litigation. They, however, furnish additional proof, if it were needed, of the vexatious character of the whole litigation. The history of those suits is to be found in 146 F. 337 and 171 F. 43.

We next turn to the consideration of the principles of law applicable to the foregoing facts and bearing upon the question: Whether the Trust Company is entitled to any costs "as between solicitor and client".

Jurisdiction of Courts of Equity Relative to Costs.

I. It is well established that the jurisdiction to award costs "as between solicitor and client" has for several centuries existed in the English Court of Chancery, and has been exercised in a variety of cases.

In Stallo v. Wagner, 245 F. 636, 638, the court in referring to the historical basis of the power of the equity courts in awarding costs, said:

"It was enacted by 17 Rich. II, c. 6, that the chancellor should award damages according to his discretion against persons bringing vexatious and unfounded suits in chancery. And 'damages,' as used in this statute, has been understood as including costs. Since the enactment of the statute the power of adjudging costs has become apparently so far inherent in the equity court as to be inseparable from the exercise of its judicial authority. It has frequently been said that the power of a court of equity to give costs is wholly inherent in the court independent of any statutory authority, and solely according to the conscience of the court.

738 "'This view,' it is said in Street's Federal Equity Practice, vol. 2, Sec. 983, 'is too radical to be considered orthordox, but it seems correct to say that the power of the equity court to allow costs, though originating in statute, has become a common principle and incident of its judicial action, so that the mere establishment of a court of equity and the endowment of it with judicial authority necessarily imports a power in such court to adjudge costs. This idea is fully exemplified in the history of the subject of costs as dealt with in the federal courts.' "

Whether such jurisdiction had its origin in the Statute 17 Rich. II, ch. 6, as some authorities hold, or existed before that time as inherent in the court, as others hold, is immaterial to our present inquiry, which is concerned only with the question of the existence of such jurisdiction at the time of the adoption of our United States Constitution.

In the leading case of Andrews v. Barnes, L. R. 39 Ch. Div. 133, decided in 1888, the court said.

"The jurisdiction of the Lord Chancellor in costs was essentially different from that at common law. 'The giving of costs in equity,' said Lord Hardwicke in Jones v. Coxeter, 2 Atk. 400, 'is entirely discretionary, and is not at all conformable to the rule at law.' 'Courts of Equity,' said the same great Judge in another case, 'have in all cases done it' (i. e., dealt with costs) 'not from any authority' i. e., as we understand, from any statutory or delegated authority)—'but from conscience, and arbitrio boni viri, as to the satisfaction on one side or other on account of vexation:' Corporation of Burford v. Lenthall, 2 Atk. 551.

"An examination of the older General Orders of the Court made, not under any statutory authority, but from the general and inherent authority of the Lord Chancellor, will shew that the Court exercised a most wide discretion not only as to the circumstances under which costs were to be awarded, but apparently as to the measure and fullness of the costs.

* * * * * * * *

"The records of the Court of Chancery during the last century shew that in numerous cases it has exercised the right of giving costs between attorney and client, or, to use the more recent language of the cases, between solicitor and client."

739 And after reviewing numerous authorities, the court further said:

"From this consideration of the earlier authorities we conclude that there was inherent in the Court of Chancery at the time of its abolition a general and discretionary power to award costs as between solicitor and client to a successful party, as and when the justice of the case might so require".

In Halsbury's Laws of England, Vol. 26, p. 798, the statement is made:

"The court has power by a special order to award costs as between solicitor and client to a successful party where it is exercising its equitable jurisdiction, but not where it is exercising its ordinary common law jurisdiction";

citing Andrews vs. Barnes, supra; Mordue vs. Palmer, L. R. 6 Ch. App. 22; Eady vs. Elsdon, 70 L. J. K. B. 701; Brown vs. Burdett, L. R. 40 Ch. Div. 244; Johnson vs. Telford, 3 Russ. 477; In re Brown, L. R. 4 Eq. Cas. 464; Eland vs. Medland, L. R. 41 Ch. Div. 476; Davies, Jenkins vs. Davis, (1891) 64 L. T. 824. See also cases cited in margin*.

The cases show, however, that costs "as between solicitor and client" have not been allowed by the English Chancery Court as a matter of course in equity cases. It is only in certain classes of cases, or when the peculiar facts warranted, that such costs have been allowed. A fair summary of the English cases in which such costs have been allowed, would, we think, include the following classes of cases:

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* Re Foster, L. R. 8 Q. B. Div. 515; Jones v. Coester, 2 Atk. 469; Corp. of Burford v. Lenthall, 2 Atk. 551; Simpson v. Malherbe, 4 Giff. 707; Ex parte Simpson, 18 Ves. Jr. 476; Dunsey v. Angove, 2 Ves. Jr. 304, 313; Turner v. Collins, L. R. 12 Eq. Cas. 438, s. c. L. R. 7 Ch. Div. 329; Forester v. Read, L. R. 6 Ch. App. 40; Pane v. Pane, L. R. 18 Ch. Div. 226, 230; Conrad v. Hanmer, 9 Beav. 3; Blest v. Brown, 4 DeGex & J. 367; Degge v. Colebrook, 1 Atk. 266, West's Ch. R. 681; Masserene v. Lyndon, 2 Brown, 291; Rennett v. Gunn, 1 Cox 253; Brutz v. Edmondson, 56 L. J. Ch. Div. 677; Edenborough v. The Archbishop of Canterbury, 2 Russ. 93; Daniel Ch. Pl. & Pr. (6th Am. Ed.) 1494, et seq.

A. Where gross charges of fraud and misconduct have been made and not sustained;

B. Where the main ground of the suit is false, unjust, vexatious, wanton, or oppressive, and so shown to be;

C. Where a fiduciary relation exists, such as trustee and cestui que trust, pledgor and pledgee, or principal and agent and the fiduciary is put to expense either in defending
740 an unfounded suit, or in administering or protecting and preserving the trust property or pledged property.

In all three classes of cases courts of equity have acted, as stated by Lord Hardwicke in Corp. of Burford vs. Lenthall, 2 Atk. 551, from "conscience and arbitrio boni viri". As expressed by Lord Chancellor Loughborough in Dungey vs. Angove, 2 Ves. Jr. 304, 313, the courts have taken this course "to do that which appertains to justice and that which appertains to example, and to vindicate the honor and justice of the court".

Similar jurisdiction has been held to exist, and has been exercised, in the state courts in the United States, especially in those states where the courts of equity have remained distinct from those of law. See Danbury vs. Robinson, 14 N. J. Eq. 324; Thome vs. Allen, 70 S. W. 410 (Ky.), s. c. 71 S. W. 431.

II. The United States Courts of Equity at the time of their creation became endowed with the powers, including that over costs, possessed by the English Chancery Court. See authorities cited in the margin**. They have exercised such power; and that power has never been taken from them.

And not only the equity jurisdiction of the federal courts has its basis in the jurisdiction of the English Chancery Court, but the practice of those courts, when not governed by statutes of the United States or by rules of the Supreme and lower courts, has a like basis. Rule 90 of the Old Equity Rules, promulgated by the Supreme Court in 1842 pursuant to R. S. 917, read as follows:

"In all cases, where the rules prescribed by this court, or by the Circuit Court, do not apply, the practice of the Circuit Court shall be regulated by the present practice of the

** 1 Pomeroy Eq. Juris. (3rd Ed.) Sec. 204, et seq.; Eaton on Equity (2nd Ed.) 17; 21 C. J. p. 27, et seq., Sec. 6; Pennsylvania v. Bridge Co., 13 How. 518, s. c. 18 How. 469; Fontain v. Ravenel, 17 How. 369; Payne v. Hook, 7 Wall. 425, 430; Russell v. Farley, 105 U. S. 433, 445; McConihay v. Wright, 121 U. S. 201; Scott v. Neely, 140 U. S. 106, 110; Mississippi Mills v. Cohn, 150 U. S. 202, 206; White v. Berry, 171 U. S. 366, 379; Waterman v. Canal, &c. Co., 215 U. S. 33, 43; Loring v. Marsh, 2 Cliff. 490, 493, Fed. Cas. #8516 Parker v. Bigler, Fed. Cas. #10,736; Costs in Civil Cases, 30 Fed. Cas. #18,394; Michie's Encyc. of U. S. Reports, Vol. 6, pp. 610-11.

High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

741 See 21 C. J. p. 31; Russel vs. Farley, 105 U. S. 433, 437, 445; Smith vs. Burnham, Fed Cas. #13,018.

In Payne vs. Hook, 7 Wall. 425, 430, the court said:

"The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses".

In Fontain vs. Ravenel, 17 How. 369, 384, the court said:

"The courts of the United States cannot exercise any equity powers, except those conferred by acts of congress, and those judicial powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the constitution of the United States."

The distinction between the powers of Federal Court of Law and Equity is often adverted to by the courts. In the early case of Parker vs. Bigler, Fed. Cas. #10,726, Mr. Justice Grier, in disallowing certain items of costs in a law action, said:

"It is alleged that the act of 26th February, 1853, 'to regulate fees and costs,' proposes to define what shall be hereafter the fees or compensation to be allowed to attorneys, marshals, witnesses, jurors, commissioners, and printers, which shall be taxed and allowed, and not to define absolutely what expenses of trial may be recovered from the losing party as costs of suit. Hence it is contended that this charge is not excluded by the enumeration of persons whose fees are limited by this act, and the expense incurred for models being necessary for the information of the court and jury should be paid by the losing party, as part of the 'expensa litis.' This may be true in a court of chancery where the decree may include any expenses which have been necessarily incurred in the suit, for the information of the court and in order to a just decision of the cause. These may be imposed on either party or both as the conscience of the chancellor may dictate, yet, in courts of law no such discretion is given to the court."

In Pennsylvania vs. Bridge Co., 13 How. 518, 563, the court said:

"Chancery jurisdiction is conferred on the courts of the United States with the limitation 'that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law.' The rules of the high court of chancery of England have been adopted by the courts of the United
742 States. And there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States, and which has been decided against in a state court.

"In exercising this jurisdiction, the courts of the Union are not limited by the chancery system adopted by any State, and they exercise their functions in a State where no court of chancery has been established. The usages of the high court of chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government, it has been observed."

This case came before the Supreme Court a second time, on the question of taxation of costs. 18 How. 460. The court discussed the power of the Federal Equity Courts to award costs both as provided by the statutes of the United States and as inherent in the courts of equity. In the course of its opinion it said (p. 462):

"Original jurisdiction in equity, in a particular class of cases, conferred by the constitution on this court, has been interpreted to impose the duty to adjudicate according to such rules and principles as governed the action of the court of chancery in England, which administered equity at the time of the emigration of our ancestors, and down to the period when our constitution was formed. And when the constitution of the United States conferred that jurisdiction on this court, it cannot be construed to exclude the power possessed and constantly exercised by every court of equity then known, to use its discretion to award or refuse costs, as its judgment of the right of the case, in that particular, might require. The court entertains no doubt of its power to award costs, and deny the application to file a bill of review."

The costs awarded included expenses of taking testimony, expenses of surveys, examinations, and reports of an engineer. It is true that these expenses had been incurred by order of the court; but this fact emphasizes rather than throws doubt upon the power of the court over costs.

This case has been recognized and approved in the late case of Newton vs. Consolidated Gas. Co., 265 U. S. 78, 83, where the court used the following language:

743 "The allowance of costs in the federal courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes. Ex parte Peterson, 253 U. S. 300, 316; and see Pennsylvania vs. Wheeling & Belmont Bridge Co., 18 How. 460."

In Ex parte Peterson, 253 U. S. 300, (a law case), the court considered the question of the power of the court over costs both in actions at law and in equity causes, and by analogy allowed as costs in the particular case the expense of an auditor, though no such item was authorized by statute of the United States or of the State of New York, where the action was tried. In its opinion the court said (pp. 316-317):

"The allowance of costs in the federal courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes. Mr. Justice Woodbury in Hathaway vs. Roach, 2 Woodb. and M. 63; Mr. Justice Nelson in Costs in Civil Cases, 1 Blatchf. 652; The Baltimore, 8 Wall. 377. In Hathaway vs. Roach, p. 67, it is said to have been the usage of the federal courts 'to conform to the state laws as to costs, when no express provision has been made and is in force by any act of Congress in relation to any particular item, or when no general rule of court exists on this subject.' And in The Baltimore, pp. 390-391, this court stated that 'the costs taxed in the Circuit and District Courts were the same as were allowed at that time in the courts of the State, including such matters as travel and attendance of the parties, fees for copies of the case, and abstracts for the hearing, compensation for the services of referees, auditors, masters, and assessors, and many other matters not embraced in the fee bills, since passed by Congress.' Neither the Act of February 26, 1853, c. 80, 10 Stat. 161, Rev. Stats., Sec. 983, nor any later act of Congress or rule of court deals expressly or by implication with the subject of taxing as costs the expense of an auditor. The practice, if any, governing in this respect the courts of New York would, therefore, be followed in the federal courts. See Huntress vs. Town of Epsom, 15 Fed. Rep. 732. But, so far as appears, the preliminary hearing before an auditor in aid of jury trials is not a part of the judicial machinery of that State. The nearest analogy to it is the reference had in actions at law on long accounts as an substi-

tute for a jury trial. The expense of the compulsory reference in such actions is so taxable. Code Civ. Proc.,
744 Sec. 3256. As there is no statute, federal or state, and no rule of court excluding auditors' fees and the expense of his stenographer from the items taxable as costs, no reason appears why they may not be included, like other expenditures ordered by the court with a view to securing an intelligent consideration of a case."

See also Missouri vs. Illinois, 202 U. S. 598.

Many statutes and rules have been passed from time to time relative to costs in the Federal Equity Courts. An exhaustive review of them would serve no useful purpose at this time. A number of the earliest statutes and rules are reviewed in Costs in Civil Cases, Fed. Cas. #18,284; The Baltimore, 8 Wall. 377; Jordan vs. Agawam Woollen Co., Fed. Cas. #7516. Later provisions are to be found in the statute of 1853 (10 St. 161, Ch. 80, Sec. 1); also in R. S. Secs. 823, 824, 983, 984 (U. S. C. Tit. 28, Secs, 571, 572, 830, 831); and in New Equity Rules 20, 50, 51, 58, 59, 67, 68, 76.

These statutes and rules, however, are not the exclusive source of power in the Federal Equity Courts touching the matter of costs, including solicitor's fees. This is plainly apparent from the authorities. In Newton vs. Consolidated Gas Co., supra, the power of the court to allow as costs an item not covered by either statutes or rules was made to depend upon local custom. And a long line of cases exists where allowances in the way of counsel fees have been made, although such allowances were not covered by rules or by statutes.

The Appollon, 9 Wheat. 362, was a libel brought by the master of the French ship Appollon agninst the collector of the district of St. Mary's for damages on account of an alleged illegal seizure of ship and cargo. Various items of damages were recovered, including one for $500 for necessary counsel fees. In reference to this item the Supreme Court, speaking by Mr. Justice Story said (p. 379):

"The fifth item, allowing $500 as counsel fees, is, in our opinion, unexceptionable. It is the common course of the admiralty, to allow expenses of this nature, either in the shape of damages, or as part of the costs. The practice is very familiar on the prize side of the court; it is not less the law of the court in instance causes, it resting in sound discretion to allow or refuse the claim."

745 To the same effect see Canter vs. Insurance Companies, 3 Pet. 307. See also The Elizabeth Frith, Fed. Cas. #4361.

It is true that in The Baltimore, 8 Wall. 377, the opinion was expressed by Mr. Justice Clifford that after the passage of the Act of February 26, 1853, counsel fees, except as provided in that act, were not allowable as costs in admiralty; and in the course of his opinion he referred to the Appollon and Canter cases, and said (p. 393):

"Reference is made to two cases where counsel fees were allowed, but it is a sufficient answer to those cases to say, that they were decided before the act of Congress, under consideration was passed."

But the scope of this statement must be restricted to the particular class of cases under discussion, for the practice of allowing counsel fees as costs in proper cases was not abrogated by the Act of February 26, 1853.

In United States vs. Waters, 133 U. S. 208, 212, the court, speaking of this practice, said:

"Both before and since the enactment of the statute of 1853, courts in the exercise of their discretion have allowed counsel fees in many cases without question when reviewed by this court. In The Appollon, 9 Wheat. 362, 379, and in Canter vs. The American and Ocean Insurance Companies, 3 Pet. 307, 319, the allowance of counsel fees by the court below was affirmed by this court as a matter within the sound discretion of the court before whom the cause was tried; and those decisions were cited with approval in Elastic Fabrics Co. vs. Smith, 100 U. S. 110, and Paper Bag Cases, 105 U. S. 766, 772."

See also Ex parte Jaffray, Fed. Cas. #7170; Spaulding vs. Tucker, Fed. Cas. #13,221; Cuyler vs. Atlantic & N. C. R. Co., 132 F. 570.

The Act of February 26, 1853, covered party and party costs, but not solicitor and client costs. In Trustees vs. Greenough, 105 U. S. 527, 535, 536, the court said:

"The fee-bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor
746 the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may

require. * * * And the act contains nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund."

And see 15 C. J. p. 20, Sec. 1; 5 Encyc, Pl. & Pr. pp. 224-225; In re Paschal, 10 Wall. 483, 493; Louisiana State Lottery Co. vs. Clark, 16 F. 20.

It is true that Federal Courts of Equity have refused to allow attorney's fees to be taxed as costs in many cases; among them the following may be cited: Arcambel vs. Wiseman, 3 Dall. 306; The Baltimore, 8 Wall. 377; Oelrichs vs. Spain, 15 Wall. 211; McIntosh vs. Ward, 159 F. 66; New York C. & H. R. Co. vs. Bank of Holly Springs, 195 F. 456; Leary vs. United States, 257 F. 246. But such refusals were based not upon any lack of power in the court, but because it was not deemed wise policy to allow attorney's fees to be taxed as costs in ordinary equity cases. There are also many cases in which Federal Courts of Law have refused allowance of costs "as between solicitor and client", but we have not considered them as apposite to the present inquiry. We think it may be safely stated, however, that whenever there have come before Federal Courts of Equity cases in which special facts showed that, in accordance with established principles of right and equity, costs "as between solicitor and client" ought to be allowed, the courts have not refused to make such allowances.

The most common classes of cases, though by no means exclusive, in which such cost allowances have been made in equity are: Foreclosures of mortgages, as illustrated by, Dodge vs. Tulleys, 144 U. S. 451; Meddaugh vs. Wilson, 151 U. S. 333; Cowdrey vs. Galveston, &c R. Co., 93 U. S. 352; Williams vs. Morgan, 111 U. S. 684; Phinizy vs. Augusta & K. R. Co., 98 F. 776; Fidelity Trust Co. vs. Hutchinson Chemical & Alkali Co., 221 F. 63 (CCA 8);

Receiverships, as illustrated by, Stuart vs. Boulware, 133 U. S. 78; Eames vs. H. B. Claflin Co., 231 F. 693; Presidio Mining Co. vs. Overton, 286 F. 848; J..C. Turner Lumber Co. vs. Toomer, 275 F. 678; City of New Orleans vs. Malone, 12 F (2d) 17;

747 Suits by stockholders to preserve the property rights of their corporation, as illustrated by, Cuyler vs. Atlantic & N. C. R. Co., supra; McCourt vs. Singers-Bigger, 145

F. 103 (CCA 8); Colley vs. Wolcott, 187 F. 595 (CCA 8); Thompson vs. Bomar, 258 F. 339 (CCA 8); Hutchinson Box &c Co. vs. Van Horn, 299 F. 424 (CCA 8); Hodgman vs. Atlantic Refining Co., 8 F. (2d) 777;

Suits by one or more creditors to preserve and bring into court for administration a fund in which they are interested as illustrated by, Trustees vs. Greenough, 105 U. S. 527; Central R., &c. Co. vs. Pettus, 113 U. S. 116; Harrison vs. Perea, 168 U. S. 311; Central Trust Co. vs. Ingersoll, 87 F. 427; Burden Central, &c Co. vs. Ferris, &c. Co., 87 F. 810; Central Trust Co. vs. U. S. Light & Heat Co., 233 F. 420; Muskogen Boiler Works vs. Tenn. Valley I. & R. Co., 274 F. 836;

Certain classes of proceedings in connection with bankruptcy matters, as illustrated by, Ex parte Jaffray, supra; Randolph vs. Scruggs, 190 U. S. 533; Beach vs. Macon Grocery Co., 125 F. 513; Receivers of Vir. Iron, Coal & Coke Co. vs. Staake, 133 F. 717; In re Lacov, 142 F. 960; In re Schocket, 177 F. 583; In re Stewart, 179 F. 222; In re Wentworth Lunch Co., 191 F. 821; In re J. F. Pierson Jr. & Co., 225 F. 889; Bramble vs. Brett, 230 F. 385 (CCA 8).

Closely akin to the foregoing classes of cases are those involving allowances made to a pledgee for expenses and attorney's fees in preserving and defending the pledged property. In 31 Cyc. p. 826, the author states the rule as follows:

"The pledgee has a lien on the property for any expenses, including the attorney's fees, reasonably incurred by him in keeping and caring for the property pledged, protecting it against liens, taxes, and assessments, or otherwise protecting the pledgor's rights, in making sale for the enforcement of the pledge, in collecting choses in action, and other expenses incurred in rendering the pledged property available for the payment of his debt, although not for any expenses incurred by reason of his own wrongful act."

And see Jones on Collateral Securities (3rd Ed.) Sec. 400; Raley vs. Ross, 59 Ga. 862; Planters' Rice-Mill Co. vs. Merchants' Nat. Bank, 78 Ga. 574; Hurst vs. Coley, 22 F. 183; Gregory vs. Pike, 67 F. 837; Danbury vs. Robinson, supra;
Ballingall vs. Hunsberger, 16 Pa. Sup. Ct. 117; Ely-
748 Walker Dry Goods Co. vs. Colbert, 124 S. W. 705 (Tex. Civ. App.); Parker vs. Watkins, Johnson's Reports (Eng.) 133, 137.

The case of Spring Garden Ins. Co. vs. Amusement Syndicate Co., 178 F. 519 (CCA 8), though not falling under any

of the foregoing classes, is interesting and instructive. Actions had been commenced by the appellee in the state court of Kansas against several insurance companies on fire insurance policies. Several of the insurance companies removed their cases to the federal court; and thereupon two of the companies filed therein a bill in equity making as parties defendant all of the other insurance companies and the insured, and setting up that an accounting and contribution was necessary if liability should be found to exist. The other insurance companies by answers and cross bills made similar allegations. The insured by cross bill set up the same facts that it had set up in the complaints in the state court. Recovery was had by the insured. A statute of Kansas provided that in suits on insurance policies a reasonable attorney's fee could be recovered as part of the costs. This court not only allowed as costs a reasonable attorney's fee, but went further and allowed the costs in the actions pending in the state court. The court said (p. 534):

"The insurance companies invoked the aid of a court of equity and in courts of equity the payment of costs by the respective parties is a proper matter of equitable distribution."

It is true that in most of the cases where costs "as between solicitor and client" have been allowed, there has been a fund in court out of which the allowance was ordered paid. But this fact has not conditioned the jurisdiction of the court to make such allowance. There is no statute or rule to that effect, nor has such been the practice. It does not appear that there was any fund in court in Pennsylvania vs. Bridge Co., supra, nor in Spring Garden Ins. Co. vs. Amusement Syndicate Co., supra, nor in In re Schocket, supra. In Beach vs. Macon Grocery Co., supra, in In re Lacov, supra, and in In re Wentworth Lunch Co., supra, although there was a fund, yet costs and expenses of a receivership were ordered paid by the losing parties. And see Burnrite Coal Co. vs. Riggs, 274 U. S. 208.

Furthermore, in cases where a trustee has been brought into court by a cestui que trust upon charges of mal-administration which have proved to be unfounded, costs
749 "as between solicitor and client" have been allowed the trustee, though there has been no fund in court. Perry on Trusts (6th Ed.) Sec. 894, states as follows:

"The general rule is, that trustees shall have their costs either out of the trust fund, or from the cestuis que trust personally. If there is a fund within the control of the court,

they may have their costs as between solicitor and client. Where there is no fund within control of the court, if the cestuis que trust bring the trustees before it to obtain a direction as to the rights of the parties, or the mode of administration, and the trustees are free from all blame or fault, they are entitled to costs against the cestuis que trust personally, to be taxed as between solicitor and client. The reason involved in the rule is this: trustees have no beneficial interest in the trust property. They hold it for the accommodation and benefit of others. If they perform their duties faithfully and are guilty of no unjust, improper, or oppressive conduct, they ought not in justice and good conscience to be put to any expense out of their own moneys. If, therefore, they are brought before the court without blame on their part, they should be reimbursed all the expenses that they incur, and allowed their costs as between solicitor and client for this purpose."

The Case at Bar.

From the foregoing authorities and many others which might be cited, we think it is clearly established that the Federal Courts of Equity have jurisdiction to allow in proper cases costs "as between solicitor and client"; and that such allowances have been made in many cases of various classes whenever the special facts warranted.

We are also of the opinion that the facts in the case at bar make it one calling for the application of the rules and principles that govern courts of equity in awarding such allowances. We have here a case where the Trust Company, a pledgee of securities as collateral to the debt of the Belt Company, was brought into court by a third party and compelled to litigate not only the validity and amount of its debt, but the title of the pledgor to the pledged property. At great expense the Trust Company established the validity and amount of its claim, and also established the title of the Belt Company to the pledged property at the time of the pledge, and its own right to subject the pledged property to the payment of the Belt Company's debt. The pledged property is in the constructive possession of the court.

750 Again, we have here a case in which the Trust Company, which had been a trustee under the mortgage of the Union Terminal Railroad Company, one of the subsidiary companies of the Belt Company, was brought into court by the Southern Company, successor in interest of the cestui que trust, and charged with gross and fraudulent violation of its duties as such trustee; and damages were

sought against it in the sum of $773,000. Other charges of violation of duty as trustee were made by the Southern Company against the Trust Company. At great expense the Trust Company met and answered these charges. They were found without merit and baseless.

Again, we have here a case in which the Trust Company, a creditor of the Belt Company, in the course of the litigation uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid. That fund was represented by the amount which the Southern Company had paid to the stockholders of the Belt Company for their stock pursuant to the reorganization plan. It is true that in the suit in which this fund was uncovered the Trust Company was not a party plaintiff in its own behalf and in behalf of other creditors of the Belt Company. But we think under the peculiar circumstances of the case this can make no difference. The Cambria Company, a creditor of the Belt Company, had brought a suit, in form of a creditor's bill, against the Belt Company, and had made the Trust Company, which was also a creditor of the Belt Company, a party to the suit. If the Cambria Company had uncovered the fund which this court afterwards held was a trust fund for the payment of the creditors of the Belt Company, it cannot be doubted that the Cambria Company would have been entitled for so doing to an allowance, in the way of costs "as between solicitor and client". But early in the litigation the Cambria Company voluntarily ceased to be a factor, so far as concerned any efforts to establish a fund for the payment of the Belt Company creditors. It remained for the Trust Company by its own unaided efforts, and in the face of the most strenuous opposition, to establish that trust fund. Other creditors by appropriate action on their part might have participated in that fund; and if astute action has been exercised in paying off other creditors and in thus isolating the Trust
751 Company, such action cannot avail to destroy the equitable right of that company to some compensation for its services in this matter.

In view of the state of the record, the case must be sent back to the trial court to make the proper allowances for costs "as between solicitor and client". The special master's report has been made. Numerous exceptions have been filed thereto by both parties. Doubtless these will have to be passed upon. We see no necessity for the taking of further testimony. The amounts to be allowed are not controlled by what the Trust Company actually expended, and

may vary widely therefrom. The allowances should be such as, in view of the facts and circumstances proved in this case which authorize them, will be reasonable and just.

The decree is reversed with instructions for further proceedings in accordance with the views herein expressed.

The foregoing opinion was concurred in by Judge Sanborn, but not filed until after his death.

Filed May 18, 1928.

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752 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1928.

Friday, May 18, 1928.

Guardian Trust Company, Henry C. Flower, Receiver, Appellant,

No. 7784. vs.

The Kansas City Southern Railway Company.

Appeal from the District Court of the United States for the Western District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby, reversed with costs; and the Guardian Trust Company, Henry C. Flower, Receiver, have and recover against The Kansas City Southern Railway Company the sum of ..... Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered by this Court that this cause, be, and it is hereby, remanded to the said District Court with instructions for further proceedings in accordance with the views expressed in the opinion of this Court.

May 18, 1928.

IN THE

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

GUARDIAN TRUST COMPANY, Appellant, *v.* THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellee.	No. 7784.

MOTION OF APPELLEE FOR A REHEARING.

Comes now the appellee, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, herein referred to as the "Southern Company," and respectfully prays the Court to grant a rehearing in this cause, and briefly and distinctly states its grounds, supported by certificate of counsel, as follows:

(a) So much of the opinion in this case as characterizes the entire litigation as of a vexatious character is a grave and serious imputation. We confidently assert that there is no evidence in the record to support the charge. It is doubly unjustified and unwarranted because of the wrongful denial of our application in the lower court to introduce evidence, both oral and documentary, not only to refute any charge or insinuation of bad faith, but affirmatively to prove the good faith of the entire litigation on our part from beginning to end.

(b) The effect of the opinion of the Court in this case, authorizing the taxation of "costs as between solicitor and client" in the sum of some $300,000, against the Southern Company, is, in our judgment, to revolutionize the practice in Federal courts of equity, established since the beginning of

our Government, with respect to the taxation of costs, and to deny or penalize free access to our courts, so essential to the public welfare, and so thoroughly a part of our theory of government.

(c) Furthermore, the opinion is, we respectfully submit, in direct conflict with the opinion and mandate of the Supreme Court in this case (240 U. S. 166), which are exclusively for that court to construe.

These, we respectfully submit, are grave and serious matters, and not only justify, but imperatively demand, an appeal to this Court for a reconsideration of its conclusions.

Summary of the Court's Conclusions.

This Court has, in effect, imported bodily into our jurisdiction the English practice of the taxation of costs as between solicitor and client in the following classes of cases:

A. Where gross charges of fraud and misconduct have been made and not sustained;

B. Where the main ground of the suit is false, unjust, vexatious, wanton, or oppressive, and so shown to be;

C. Where a fiduciary relation exists, such as trustee and *cestui que trust,* pledgor and pledgee, or principal and agent, and the fiduciary is put to expense either in defending an unfounded suit, or in administering or protecting and preserving the trust property or pledged property.

With these alien and unnaturalized principles as a guide, the Court, after making the astounding statement, at page 15 of its opinion, concerning what it is pleased to call "the vexatious character of the whole litigation," seeks to apply these principles to the case at bar, pointing, for its justification, to three facts, which may be summarized as follows:

1. The Trust Company was compelled to litigate the validity and amount of its debt, and also the title of the pledgor to the pledged property.

2. The Trust Company had been a trustee under the mortgage of the Union Terminal Company, and was charged with a violation of its duties as such trustee.

3. The Trust Company brought into the constructive possession of the Court a fund from which creditors of the Belt Company were entitled to be paid.

These facts we are told in the opinion, justify the imposition upon the Southern Company of the enormous amount of attorneys' fees paid by the Trust Company covering the *entire period* of this litigation, from its institution in 1900 to the decision of the Supreme Court in 1916, and perhaps down to this date.

Summary of Our Objections to the Court's Conclusions.

We desire to protest as vigorously as lies within our power against the Court's wholly unwarranted imputation of bad faith in initiating and conducting this litigation, for the reason that if the Court's finding stands, we will not only have been convicted without evidence, but will also have been denied the right to introduce evidence, in our own behalf, upon the very issue in respect of which we have been convicted.

We also desire to protest as vigorously as lies within our power against the conclusion reached by the Court to penalize the Southern Company, through a resort to the English doctrine of taxation of costs as between solicitor and client, for all the expense of the Trust Company for attorneys' fees and other items during the entire litigation, from beginning to end. We regard this question as foreclosed by repeated decisions of the Supreme Court. We consider it wholly unwarranted under the opinion and mandate of the Supreme Court in this case. We contend that it is one of the fundamental principles of our Government that every one is entitled to free access to the courts, and that this right would cease to exist if an intending litigant were threatened and menaced with punishment of this character if he fails, perhaps through no fault of his own, rightly to anticipate the decision which some court, no matter how able, may ultimately reach as to the merits of his case.

I.

The statement in the opinion that the entire litigation was vexatious, is entirely unwarranted for the reasons, first, it is wholly unsupported by the record; secondly, it is in conflict with the opinion and mandate of the Supreme Court in this case (240 U. S. 166); thirdly, the record, as it stands, shows affirmatively the complete good faith of the Southern Company and the others associated with it during the entire litigation; and fourthly, the Southern Company was wrongfully denied the right to introduce evidence in its own behalf upon that issue.

It is deeply to be regretted that the Court has felt impelled to characterize "the whole litigation" as of a "vexatious character." We desire to say, with the utmost respect and, at the same time, with the greatest earnestness, that we feel that this accusation is wholly unsupported by the testimony; most unfair to past and present counsel, as well as to the parties, and prejudicial in the highest degree. We desire to discuss the matter with becoming moderation and, at the same time, with a frankness and candor which the circumstances seem to justify.

Several facts, which are unquestioned and uncontroverted, stand out in striking challenge to this extraordinary declaration of the Court, which point out conclusively and unerringly, as we believe, the error into which the Court has fallen, due, doubtless, to the great length of this litigation, with its vast accumulation of pleadings, issues, testimony, briefs, and collateral matters.

First. We contend, with complete confidence in the contention, that neither the special master, the lower court, this Court, nor the Supreme Court has held that the whole litigation, or any part of it, was trivial, insincere or vexatious. Nowhere in the entire litigation has that issue been made. It was sought to be made in this Court at the reargument in 1913, but this Court declined to entertain it. Nowhere has the Southern Company or the Belt Company and its receivers

had an opportunity to meet an issue of this character by the introduction of testimony, or otherwise. No evidence has, in fact, been introduced by any one upon this subject. There is nothing whatsoever in the record as it now stands, we earnestly insist, to warrant or justify a finding that the entire litigation was not in perfect good faith.

Secondly. The opinion of the Supreme Court in this case and its mandate (Rec. 465), which superseded the opinion and mandate of this Court (*First National Bank* v. *Chicago Trust Co.*, 207 U. S. 61, 66), contains no intimation that the litigation, or any part of it, was unjustified or unwarranted, and they, furthermore, constitute a direction to the district court to tax costs only as between party and party.

Thirdly. The record, as it stands, affirmatively shows the good faith of the Southern Company and those associated with it on its side of the litigation, and this will be pointed out in due course.

Fourthly. The lower court in its first opinion, in 1923 (Rec. 691, 699), erroneously said that this Court had found that the Cambria suit was wholly baseless and unwarranted. This was the first time that any court had ever intimated that the good faith of the Southern Company or any of those associated on its side of the litigation was questioned, and the intimation was entirely erroneous, as we shall point out. Thereupon the Southern Company, in December, 1923 (Rec. 33) sought to file in the lower court a petition "for leave to introduce testimony proving that this litigation was instituted and conducted on the part of each of the complainants in entire good faith"; and this petition was wrongfully denied by the lower court on the same day on which it was presented.

This petition was signed by four counsel who are officers of this Court, and verified by one of them. It sets out in detail the history of the institution and conduct of this litigation, from beginning to end, and asks leave to make proof, by oral and documentary evidence, of each and every statement therein contained. This petition is printed as Appendix A to this brief. Our earnest prayer is that the Court will read this petition from beginning to end. We say with the greatest confidence that no one can read it without reaching

the conclusion, *first*, that if the facts therein stated are true, then the entire litigation was instituted and conducted to its end in the utmost good faith, and that each and every step taken therein by the complainants and intervener was fully justified; and, *secondly*, that the petition itself, signed by reputable counsel, and verified by an officer of this Court, was sufficient to challenge the attention of the lower court and imperatively to require a judicial inquiry to ascertain if the facts offered to be proven could be established in due and orderly course of procedure; and that a denial of the petition was a grave and serious injustice. It is quite likely that this error would have been rectified later by the lower court, but for its revised opinion, in 1926 (Rec. 704), in view of which the investigation sought by the petition became wholly unnecessary.

The net result is that this Court has made a finding that the entire litigation was vexatious, not only in conflict with the opinion of the Supreme Court, but without any issue made or testimony taken thereon; and, further, as we shall presently show, without any support whatsoever in the record as it stands; and, at the same time, and almost in the same breath, the Court has wrongfully denied to the Southern Company an opportunity to make an issue of its good faith and to introduce testimony in support of it.

Our confidence in and respect for the Court makes it unnecessary to argue that if we are correct in any of the foregoing statements, the charge of instituting and continuing vexatious litigation will be at once withdrawn.

The litigation which occurred after the final decree of June, 1910.

A "vexatious suit" is thus defined in *Bouvier's Law Dictionary*, Rawle's Third Edition, Vol. 3, p. 3399: "A suit which has been instituted maliciously, and without probable cause, whereby a damage has ensued to the defendant."

Bearing this definition in mind, we will, for the sake of clarity and to avoid confusion, first take up the course of the litigation following the rendition of the final decree, in June, 1910. This covers the period when a large part of the Trust

Company's expenses for counsel fees and other items was incurred, and during which the litigation was carried on, upon the Trust Company's own initiative. The injustice of imputing to the Southern Company any improper motives in connection with this matter is so glaring as to challenge at once the attention of the Court. Later we will trace in a similar manner the history of the litigation from the beginning to the decree of June, 1910, for the purpose of showing that there is not the slightest evidence of bad faith or improper motive in its institution and prosecution.

The only party that appealed from the decree of June, 1910, was the Trust Company; and substantially the only issue raised by it on its appeal to this Court, and subsequently by us on our appeal to the Supreme Court, was the question of the liability of the Southern Company for the debt of the Belt Company. The Central Improvement Company matter was incidental to this issue. If the Southern Company was required to pay the Belt Company's debt, that automatically decided the Central Improvement Co. matter. *The liability issue was one that the Trust Company itself had injected into the case in 1905.* If the Trust Company had refrained from introducing this issue into the case, its appeal would have been limited to the comparatively unimportant item of the lands of the Central Improvement Company.

It seems to us unthinkable that the Trust Company's appeal to this Court, substantially for the purpose of determining the liability issue, or our appeal from this Court to the Supreme Court upon the same issue, can be characterized as vexatious on our part. Obviously, no one will be heard to urge that the Southern Company should have confessed error in the appeal to this Court, or that it should have refrained from taking the appeal from this Court to the Supreme Court.

It should be wholly unnecessary for us to argue the good faith on our side of this litigation following the decree of the lower court. But what are the facts?

(a) The lower court decided the liability issue in favor of the Southern Company, and also awarded it the Central Improvement Company lands. Is there any shadow of reason for the claim that the Southern Company was vexatious in

asserting these claims in the lower court, in securing the decree of that court sustaining the validity of its claim, or in seeking, upon the Trust Company's appeal to this Court, to sustain and retain its position?

The decree of the lower court, in favor of the Southern Company upon these two issues, in and of itself, effectively dispels and refutes any imputation of bad faith or improper motives. It is said in *Crescent City* v. *Butchers' Union*, 120 U. S. 141: . . . "the judgment or decree of a court having jurisdiction of the parties and of the subject matter, in favor of the plaintiff, is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal." The decree of the lower court was for the Southern Company, and that effectively disproves any charge that it was a vexatious suit, even though the judgment was reversed by this Court.

If the unthinkable intimation or suggestion should be made (nowhere has it been made), that the lower court was actuated by improper motives in thus rendering its decree, and that these motives are to be imputed to the Southern Company, the case just cited gives the answer, in the following language (p. 159):

> . . . It is equally true and equally well settled in the foundations of the law that neither misconduct nor demerit can be imputed to the court itself. It is an invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly.

If there were nothing more in the case, the decree of the lower court in favor of the Southern Company, is a complete and sufficient justification for all that the Southern Company did following its entry in June, 1910. But there is much more.

(b) This Court handed down its first opinion (201 Fed. 811) in October, 1912. There was no suggestion in it that the matters decided were trivial or lacking in substantial merit. On the contrary, this Court, realizing the difficult nature of the issues involved, and being desirous of affording the fullest opportunity to test its conclusions, adopted the unusual procedure of permitting a reargument of the entire

case in January, 1913. After nearly a year's deliberation, it handed down its second opinion. Here, again, as we shall presently show, there was no finding that the litigation was frivolous or vexatious. True, it said in its opinion that the averment that the Belt Company was not indebted to the Trust Company "has been *adjudged* untrue," and that "it has *become* clear that the Cambria Company has no cause of action against the Trust Company." But this is quite another matter, and is discussed later. The fact that this Court permitted the reargument ought to be sufficient evidence that it regarded the issues as serious, important and difficult. It is not in the habit of granting rehearings where litigation appears on its face to be malicious and without probable cause.

(c) The Southern Company appealed from this Court to the Supreme Court. The Trust Company filed a motion to dismiss. The Southern Company countered with an application for certiorari.

The Supreme Court held that the nature of the case was such that if it should appear that an appeal did not lie, the writ of certiorari would be granted, saying:

> The motion to dismiss is hence postponed to the hearing on the merits; and, *being of opinion that the nature of the case is such as to authorize the granting of the writ of certiorari which is applied for,* in the event it develops on the hearing there is no jurisdiction to review the same, the application for the writ of certiorari is therefore also postponed to the hearing.

It is unnecessary to point out that the Supreme Court, particularly at that time—in May, 1914—issued its writs of certiorari very sparingly, and only in cases where grave questions were involved or where the public interest was directly affected. It did not issue its writ to review cases utterly lacking in merit, or of a vexatious character.

(d) Finally, the case was heard and decided in the Supreme Court, and the decree of this Court was affirmed. The Chief Justice and one of the Associate Justices dissented, as appears from the following statement (240 U. S. 166, 178):

> The Chief Justice and Mr. Justice Van Devanter are of opinion that, upon the finding of the Master, the decree should be reversed, and therefore dissent.

Two Justices of the Supreme Court felt that the case of the Southern Company was a meritorious one. Surely, there is no necessity for the Southern Company to apologize for advocating a cause that received their support. To stigmatize such litigation as "vexatious" involves processes which we fail to understand.

The two injunction suits.

We desire to make a brief reference to the two injunction suits, reported in 146 Fed. 337 and 171 Fed. 43. In the Court's opinion (p. 15), they are referred to as "the two unwarranted injunction suits"; and it is added that "they furnish additional proof, if it were needed, of the vexatious character of the whole litigation."

We are prepared not only to argue, but to demonstrate, that the injunction suits were neither unwarranted nor are they additional proof, or proof in any degree, that the entire litigation, or any part of it, was vexatious.

(a) Both injunctions were duly granted by the District Court of the United States for the Western District of Missouri, in a case of which that Court had jurisdiction, both of the subject-matter and of the parties. The injunctions were granted only after the Trust Company had been accorded a full hearing. One was granted by Honorable John F. Philips, District Judge for the Western District of Missouri, and the other by Honorable Smith McPherson, District Judge for Iowa. In both cases it was the court, in the exercise of its judicial functions, after hearing in due and orderly course, that granted the injunctions. True, the injunctions were afterwards reversed by this Court. But the action of the court in granting the injunctions, applying the rule of *Crescent City* v. *Butchers' Union*, 120 U. S. 14, "is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal." To characterize the injunctions as vexatious and unfounded is to impute misconduct and demerit to the court itself, in defiance of the "invincible presumption of the law that the judicial tribunal, acting within

its jurisdiction, has acted impartially and honestly." This should be a complete answer to the Court's criticism of the injunction suits; but there is another answer, which we now proceed to state.

(b) The injunction suits were concededly ancillary to the Cambria suit, in which the jurisdiction of the Federal Court was founded on diversity of citizenship. The Southern Company claimed, as ground for its injunction, that the Federal Court first acquired jurisdiction of the controversy and the parties thereto, and that the Trust Company could not deprive the Southern Company of its right to such an adjudication in the Federal Court by bringing a subsequent suit in the State Court to obtain an adjudication by the latter court of the same controversy involved in the proceedings in the Federal Court. The district court granted the injunctions, and they were reversed in this Court, in 1906 and 1909, respectively.

But the principles of law for which the Southern Company contended unsuccessfully in this Court in those two cases were, we respectfully submit, fully and completely adopted by this Court in 1921, in *Burke Construction Co.* v. *Kline,* 271 Fed. 605. It is there held that where a defendant, in a suit in a Federal Court whose jurisdiction is based on a diversity of citizenship, thereafter brought an action in the State Court on the same controversy, the Federal Court can protect its jurisdiction, and plaintiff's constitutional right to have the cause determined in the Federal Court, by enjoining the proceedings in the State Court pending the determination in the Federal Court. There, the action in the Federal Court was *in personam,* involving the respective liabilities of parties to a contract. The subsequent action in the State Court involved the same subject-matter. This Court held that the action in the State Court should be enjoined, saying (p. 611):

> When a citizen of one state, in the exercise of the right granted to him by the Constitution and the acts of Congress to an adjudication of a controversy judicable in a Federal Court between him and a citizen of another state, brings a suit *in personam* or *in rem* against the latter in the proper Federal Court to obtain the adjudication of that controversy by that court, and that court first acquires jurisdiction of that controversy and

> of the parties thereto, and the plaintiff therein persistently demands the adjudication of the controversy by the Federal Court, the defendant in that suit may not deprive the plaintiff of his constitutional right to such an adjudication by the Federal Court, or of the enforcement thereof by that court, by bringing a subsequent suit in a State Court against the plaintiff in the Federal Court or against him and others to obtain an adjudication by the latter court of the same controversy or of that controversy and of other controversies, or by any other action or proceedings such a defendant may take.

It is entirely clear, we respectfully submit, that if, in 1906 and 1909, when this Court decided the two injunction suits, it had taken the view of the law stated in the *Burke* case, the injunction suits must necessarily have been affirmed, instead of reversed. It is true that the *Burke* case was afterwards reversed by the Supreme Court (260 U. S. 226), but that only serves to emphasize the difficult nature of the questions involved, and the unfairness of penalizing parties because their counsel may be unable to predict with absolute certainty what view an appellate court will take in so delicate a matter as the dividing line between Federal and State jurisdiction. If the injunction suits had been affirmed in this Court, as, for reasons above stated, they might well have been, it would never have occurred to any one to condemn them as vexatious. Naturally, the Southern Company could not know in advance of an adjudication in this Court, that the rule, afterwards stated in the *Burke* case, would not be applied in its case.

The two injunction suits merely emphasize a situation which occurs in everyday practice of the law, when one party feels that his chances are best in a Federal Court, under the rules and decisions that obtain there, and the other party feels that his client will fare best in the State Court, under its rules and decisions. Each one strives to have the case determined in the jurisdiction of his preference. The Southern Company sought an adjudication in the Federal Court; and the Trust Company was striving just as hard to secure an adjudication of the cases it had brought in the State Court. Each party was well within its rights in seeking the forum of its preference.

Surely, this Court will be the last one to condemn a litigant or his counsel with a charge of vexatious litigation merely because an appellate court may disagree with a lower court with respect to certain difficult questions of law; and this is especially true where the appellate court may fairly be said to have entertained different views of the law at different times on the same subject.

The litigation from the beginning up to the decree of June, 1910.

Having now dealt with the course of the litigation from the date of the decree of the lower court—a period which is a part of "the whole litigation" characterized as "vexatious" by this Court—and having, we believe, completely demonstrated the entire freedom of the Southern Company from any criticism whatsoever with respect thereto, we go back to the institution of the action, in 1900, and bring it down to the date of the final decree, in 1910, for the purpose of showing that from its inception to the final decree, there was no just cause for criticism, and that there are no facts or circumstances which justify the Court's wholesale condemnation of the motives and purposes prompting the litigation.

The names of Louis C. Krauthoff and Frank Hagerman are signed to the bill of the Cambria Company, filed in September, 1900, and it is verified by the latter. The name of Thomas R. Morrow is signed as counsel to the ancillary bill of the Belt Company and its receivers, filed in 1901. These three gentlemen, in their lifetime, were accomplished and distinguished officers of this Court, and stood foremost among the leaders of the bar of the State of Missouri. As is well known to some of the members of this Court, they were men of unquestioned integrity, and deserved and received the confidence and respect of both bench and bar. There is a strong presumption, which this Court might very properly indulge, that lawyers of ability, character and standing, such as these gentlemen were, did not institute this action for purposes of vexation, or, reverting to the definition of a "vexatious suit," given above, "maliciously and without probable cause." To indulge such a presumption of honesty and

upright conduct is but a small tribute to the memory of honorable and distinguished members of the Bar and officers of this Court. If, at this late day, this Court, is to impute unworthy and dishonorable motives to them, it should only be after the formality of a hearing, where those who may desire to speak for them, may be accorded an opportunity so to do, and after the introduction of testimony so cogent and compelling as to lead irresistibly to no other conclusion. It should *not* be after the denial of a hearing, and after a refusal even to receive evidence in their behalf.

We say, with great confidence and with all due respect to the Court, that there is no evidence in this record to support the Court's finding that this litigation was vexatious; and we say, further, that a great wrong was done when the Court denied all opportunity to present evidence, both oral and documentary, to prove that the institution and conduct of this litigation was in entire good faith and fully justified.

We lay to one side, for the moment, the facts set forth in the application to introduce testimony, printed as Appendix A, which fully and completely sustain the integrity of the entire litigation, and fully and amply warrant its institution and its conduct from beginning to end. We now proceed to point out other facts and features contained in the record, but evidently overlooked by the Court, which effectively disprove the charge of vexatious litigation.

The Cambria Company Bill.

The Cambria Company bill was an ordinary creditor's bill, based upon a judgment for $100,000, against the Belt Company. It alleged that upon a true accounting between the Belt Company and the Trust Company, the latter's claim of debt would be wiped out, and the collateral then held by the Trust Company would be subjected to the judgment. It was well known that there had been dealings between the Belt Company and the Trust Company, covering a period of years, during which there had been a community of officers, the Trust Company being the dominant company. The Cambria Company appealed to the rule stated in *Geddes* v. *Anaconda*

Copper Co., 254 U. S. 590, where it is held that transactions between boards having common members are zealously scrutinized; and where the fairness of such transactions is challenged, the burden rests upon the dominant company to show their entire fairness.

Special Master Douglass recognized the propriety of an accounting between the parties. He said (S. C. Rec. 760) that "the relations of the Belt and Trust Companies were exceedingly intimate, and of such character as not only to warrant, but perhaps to exact, the most scrutinizing investigation of any questionable transactions between them, at the instance of any interested party."

There is not the slightest indication in the record that the Cambria suit was malicious, and without probable cause, within the definition of a "vexatious suit." While this Court stated that the Cambria suit was inspired by the Southern Company, the facts in the record are that the Southern Company pointed out to the Cambria Company the relations between the Belt Company and the Trust Company, and the opportunity to subject the collateral to the Cambria Company's claim if the Trust Company's debt should be cancelled. The Cambria Company acted in its own interest in instituting the action. It has been intimated that the Southern Company has paid the Cambria Company's judgment. The record does not show this to be a fact; and it is not a fact, as we stand ready to prove, if deemed material.

The Bill of the Belt Company and Its Receivers.

(a) The ancillary bill of the Receivers for the Belt Company was filed pursuant to direction of the Court which appointed them. The Receivers were authorized (Rec. 29) to bring suits for an accounting, arising out of past dealings between the Belt Company and any other person whatsoever. Every one understood this to be an authorization, if not, indeed, a direction, to institute a suit for an accounting against the Trust Company. There was no other company to which it could apply. In effect, therefore, the district court of the United States for the western district of Missouri, acting

judicially, authorized the Receivers, as the arm of the court, to institute this very proceeding which is now characterized as vexatious. As we have before had occasion to say, quoting from 120 U. S. 141, it is the invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly, and that neither misconduct nor demerit can be imputed to the court itself. As the Receivers acted under the direction of the court, how can any improper motives be imputed to them? If the filing of the bill was vexatious, it was the court itself which directed the institution of the vexatious proceeding.

(b) The amended ancillary bill was filed by agreement with the Trust Company, embodied in a stipulation (Rec. 890). The stipulation is signed by Francis M. Black, at that time Receiver for the Trust Company and a former Judge of the Supreme Court of Missouri, and an honorable and upright man. We contend that this stipulation provided for an accounting by agreement of the parties. It will be noted that the stipulation provides that the Belt Company shall be a party complainant with the Receivers. Why was this done? This would be fully answered if we were at liberty to offer the testimony outlined in the petition printed as Appendix A; but, without the aid of that testimony, it is apparent from the stipulation itself that Judge Black wanted the Belt Company to be a party complainant so that, if he were successful, he might have judgment against the corporation itself. This is further evidence that the Trust Company itself felt that an accounting was inevitable, and that the sooner it was had the better. Surely, it will not be denied that an accounting had by consent is not a vexatious proceeding.

That the stipulation was intended by the Trust Company as a consent to an accounting, is not only apparent from the stipulation itself, but the lower court expressly ruled that such was its effect. The court, in March, 1908, in the course of denying a motion filed by the Trust Company, and after reciting the foregoing stipulation, said:

> The Guardian Trust Company, by its stipulation, its appearance and answer in said cause has consented to the submission to said Master the hearing and find-

> ings on all the matters involved in controversy between it and the parties to said litigations. It has consented that the Master take an accounting, finding and report as to the respective rights and claims of the parties to the property, notes, bonds and claims involved.

This was an adjudication of the court, made after hearing, at which the Trust Company was represented by counsel. No objection was ever made by it to the court's ruling. If, as the court decided, the accounting was by agreement between the parties, how is it possible that such a proceeding can now be characterized as vexatious?

(c) The Court in its opinion refers, with apparent criticism, to the filing of the first amended and supplemental ancillary bill of the Belt Company and its Receivers. The fact is that this pleading was filed at the request and insistence of the Trust Company, which took the position that, having submitted its account to the master, it devolved upon the complainant to surcharge and falsify the account. The pleading was filed to satisfy this demand, as appears from a fragment of the proceeding before the master in the record (p. 15). The Court also refers, with apparent disapproval, to the filing of the second amended and supplemental bill of complaint. This pleading, however, was filed by stipulation between the parties (S. C. Rec. 391), after the taking of testimony was completed, and in order to conform the pleading to the proof. This is the usual and ordinary practice, and ought not to give rise to adverse criticism.

The intervening petition of the Southern Company.

The Southern Company's intervening petition was filed by agreement with the Trust Company, embodied in a stipulation (S. C. Rec. 164-166). Its counsel knew the nature of the claim to be asserted by the Southern Company, and was, in fact, anxious to have the Southern Company a party to the action. The amended intervening petition was also filed by agreement, expressed by stipulation (S. C. Rec. 267-269). It will also be noted that the Trust Company expressly consented

in the stipulation that the claim against it on account of its disposition of the Union Terminal Company bonds should be litigated in this action; otherwise it is improbable that this claim could have been asserted in the intervening petition. The Southern Company's claim was based upon the fact that it was the purchaser at foreclosure sale of the properties of several companies, and thereby acquired the equitable title to the collateral held by the Trust Company, or the properties represented by it. This claim was sustained by the special master and by the lower court with respect to the lands of the Central Improvement Company, which were by far the most important and valuable item in the controversy. We respectfully invite the Court or counsel to point out any fact or circumstance indicating, directly or remotely, that this intervention was malicious or without probable cause, or that it constituted a vexatious suit or proceeding.

The charge of fraud.

It is true that fraud was charged on both sides; but the fraud charged against the Trust Company was in the nature of constructive fraud (26 C. J. 1061), arising from the relation of the parties, the common officers and directors, controlling the corporations in question, and the alleged misuse by the Trust Company of the power derived from this community of interest, within the rule of the *Geddes* case, 254 U. S. 590.

The Trust Company itself did not feel that charges of gross fraud or misconduct had been made against it. It deliberately took the position that the charges made were of constructive fraud, and not "actual fraud." This is a matter of record. In the "Answer of Guardian Trust Company on rule to show cause," filed in the lower court on December 16, 1907, it is said, in paragraph 13 (Rec. 558):

> There is no valid cause of action against this defendant set up in the said ancillary bill of complaint; *no actual fraud is charged therein* and said bill presents a legally meaningless theory and an impossible case.

The foregoing statement is signed by Mr. Rosenberger and Mr. Mecartney, both counsel for the Trust Company at that time, *and is sworn to by the former.*

It thus appears that it was the deliberate opinion of the Trust Company in 1907, about a year after this case had been argued for two weeks before the special master, when the whole matter was fresh in the minds of counsel, that no "actual fraud" had been charged against it. At that time the Trust Company did not conceive itself injured, or even irritated, by the charges made. It is inconceivable to us how the Court is able to discover gross and scandalous charges of fraud, when the Trust Company, through its counsel, not only stated to the Court that no such charges had been made, but actually made oath to the statement. If the Trust Company thought that the litigation was vexatious, or that charges of gross fraud had been made against it, here was a splendid opportunity to say so. Clearly, if the proceedings were vexatious, the Trust Company in 1907, after the conclusion of all the testimony and after the completion of extended arguments before the master, was totally unaware of that fact.

When the Trust Company took its appeal, it assigned as error (201 Fed. 817) "that the Court erred in adjudging that one-third of the costs of this action be paid by the Trust Company." If the Trust Company at that time conceived that the litigation was so vexatious as to involve the taxation of costs as between solicitor and client, it seems reasonably certain that it would have said so at that time. Its attention was sharply directed to the matter of costs. It deliberately stated its complaint with respect to the costs. It is entirely clear that, at that time, neither the Trust Company nor its counsel entertained the thought that the litigation was anything more than a sharply contested lawsuit.

There was ample justification for the accounting.

Aside from the order of the lower court providing for the accounting, and aside from the stipulation consenting to an accounting, and laying to one side all other matters which have been referred to above, there was, we earnestly and confidently contend, full and complete justification for the

demand made upon the Trust Company for an accounting.

Space does not permit a review on this motion of all the charges made by complainants, which, we contend, amply justified the accounting. If the Court feels that it would be in any degree helpful, we will gladly undertake the severe task of reviewing all the charges made by complainants, with references to the testimony of witnesses and to the report of the master, showing a complete justification for requiring the Trust Company to account for its conduct.

We will, therefore, for the present, content ourselves with referring to one item, referred to as the De Goeijen item of $89,333.33. This was 25 per cent. of the entire indebtedness claimed by the Trust Company, amounting, at that time, to about $360,000. It appears without contradiction that this item of $89,333.33 had been for a long time prior to March 31, 1899 (the day preceding the receivership of the Gulf Company), carried on the books of the Trust Company as an indebtedness of Mr. De Goeijen (whose solvency was doubtful), and on that day was arbitrarily, and without consideration, charged to the Belt Company, thus increasing its apparent indebtedness in the same amount. It was believed by the complainants, at the time of the institution of this litigation, and there was obvious justification for the belief, that the Trust Company on the eve of the receivership of the Gulf Company had merely dumped this uncollectible debt back on the Belt Company; and, accordingly, in the accounting suit, this item of indebtedness was challenged.

One of the outstanding and impressive features of this case, is that the Trust Company and its counsel believed that the Trust Company had no right to dump this account back on the Belt Company, and that the claim would have to be allowed. This is a matter of record, about which there can be no question or controversy. Mr. Mecartney became Chief Counsel for the Trust Company in 1904, and in a written report upon this litigation made to the directors of that company, dated December 1, 1904 (Rec. 540), after stating the facts with respect to the De Goeijen item of $89,333.33, said the Belt Company should be re-credited with this amount. He said: "The item must be allowed." This was the deliberate opinion of the Chief Counsel for the Trust Company, given

four years after the institution of the action. Twenty-five per cent. of complainants' claim was, in his opinion, not even debatable. It was not to be litigated; it was to be conceded and allowed. Other counsel for the Trust Company (Rec. 512) had been of the same opinion.

We have, then, a claim in the accounting suit amounting to $89,333.33 which complainants' counsel felt was a just and meritorious claim. Defendant's counsel also felt that it was a just and meritorious claim, and so stated in writing to his principal. In the face of this fact, how can this Court say that the whole litigation was vexatious? If a plaintiff asserts, and the defendant concedes, that plaintiff's claim to the extent of 25 per cent. is just and meritorious, can it be said that it is a vexatious suit, involving malice and want of probable cause? Is it malicious to sue a defendant for what it admits to be due? Is there not probable cause for a demand when defendant concedes it to be just?

True, the De Goeijen item was disallowed by the master. The circumstances are set forth in detail in our brief in this Court (p. 20). It is not pleasant reading. It is sufficient to say that a witness was employed by the Trust Company to demolish this item, in consideration of one-half of one per cent. upon the amount to be saved by the Trust Company, or a total of $446.66. But, to make it look right, his compensation was fixed at $450.00. He testified to a secret understanding, not evidenced in any record, paper, document, book or memorandum (S. C., Rec. 692), and thus the Trust Company escaped. One of the extraordinary and incomprehensible features of the Court's opinion is that it requires the Southern Company to pay $450.00 to the Trust Company for testimony of a secret understanding which enabled that company to get rid of a claim which it freely conceded to be correct, amounting to one-fourth of the entire amount in controversy.

No court has found that any part of this litigation was baseless and unwarranted.

We challenge the statement contained in the opinion (p. 13): "This Court characterized the Cambria Company suit as 'baseless' and 'unwarranted'."

We strenuously insist that this Court in its former opinions made no finding whatsoever of the *bona fides* of the institution and prosecution of this action. In its first opinion (201 Fed. 811), the facts are stated at page 816, in plain language and without the use of unnecessary emphasis. It said:

> The master found that the evidence did not support the claim of the Cambria Company, and recommended that its bill be dismissed for want of equity. . . . The report of the special master was in all things approved and confirmed, and a decree entered in accordance with the findings and recommendations of the master.

Upon the reargument, counsel for the Southern Company endeavored with much earnestness in brief and argument to controvert the conclusions of the Court stated in the first opinion. Substantially the only issue dealt with was the liability issue. As the criticism by counsel of the first opinion of the Court had been respectfully earnest and strenuous, so, the second opinion of the Court was emphatic and positive in support of the conclusion reached in its first opinion. The conclusions reached by the Court in its first opinion, and in its second opinion, were substantially the same; the difference between them is largely in the emphatic language employed in the second opinion to reinforce its first conclusion. In the second opinion (210 Fed. 714), in reciting the facts to show that there was no evidence of laches on the part of the Trust Company, the Court expanded the simple statement above quoted into the following:

> On September 6, 1900, the Cambria Company commenced the suit here in hand against the Belt Company and against the Trust Company to enjoin the latter from selling its collateral and applying their proceeds to the payment of the debt of the Belt Company, a suit which it founded on the averment, which has been *adjudged* untrue, that the Belt Company was not indebted to the Trust Company, and on other allegations so baseless that it has *become* clear that the Cambria Company had no cause of action against the Trust Company.

This, we respectfully submit, is no more than saying that in the decree in the lower court it was *adjudged* that the bill

of the Cambria Company should be dismissed for want of equity. There is here no independent finding made by this Court. There could not be, since the evidence was not brought to this Court.

Again, the Court says (p. 717):

> It (the Trust Company) gave notice of its sale of its remaining collaterals on September 1, 1900, and was enjoined from proceeding in the baseless suit of the Cambria Company.

Again, it is said (p. 718):

> By the Belt Company's consent to a judgment against it in favor of the Cambria Company, it laid the technical foundation of the Cambria Company's unwarranted suit, which prevented the Trust Company from selling its collaterals, and held the issue of the Belt Company's indebtedness to it suspended for more than eight years.

In both these quotations, this Court is not making an independent finding of its own; it is merely reciting the *adjudication* in the lower court, that the bill of the Cambria Company was without equity. In the nature of things, this Court could not have made a finding that the Cambria Company suit was wholly baseless and unwarranted, except in the sense stated. The evidence in the case was not taken to this Court. The Court said (201 Fed. 816): "The evidence has not been brought to this court." As this Court states (210 Fed. 723), "it would be unwise and might be unjust" to adjudicate any issue in the absence of the evidence. No appeal had been taken to the finding on the issue of debt or no debt as between the Belt Company and the Trust Company, and hence neither that issue nor any of the evidence bearing upon it was before the appellate court. This Court used the quoted language in the course of a somewhat spirited argument against the imputation of laches to the Trust Company. It was supporting its conclusion; not making a finding of fact.

The opinion of the Supreme Court is controlling, and it contains no intimation that the litigation was vexatious.

We have contended that there was no finding by this Court that the litigation, or any part of it, was unwarranted, or baseless, or vexatious. The case was appealed to the Supreme Court of the United States, and its opinion supersedes the opinion of this Court, and its mandate controls the character of the decree entered in the district court, including provisions in the decree touching the matter of costs.

In the opinion delivered by the Supreme Court, the history of the litigation is stated, the relations of the parties are defined, and the entire matter is reviewed, as it was in this Court, and the decree of this Court was affirmed. What, therefore, was the decree of this Court? It is found in the concluding paragraph of its opinion (210 Fed. 723, 724), where the District Court is directed to enter a specific decree, the details of which are stated at length. The Southern Company is required to pay the debt of the Belt Company "and the costs of this suit." If it fails to do so, then certain property may be sold in order to pay "the debt and the costs" out of the proceeds of the sale. The proceeds of such sale shall be applied in the payment of the debt "and of the costs after as well as before the decree." "The decree should adjudge that the Trust Company may recover its costs down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may apportion those costs between them, but not as against the Trust Company, which should be permitted to pursue either or both of them until its costs are paid."

This is the decree which the Supreme Court affirmed, for reasons stated in its opinion. Nothing is said by the Supreme Court or in the proposed form of decree which warrants an imputation of bad faith. The decree carries ordinary costs as between party and party, and no more. If the Supreme Court had intended that costs should be taxed in accordance with rules obtaining in some foreign jurisdiction, or in some unusual and unprecedented manner, it would have said so in plain and direct language. If it had thought that the litigation

was trivial or vexatious, and that the parties should be penalized on that account, we may be sure that we would not be left to conjecture as to its intention. Where the Supreme Court finds that either parties or counsel have overstepped the bounds of propriety, and for that reason need to be rebuked, it is its custom and practice to say so in direct and unambiguous language.

II.

This Court has erroneously ignored the controlling effect of the Supreme Court's opinion and mandate, which require the taxation of costs only as between party and party.

This Court in its opinion quotes freely from the opinion of this Court (210 Fed. 696) and bases its conclusion exclusively upon what is there said. No reference is made to the opinion of the Supreme Court or to its mandate. This, we contend, was a manifest error. As before stated, the opinion and mandate of the Supreme Court operated to supersede the opinion and mandate of this Court, and it is clear, we contend, that the opinion and mandate of that court contemplate and require the imposition of costs only as between party and party, and effectively prohibit the taxation of costs as between solicitor and client.

It is familiar law that it was the duty of the district court, to which the mandate in this case was addressed by the Supreme Court (Rec. 465), to carry it into execution according to its terms, in the light of the opinion of the Supreme Court. It could not vary it or examine it for any other purpose than execution; or give any other or further relief, or review it, even for apparent error; nor intermeddle with it in any manner (*Ex Parte Union Steamboat Company*, 178 U. S. 317).

The only power possessed by the district court was "to enter a judgment carrying out the mandate according to its terms" (*Re Washington R. Co.*, 140 U. S. 91). This, of course, means the mandate of the Supreme Court,—not the mandate of this Court.

In *Re Sanford Fork & Tool Co.*, 160 U. S. 247, the court said:

> When a case has been once decided by this court on appeal and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. Sibbald *v.* United States, 37 U. S. 12 Pet. 488, 492; Texas & P. R. Co. *v.* Anderson, 149 U. S. 237. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court.

The court added:

> The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and either upon application for a writ of mandamus, or upon a new appeal, *it is for this court to construe its own mandate, and to act accordingly.* Sibbald *v.* United States, 37 U. S. 12 Pet. 488, 493; West *v.* Brashear, 39 U. S. 14 Pet. 51; Wayne County Suprs. *v.* Kinnecott, 94 U. S. 498; Gaines *v.* Caldwell ("Gains *v.* Rugg"), 148 U. S. 228, 238, 244.

The interpretation of the Supreme Court's opinion and mandate is exclusively for that court. The question in this case is what the Supreme Court intended by its opinion and mandate. The hearing in the Supreme Court was *de novo.* Its opinion naturally superseded the opinion of the lower courts. So well established is this rule that the Supreme Court will grant certiorari to the Court of Appeals where, as here, the question "involves the construction of a prior decree of the United States Circuit Court affirmed by this court" (*St. Louis, K. C. & C. R. Co.* v. *Wabash R. Co.*, 217 U. S. 247, 251).

The exclusive power and duty of the Supreme Court to construe its own decrees is emphasized in *United States* v. *Terminal R. R. Assoc.*, 236 U. S. 194, where the court said (p. 199):

> A motion made by the United States to dismiss the appeal taken by the defendants in No. 572 is also without merit. The duty of the court below was but to execute the mandate of this court, and every controversy between the parties concerning the discharge by the court below of its duty was open for this court to examine either originally, if essential, or as the result of an appeal by one of the parties, or by way of assertions of right made by the other party as an appellee even in the absence of a cross appeal,—a result inevitably arising from the fact that both parties, so far as the settlement of the decree of this court was concerned, were in this court and endowed with the capacity to invoke its action for the proper shaping and execution of the decree, either by original proceeding or in any other appropriate form.

It is clear that the opinion of this Court was not binding upon the Supreme Court; even the opinion and mandate of this Court upon a prior appeal would not have been *res judicata* in the Supreme Court (*Messenger* v. *Anderson*, 235 U. S. 436; *Diaz* v. *Patterson*, 263 U. S. 399).

The Supreme Court did not affirm the expression of the views of this Court, set forth in its opinion, but it did affirm the decree of this Court. We now proceed to examine the decree of this Court to ascertain what the Supreme Court intended by its affirmance.

While this Court did not render a formal decree, it directed the lower court to render a specific decree. It was this specific decree which the Supreme Court affirmed. For ready reference, we quote it, as follows (210 Fed. 723, 724):

> And the conclusion of the whole matter is that the decree below should be reversed and the district court should render a decree which should contain the first five paragraphs of the former decree, except that the proceeds of the sale of 99 first mortgage bonds and coupons of the Kansas City & Northern Connecting Railroad Company, amounting to $40,001.25, referred to in paragraph 5 of the former decree, together with

all interest which has accrued and shall accrue, has been and shall actually be earned on said sum, shall be applied as a credit at the time when the Trust Company shall receive said sum as its own, upon the amount which the Southern Company should pay to the Trust Company, as hereinafter provided, which future decree should also adjudge that the Southern Company is indebted to and should pay to the Trust Company the amount of the indebtedness of the Belt Company to the Trust Company, that is to say, the sum of $639,658.86 and interest from the date of the former decree on $473,723.59 at 6 per cent. per annum, on $46,565.76 at 7 per cent. per annum, and on $119,369.51 at 8 per cent. per annum, *and the costs of this suit;* that the Trust Company's right to and equity in the property of the Belt Company which was transferred to the Southern Company by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and by the foreclosure proceedings, sale, and conveyance, and otherwise, was and is prior in time and superior in equity and right, to the extent necessary to pay that debt, to the right, title, and equity of the Southern Company therein; that by virtue of the indebtedness of the Belt Company to the Trust Company and the pledge to it of 1,120 shares of the stock of the Central Company, the equity and right of the Trust Company in the property of the Central Company described in the sixth paragraph of the former decree is superior, to the extent necessary to pay that debt, to the right, title, claim, and equity of the Southern Company therein; that in case the Southern Company shall pay its debt to the Trust Company *and the costs of this suit* adjudged in this suit by a day to be named in the decree, then all the collateral security described in paragraph 5 of the former decree which has not then been disposed of, and all the proceeds of such security which has not then been disposed of or applied, shall be surrendered and delivered to the Southern Company; that in case the Southern Company fails to pay its debt to the Trust Company and *the costs of this suit* by a day to be named by the court in the decree, then the said property of the Central Company and the property of the Belt Company which was transferred to the Southern Company as aforesaid, and the collateral security then remaining in the possession of the Trust Company, or such part or all said property as it shall be necessary to sell in order to pay the debt and

costs out of the proceeds of the sale or sales to which the Trust Company, in view of the pledge to it of only 1,120 shares of the stock of the Central Company and the possible equities of the Central Company's other stockholders and creditors, shall be equitably entitled, be sold by a master or receiver to be named by the court; that the proceeds of such sale or sales to which the Trust Company shall be equitably entitled be applied to the payment of the debt and of *the costs* after as well as before the decree until they are completely paid; and that the remainder of the proceeds, if any, be paid to the Southern Company or to such other party as may be equitably entitled thereto; that on the demand of the master the Southern Company, the Trust Company, the Central Company and its receiver, surrender and deliver to him, or to the purchaser or purchasers of any of this property as the master shall direct, such part or all of said property as he shall specify; and that, if an amount to which the Trust Company shall be equitably entitled sufficient to pay the debt with interest and *the costs* before and after the decree is not realized from the sales, then that the Trust Company have judgment and execution against the Southern Company for the remainder unpaid. The decree should adjudge that the Trust Company may recover *its costs* down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may apportion *those costs* between them, but not as against the Trust Company, which should be permitted to pursue either or both of them until *its costs* are paid.

What provision for the taxation of costs did the Supreme Court intend to make by its affirmance?

There are numerous references to "the costs of this suit"; "the costs after as well as before the decree"; "its costs down to the entry of the decree"; with a further provision that the Trust Company shall be permitted to pursue either the Cambria Company or the Southern Company, or both of them, "until its costs are paid."

When the Supreme Court affirmed the decree awarding "costs," without further designation or qualification, against the unsuccessful party, it could only mean taxable costs, in the ordinary acceptation of the term, that is, costs as between party and party, as the word "costs" has been used in judg-

ments and decrees from time immemorial, in accordance with the practice of taxing costs which has prevailed in this country from the beginning. It could only mean ordinary taxable costs, as distinguished from an allowance out of a fund, or as distinguished from attorneys' fees fixed by statute and allowed in certain designated cases.

Is it to be assumed that when the Supreme Court affirmed the decree carrying "costs," it acted carelessly and inadvisedly, and that what it really intended to do was to import into our jurisprudence the English system of taxation of costs, by which the losing party was to be burdened and penalized with the attorneys' fees and other expenses of the successful litigant? Is it possible to assume that the Supreme Court, merely by affirming a decree carrying "costs," intended thereby to overrule its long line of decisions, such as *The Baltimore,* 8 Wall. 397; *Oelrichs* v. *Williams,* 15 Wall. 211; *Tullock* v. *Mulvane,* 184 U. S. 497, and *Missouri Pacific R. Co.* v. *Larabee,* 234 U. S. 459, which, we contend, have authoritatively established a rule in this country exactly to the contrary?

But it will not do to indulge in the assumption that the Supreme Court in its opinion and mandate overlooked some feature which a lower court may feel called upon to correct. Such was the case of *Washington R. Co.* v. *McDade,* 135 U. S. 554, where the Supreme Court affirmed the judgment of the lower court, but nothing was said about an allowance of interest, and the lower court, assuming this to be an oversight, made an allowance of interest. The Supreme Court, however, in *Re Washington R. Co.,* 140 U. S. 91, by mandamus, pointed out with some emphasis that its mandates, whether right or wrong, were not to be corrected by a lower court.

It is too plain to require argument that if the Supreme Court had intended any departure from the ordinary practice in the taxation of costs, it would have said so in plain and unambiguous language. If it had intended that an allowance should be made to the Trust Company in addition to taxable costs, it is unthinkable that a statement to that effect would not be found in the opinion or the mandate. If it had intended to overrule its prior decisions and import the English system

into our jurisprudence, it is inconceivable that it would not have said so in plain language, which would be a warning to all future litigants that litigation thereafter was to be at the peril of paying all counsel fees in case of failure.

But there are other facts and circumstances which amount to a demonstration that the Supreme Court intended the decree to carry nothing more than the ordinary taxable costs. Its opinion contains no language and no statement indicating any reason for departing from the ordinary rule of imposing taxable costs upon the defeated party. As has been before pointed out, there is not the slightest suggestion in the opinion that the court regarded the litigation as trivial or vexatious, or otherwise than as an earnest and strenuous effort of the parties to secure an adjudication upon serious and difficult questions. There is no suggestion in the opinion that the Trust Company was put to the expense of defending pledged property and that it should be compensated therefor. There is no intimation in the opinion that the Trust Company accumulated and brought into court a fund for distribution among creditors for which an allowance should be made. There is nothing in the opinion to warrant a departure from the ordinary, every-day rule for the taxation of costs.

The recent case of *Sioux County* v. *National Surety Co.*, U. S. , decided February 20, 1928 (72 L. Ed. 240), should be accepted as conclusive authority that the word "costs" does not include attorneys' fees. There, the action was on a surety bond, under a statute of Nebraska which provided that in such actions "a reasonable sum as an attorney's fee in addition to the amount of his recovery" may be taxed as a part of the "costs." This Court held (16 F. (2d) 688) that attorneys' fees were not a part of the "costs" provided for in R. S. Sec. 823 and 824, and, therefore, could not be allowed as costs in a Federal court. Upon appeal, the Supreme Court stated the position of this Court in the following language (p. 241):

> In striking down so much of the judgment as allowed an attorney's fee the court below was persuaded that sec. 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the state court. As

> costs in the federal courts are regulated exclusively by Rev. Stat. sec. 823 and 824 the court concluded that other costs, authorized only by a state statute, could not be included in the judgment. See United States *v.* Sanborn, 135 U. S. 271, 282; The Baltimore, 8 Wall. 377, 388, *et seq.;* compare Ex parte Peterson, 253 U. S. 300, 314-319.

The question was thus squarely presented for decision by the Supreme Court as to whether attorneys' fees constitute a part of the "costs" which may be allowed as such in a Federal Court; and it agreed with this Court that such attorneys' fees are not, and cannot be, a part of the taxable costs prescribed by the Federal Statute. The Court did, however, give effect to the Nebraska statute by holding that the amount of the attorney's fee could be included in the judgment. It said (p. 242):

> That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by Rev. Stat. sec. 823, 824. The present allowance, *since it is not costs in the ordinary sense,* is not within the field of costs legislation covered by Rev. Stat. sec. 823, 824. That the particular mode of enforcing the right provided by the state statute—*i. e.,* by taxing the allowance as costs—is not available to the federal courts under Rev. Stat. sec. 823, 824 does not preclude the recovery. Since the right exists, the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment.

This latest and controlling ruling of the Supreme Court is direct authority that the word "costs," even when used in a statute, is not broad enough to include attorneys' fees; and, furthermore, that the costs provided for in R. S. secs. 823, 824 do not include attorneys' fees. How can it be argued, therefore, that when the Supreme Court directed that "costs" be paid by the Southern Company, it intended to include the attorneys' fees of the Trust Company?

In two other decisions of the Supreme Court, hereafter referred to (*Oelrichs* v. *Williams,* 15 Wall. 211, and *Tullock* v. *Mulvane,* 184 U. S. 497), the actions were upon injunction bonds which were conditioned to pay to defendants "all costs and damages." In both cases, it was held that counsel fees, incurred in securing a dissolution of the injunction bonds, did not come within that expression.

In 39 Cyc. 463, it is said:

> Where the costs of a trustee are directed to be taxed, that means as between party and party; not in the larger way.

In several instances the lower courts have held that the word "costs" in a decree or in a statute is to be construed as including only taxable costs, as distinguished from allowances. Some of these will now be referred to.

In *Kell* v. *Trenchard,* 146 Fed. 245 (Circuit Court of Appeals, Fourth Circuit), the mandate of the Court of Appeals provided that the "costs" of the case in both the appellate and the lower court should be borne equally by the appellant and the appellees. In a taxation of costs pursuant to this direction, the lower court included an allowance to the receiver as a part of the costs properly to be divided. The action of the lower court in including the allowance to the receiver was appealed from, and reversed on appeal, the appellate court saying (p. 247):

> In decreeing the division of costs in this court and the court below was meant only *the ordinary taxable costs of the litigation,* and not such charges and expenses as the costs of the receivership and payments and allowances to receivers; those being costs properly appertaining to the receivership, and chargeable against the *property* in the receiver's hands. Ferguson *v.* Dent (C. C.) 46 Fed. 88; Elk Horn Oil & Gas Co. *v.* Foster, 99 Fed. 495, 39 C. C. A. 615.

In *Doddridge County Oil & Gas Co.* v. *Smith,* 173 Fed. 386, it is held that under a decree of a federal court awarding the lessee "its direct damages and costs incurred by reason of its exclusion from the lease," it is not entitled to recover from the defendant the amount paid its counsel for services

beyond the docket fee taxable under R. S. sec. 823, 824, either as costs or direct damages. The court said (p. 389): "the attorney's fees and expenses incurred by the company cannot be decreed against Smith as costs."

In *United States* v. *Wilson,* 193 Fed. 1007, it is said:

> I think that the word "costs" in section 974, Rev. Stat. U. S., means taxable costs of the trial before the court and petit jury in which defendants have been convicted.

In *United States* v. *Smith,* 240 Fed. 756, the court said (p. 757): "the word 'costs' means merely the taxable costs of the court cause."

If the Trust Company desired to have the opinion and mandate of the Supreme Court broadened so as to include allowances in the nature of costs as between solicitor and client, it should have made an appropriate application to that court for that purpose, and before the expiration of the term. After the lapse of the term of the Supreme Court, the provision relative to costs could not be altered (*Fairmont Creamery Co.* v. *Minnesota,* 275 U. S. 70, 73).

III.

Upon no conceivable theory of the law was the Court justified in imposing upon the Southern Company the Trust Company's counsel fees for services rendered after the decree of the lower Court of June, 1910.

The effect of the Court's opinion, as we read it, is to impose upon the Southern Company all of the Trust Company's expenses for attorneys' fees and other items during the entire litigation, covering the period after the decree of June, 1910, as well as prior thereto.

We desire, as a preliminary matter and before coming to a discussion of the principle of taxation of costs as between solicitor and client, to direct the Court's attention to that part of the litigation occurring after the decree of June, 1910. We earnestly and confidently contend that upon no conceiv-

able theory of the law, not even upon the Court's own theory, can the Trust Company's expenses, incurred during this period, be taxed against the Southern Company.

Shortly stated, these expenses were incurred, in the main, upon the issue of the Southern Company's liability for the debt of the Belt Company, which the Trust Company itself injected into the case in 1905. This issue, as we have pointed out under a previous heading, involved serious and difficult questions of law, and the Southern Company cannot, in good conscience, be penalized for resisting the Trust Company's claim in the lower court or in the appellate courts. Furthermore, a large part of the Trust Company's expenditures for attorneys' fees during this period, to wit, $47,000.00, were, in the opinion of this Court (280 Fed. 64), due solely to the alleged incompetency of its counsel, for which the Southern Company was in no way responsible.

The Trust Company's appeal from the decree of June, 1910.

Aside from formal and other matters immaterial to this discussion, the final decree of June, 1910, adjudicated three matters: First, that the Belt Company was indebted to the Trust Company in the sum of $639,658.00; secondly, that the Southern Company was not liable for this indebtedness; and, thirdly, that the Southern Company was entitled to the property of the Central Improvement Company, which, as above stated, was then valued at approximately $200,000.00.

From this decree the Trust Company appealed to this Court. It presented three assignments of error, which are thus stated by this Court (201 Fed. 817):

> (1) That the court erred in including in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness owing by the Belt Company to the Trust Company.
>
> (2) That the court erred in requiring the Central Improvement Company and its receivers to convey to the Southern Company the properties specified in the decree.

(3) That the court erred in adjudging that one-third of the costs of this action be paid by the Trust Company.

Neither the Southern Company nor the Belt Company and its receivers appealed from this decree. The reasons therefor are plainly apparent from the situation as it then existed. While it was thought that the judgment against the insolvent Belt Company was erroneous and, in certain respects, unwarranted by the evidence, yet the Southern Company was held not liable for its payment. The Trust Company's own appeal only drew in question the propriety of *including* the finding of nonliability in the final decree, and did not seek to relitigate that issue. Furthermore, the Southern Company was awarded the Central Improvement Company land, which was by far the item of greatest value involved in the collateral held by the Trust Company. Under these circumstances, the Southern Company and those allied with it in the litigation were willing to accept the final decree, and to content themselves with an effort to secure its affirmance upon appeal. When, a year later, this Court gave the Trust Company an opportunity to relitigate the liability issue, it was then too late for the Belt Company and its receivers to appeal.

The liability of the Southern Company for the judgment against the Belt Company was the main issue in the Trust Company's appeal, and this, as before stated, was an issue which that company itself injected into the litigation in the lower court. The disposition of the Central Improvement Company property was an incident thereto, since, if the Southern Company should be liable for the debt of the Belt Company, all the collateral, including the Central Improvement Company property and securities, would, upon the payment of the debt, revert to the Southern Company. The Trust Company's assignment that the lower court erred in the judgment that one-third of the costs of the action be paid by the Trust Company, is of no significance here, except that it indicates pretty conclusively that the Trust Company at that time had no thought that anything more than ordinary costs, as between party and party, should be awarded against the Southern Company, or any one else.

Counsel fees incurred after the decree of June, 1910.

We lay to one side for later consideration the counsel fees and other expenses incurred by the Trust Company up to and including the final decree of June, 1910, and confine ourselves now exclusively to its disbursements for counsel fees and other expenses incurred by it subsequent to the date of the decree, which include two hearings in this Court and one hearing in the Supreme Court. The injustice of imposing these expenses upon the Southern Company is so plain and obvious that a brief reference to the uncontradicted facts will suffice to point out the error into which the Court has fallen.

Upon what conceivable principle can the Southern Company be condemned to pay the Trust Company's attorneys' fees and other expenses involved in its appeal to this Court to determine the liability issue which the Trust Company itself injected into the litigation in 1905? The decree of the lower court was against the Trust Company; and, accordingly, it appealed to this Court. As has been heretofore pointed out, the issue was an exceedingly difficult one, and involved in much doubt and uncertainty. The *Boyd* case (228 U. S. 482) had not then been decided. This Court recognized the serious and difficult nature of the controversy when it permitted two arguments and handed down two elaborate opinions. The Supreme Court held that the nature of the case was such as to warrant the grant of its writ of certiorari, and the case was finally decided by a divided court. What justification can there be for penalizing the Southern Company in these circumstances?

What rule of law or morals or ethics did the Southern Company violate in resisting the appeal of the Trust Company to this Court, and in appealing from this Court to the Supreme Court, which should warrant the imposition of drastic penalties? What warning was there in the books of text writers or in the decisions of the courts, saying to the Southern Company, in effect: "If you resist the Trust Company's appeal to the Circuit Court of Appeals, or if you appeal from that Court to the Supreme Court, you do so at your peril of being mulcted for the attorneys' fees and other

expenses of the Trust Company, in the event that you are unsuccessful."

What becomes of the guaranty that "The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay (Const. of Mo., Art. II, Sec. 10)?

The right of free access to the courts is fundamental in our theory of government. In *Straus* v. *Victor Talking Mach. Co.*, 297 Fed. 791, 798, it is said: "Free access to the courts must neither be denied nor penalized."

In *Missouri Pacific R. Co.* v. *Larabee*, 234 U. S. 459, the right of a state to impose attorneys' fees upon the losing party in an appeal to the Supreme Court of the United States was denied on the ground that if that were permitted, "the right to freely seek access to the Supreme Court of the United States would cease to exist."

In *Wetmore* v. *Mellinger*, 64 Iowa, 741, it is said:

> The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts.

The imposition of the Trust Company's expenses incurred following the final decree of June, 1910, can only be justified upon the assumption that the Southern Company, instead of resisting the Trust Company's appeal, should have filed a confession of error, and permitted a perfunctory reversal of the decree, and, further, that it should have refrained from prosecuting an appeal from this Court to the Supreme Court. The assumption, of course, is absurd. The Southern Company would have betrayed its stockholders, and its counsel would have been traitors to their client, if they had taken any other course than the one they pursued.

Not only is there glaring injustice, we respectfully submit, in imposing upon the Southern Company any of the expenses of the Trust Company following the final decree, but such a ruling is particularly obnoxious to the extent that it penalizes the Southern Company for what this Court has characterized

as the mistakes of opposing counsel; and this we now proceed to point out.

After the Trust Company's appeal had been argued in this Court, in May, 1911, certain stockholders of the Trust Company were permitted to intervene, on the ground that the Trust Company's attorneys, Messrs. Gates & English, had made a mistake in assigning as error the *inclusion* in the decree of the finding that the Southern Company did not assume the debt of the Belt Company, instead of challenging the correctness of the finding itself.

It should be said, in all fairness to Messrs. Gates & English, that there were at that time several actions pending in the state court at Kansas City, brought by the Trust Company against the Southern Company, for this same indebtedness. They preferred to litigate the liability issue in the state courts, where they felt that their chances of success were better than in the federal courts. As above stated, the *Boyd* case (228 U. S. 482) had not then been decided. They relied upon the statement contained in the opinion of this Court, where, referring to the case now under consideration and to the state court cases, it was said (171 Fed. 42, 50): "The liability of the Southern Company to pay the debt, which the Trust Company alleges in the actions at law it has promised to pay, *is not an issue and cannot be determined in the suit in equity*" (this suit). This, if literally true, would fairly justify their position. Hence, their effort to exclude that issue from this case and try it in the cases in the state court. This Court held that their position was a mistaken one (201 Fed. 818), but that it is not material here.

The result of the intervention of the stockholders was that a sharp clash occurred between their representative, Mr. Mecartney, and the regular counsel for the Trust Company. The former prevailed in his contentions, and the liability issue was raised in this Court and decided adversely to the Southern Company. The Trust Company not only paid Messrs. Gates & English their fees for services rendered on the appeal (Rec. 71-73), but it was required to pay Mr. Mecartney $47,000.00 (Rec. 73) by the judgment of this Court in *Mecartney* v. *Guardian Trust Co.*, 280 Fed. 64. His judgment was, by this Court, put upon the ground that he had per-

formed a service which should have been performed by the regular counsel.

We find, therefore, an unnecessary duplication of counsel, with charges and counter-charges of neglect and incompetency, resulting in the Trust Company being required to pay a much larger bill for legal services than would otherwise have been necessary. Other counsel fees in substantial amounts were also paid by the Trust Company upon the appeal to this Court.

Upon what theory of the law, English or American, should the Southern Company be required to pay for this unnecessary duplication of counsel? Upon what theory of law or morals is the Southern Company called upon to underwrite the legal ability or capacity of opposing counsel? If there is a quarrel among opposing counsel, resulting in an unnecessary duplication of services and charges, why should the Southern Company be required to pay the fees of both? Even the English practice would not require this. It seems unnecessary to argue further so plain and obvious a proposition.

IV.

It is contrary to both reason and authority to base an allowance of counsel fees in this case upon the assumption that the Trust Company uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid.

This Court seeks to justify the imposition of costs as between solicitor and client upon the assumption that "the Trust Company in the course of litigation uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid." This, we contend, is clearly erroneous, and the error is susceptible of plain demonstration.

We insist that no fund was uncovered and brought into the constructive possession of the court, within the meaning of the rule relied upon; and, furthermore, we insist that the case is governed by established principles which prohibit

the allowance of counsel fees in the circumstances shown in this case. Before coming to a discussion of these questions, we call attention to the following considerations:

(a) It is true that this Court, in the course of its argument, for the purpose of pointing out the equitable rights of the Trust Company, said that the property of the Belt Company was a trust fund. It meant no more than that the right of a creditor to resort to it for the satisfaction of his debt was superior to the right of a stockholder. This is the view taken by the Supreme Court, which said:

> The Circuit Court of Appeals decided that the Guardian Trust Company . : . was entitled to charge the appellant for the Belt Company's debt, because the reorganization scheme, adopted upon the foreclosure of a mortgage of the Belt Company's property and a purchase by the appellant, left the unsecured creditors inadequately provided for, while it made a considerable provision for the stockholders in the Belt Road.

While the Supreme Court adopted and applied this view, it did not hold that the property of the Belt Company was a trust fund; much less did it hold that the property of the Belt Company had been uncovered for the benefit of creditors and placed in the constructive possession of the Court.

(b) The decree of this Court, which the Supreme Court affirmed, did not order the distribution of any fund to creditors. It merely awarded a personal judgment against the Southern Company for the amount of the Belt Company's debt, with the return of the collateral upon payment of the debt, and with a sale of the collateral upon a failure to pay the debt. It was a personal judgment, which has long since been paid in full, in favor of the Trust Company, and this judgment did not inure to the benefit of any one else.

(c) At no time did the Trust Company assert any claim except its own. There can be no pretense that it was acting for the benefit of any creditor. Its claim that the Southern Company was liable for the debt of the Belt Company is stated in its answer to the amended intervening petition of the Southern Company (S. C. Rec. 311), and is asserted solely in

its own behalf. It is in the nature of a legal claim, as distinguished from an action in equity. The suits in state courts upon the same cause of action (S. C. Rec. 502) were actions at law, triable by jury (R. S. Mo. 1919, Sec. 1398).

(d) Not only was the property of the Belt Company not a trust fund, in any substantial sense, but it was not in the possession of any court at the time the Trust Company asserted its claim in 1905, nor has it been in the possession of any court since that time. The property of the Belt Company, as appears from the Trust Company's answer (S. C. Rec. 295) was sold in November, 1901, at foreclosure sale, and purchased by the Southern Company, which ever since that time has had exclusive possession thereof. Manifestly, the stock of the Southern Company, which was issued in exchange for the stock of the Belt Company in the reorganization (if that be regarded as a "fund"), has never been in the possession of any court.

The Court's ruling is in direct conflict with the applicable authorities.

The Court conceives that its decision with respect to the discovery and administration of a fund is supported by *Trustees* v. *Greenough*, 105 U. S. 527, and decisions of that character. Those cases hold, in general, that where one litigant, at his own expense, has either created, preserved or protected a fund, and others were entitled to claim, and did claim, the results of his labors, it was not fair that the persons who have taken the risk and cost and expense of the litigation should bear all the costs, but those that shared in the fruits should bear their full pro rata share. The extent of the rule was that where meritorious results were actually achieved, those who, by inaction, sought to await the result and escape all expense if the case be lost, but if successful, to share the actual benefits by receiving their portion of this success, should not be allowed to do so without contributing their share of the expense (*Buell Case*, 201 Fed. 762, 768).

The total inapplicability of this rule to the case at bar is manifest, for several reasons, which we now point out:

(a) In this case the Court did not take charge of, administer, preserve or distribute any fund. It awarded a money judgment in favor of the Trust Company and against the Southern Company, which has long since been paid in full. The rule of the *Greenough* case, which permits the making of an allowance to counsel, does not apply. It would not have applied, even though a fund had been uncovered and administered, since the result of the litigation was a personal judgment, and not the distribution of a fund.

This rule is stated clearly and emphatically by the Supreme Court of Missouri in *Johnson* v. *United Rys. Co.*, 247 Mo. 326, 152 S. W. 362. There, an action in equity was brought in behalf of complainant and other creditors to subject to the payment of their debts certain property which the debtor had transferred in fraud of creditors. There was a money judgment for complainant, and his motion for an allowance of attorney's fees was denied. The court held that the rule of the *Greenough* case had no application, saying:

> With cases of that ilk eliminated, there is left to consider a doctrine of equity, viz., that a trust fund of right should bear the expenses of its own administration. According to that rule, it has been held that where a transaction has been ripped up or a conveyance set aside for fraud and an estate has been uncovered and recovered, which, in equity, belongs to creditors, and that estate is held in the hollow of the chancellor's hand to be administered and distributed, attorney's fees may be allowed as part of the trust administration. White *v.* University Land Company, 49 Mo. App. 450; Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157; Central Railroad, etc. *v.* Pettus *et al.*, 113 U. S. 116, 28 L. Ed. 915; Woodward *v.* Mastin, 106 Mo. loc. cit. 364, 365, 17 S. W. 308. Agreeably thereto are an array of other cases industriously collated in Mr. Gilliam's brief *pro se*. But it seems to us their doctrine does not apply here. This because the power of a court of equity is flexible enough to measure out relief in cases of this kind by a general personal judgment, without segregating a fund in kind, and bringing its corpus into a court of equity for administration. Accordingly, here the judgment was a general money judgment against Railways Company. It stopped short at that point. It administered no fund.

> It took this form apparently by consent of the parties; at least, no one took exception to that feature. In such fix, the case falls within the doctrine of the general rule, viz., that in Missouri one litigant cannot be compelled to pay the attorneys' fees of another, either in equity or at law. Pickel *v.* Pickel, 147 S. W. 1059, not yet officially reported. It appears that Johnson contracted that Mr. Gilliam on top of a named percentage might have all attorney's fees the court allowed. That friendly turn added no virtue to movent's position. In that aspect it dealt with a bird (not in hand, but) in bush. We hold the motion well ruled.

This rule applies squarely to the case under consideration. Here, there was a general money judgment against the Southern Company. The decree stopped short at that point. It administered no fund. The case therefore falls within the doctrine of the general rule, in Federal Courts as well as in the State Courts of Missouri, that one litigant cannot be compelled to pay the attorney's fees of another, either in equity or at law.

(b) Even where a creditor sues in equity for the benefit of himself and all intervening creditors, and obtains a decree for complainant and such creditors, and the complainant and such creditors receive the full amount of their debts, with interest and taxable costs, the complainant is not entitled to an allowance for solicitor's fees out of the surplus otherwise payable to the debtor, after full payment of all debts and costs.

In this case, the only creditor was the Trust Company. It did not sue for the benefit of other creditors who might come in and assert their claims. The Trust Company's debt became merged in a personal judgment, and that judgment with interest has been paid, and the taxable costs have been paid. Upon what theory of law is the Trust Company entitled to impose the burden of counsel fees upon the surplus of the trust fund (assuming there was a trust fund), belonging to the Southern Company?

The authorities deny the validity of a claim of this nature. One such authority is *Huff* v. *Bidwell*, from the Fifth Circuit, 195 Fed. 430, where it is held:

> Where a judgment lien creditor sues in equity for the benefit of himself and all intervening creditors, and

obtains decree for complainant and such creditors, and the defendant's property condemned and sold to satisfy debts exceeds the amount of debts and interest and costs, the complainant is not entitled to an allowance from his solicitor's fees out of the surplus otherwise payable to the debtor after full payment of all the debts and costs.

The court said (p. 431):

> In creditors' suits, the underlying principle upon which those who do not appear as plaintiffs are charged with a proportionate part of the solicitors' fees is that the plaintiffs represented, and were suing for, the others; and this agency is generally shown by the appearance of the other creditors in court propounding their claims and claiming to share in the result of the suit. Lamar *v.* Hall & Wilberly, 129 Fed. 79, 83, 63 C. C. A. 521; Farmers' Loan & Trust Company *v.* Green, 79 Fed. 222, 24 C. C. A. 506; Hand *v.* Railroad Company, 21 S. C. 162. But the plaintiff in this case in no sense represented Huff, the defendant. The suit was not brought for his benefit. There was no just reason for seizing more of his property than would pay his debts, principal and interest, and the costs of suit. The property having been sold for a sum in excess, the proceeds necessarily came into court; but it was never the purpose of the suit to accomplish more than the collection of the debts and costs. *If no creditors had intervened, if the suit had been brought by the plaintiffs to enforce and collect their judgments only, is there any known principle upon which Huff could have been made responsible for the plaintiffs' solicitor's fees?* The intervening of the creditors may in such cases oblige them to contribute to the payment of the fee; but such interventions impose no obligation on the defendant who is sued. On principle, it seems to us that this fee cannot be added to Huff's indebtedness.

The sentence which we have italicized has accurate and precise application to this case. Here, no other creditors did intervene. The Trust Company sought to enforce and collect its claim only. Is there, therefore, any known principle upon which the Southern Company can be made responsible for the Trust Company's solicitors' fees?

In 20 Cyc. 825, the rule is thus stated:

> Upon a conveyance by a debtor being set aside as fraudulent, at the suit of a creditor, and a sale of the property being ordered, the creditor's attorney may be allowed a fee out of the proceeds; but such fee should be paid out of that part applicable to the demands of creditors, and not out of such balance as may come to the debtor after the liquidation of the debts proven and passed.

The foregoing quotation is cited and followed in *Pickel* v. *Pickel,* 147 S. W. 1059 (Supreme Court of Missouri), in a case where, at the suit of a wife, a conveyance by a husband was set aside as fraudulent as to her rights of maintenance.

In *Wagener* v. *Mars,* 27 S. C. 97, 2 S. E. 844, 846, it is held:

> Upon conveyances by a debtor being set aside as fraudulent at the suit of a creditor, and a sale of the property being ordered, the creditor's attorney may be allowed a fee out of the proceeds, but the fee should be paid out of that part applicable to the demands of creditors, and not out of such balance as may come to the debtor after the liquidation of the debts proven and passed.

The court said:

> As to the fee. This is a creditor's bill, or in its nature, and the proceeds of the sale are directed by the decree to be held subject to the further order of the court, the master in the mean time to report incumbrances and liens, etc. We think, in so far as the proceeds may be applied to the creditors who may come in and share the result of the plaintiffs' action, a fee for respondent's counsel may be paid therefrom. But, should the lands sell for more than enough to pay said claims, the balance, which would belong to the defendants, should not be diminished by any portion of said fee. In other words, the fee should be deducted from the amount of proceeds applied to the creditor's claims. It may be that there was no doubt below that it would take the entire proceeds of the prospective sale to meet the demands, and therefore the order made was not objectionable. With that understanding, this portion of the decree is affirmed also. But, should it turn out

otherwise, then this portion of the decree should be enforced, as above suggested.

In *Miller* v. *Kehoe,* 107 Cal. 340, it is held:

> Counsel fees may be allowed in equity in an action for the preservation or distribution of a fund where all the parties have a common interest; but a plaintiff who brings suit for himself and others interested with him cannot recover counsel fees against a defendant who denies the right of each and all of the plaintiffs, and sets up in himself an adverse and independent title to the thing in litigation.

The court said (p. 343):

> We think, however, that the court below erred in decreeing that attorneys' fees should be paid to the plaintiffs or to the assignee in insolvency out of the gross proceeds of the sale of the property. That would be to make the defendant Margaret pay the attorneys' fees of plaintiffs out of the "residue" coming to her; and for this there is no warrant of law. . . . Counsel for respondents contend that this part of the decree can be maintained under the rule, sometimes applied in equity, that where it is necessary to bring an action for the preservation or distribution of a fund, and the action is brought by one beneficiary for the benefit of himself and all the other beneficiaries, the plaintiff may have a reasonable counsel fee out of the fund. This is merely compelling all the persons for whose benefit the action is brought to bear their share of the expenses of the suit, and is equitable and just. But evidently the rule applies only to a case where all the parties have a common interest. It clearly does not allow a plaintiff who brings suit for himself and others interested with him to recover counsel fees against a defendant who denies the right of any and all the beneficiaries, and sets up in himself an independent and hostile right or title to the thing in litigation. In the latter case the plaintiff would be no more entitled to recover counsel fees from the defendant than he would be in an action of debt or ejectment.

The reason for this rule is that the services of counsel are rendered, not in behalf of any party or parties, but with respect to the property itself. It is therefore proper that

compensation for services of counsel should be made a direct charge upon the fund which is to be distributed to creditors, and paid prior to the distribution. The expenses of counsel come out of the fund and are always deducted from the fund before distribution is made. The extreme limit of a creditor's recovery is the amount of his debt, with interest, diminished by his pro rata contribution to the allowance to counsel. This rule has been expressed by the Supreme Court in *Meddaugh v. Wilson*, 151 U. S. 333, where the court said:

> Their services in this respect not being to any party or parties, *but in respect to the property itself*, and to secure its proper application among all parties interested, it is clearly in accordance with settled rules of equity jurisprudence, as well as with the practice in bankruptcy proceedings, that compensation for their services, including the pay of their counsel, should be made a direct charge upon the property, and a charge prior in right to the claims of creditors or stockholders. "It is a general principle that a trust estate must bear the expenses of its administration." International Imp. Fund Trustees *v.* Greenough, 105 U. S. 527, 532.

If there had been in this case a fund in the possession of the court for administration and distribution (we insist there was not), the utmost limit of recovery by the Trust Company and other creditors (assuming there were others, although, in fact, there were not) would be the full amount of their respective claims, with interest, diminished by their proper proportion of any allowance made for counsel fees. The amount distributable to the Trust Company, plus its pro rata share of the allowance of counsel fees, might equal, but could not exceed, the amount of its claim, with interest. In other words, the Trust Company would pay its proportion of counsel fees out of its own distributive share; and the same would be true of other participating creditors.

The result is the same, in principle, where, as here, the Trust Company was the only creditor. The amount awarded it in this case was the full amount of its claim, with interest, and, accordingly, on both principle and authority, the Trust Company should pay its own counsel fees out of the proceeds of its judgment.

Certainly, there is no equity in requiring the Southern Company to pay out of its share of the trust fund (assuming as before, that there was one), the expenses of the Trust Company's counsel, who rendered no service whatsoever for the Southern Company, and whose activities were wholly in conflict with its interest.

(c) Not only was the Trust Company awarded a money judgment, which has been paid, and not only does the Trust Company seek to impose its claim for counsel fees upon the part of the trust fund (if there was one) remaining after the only creditor in the action has been paid in full, but the fact remains that the Trust Company's effort in this litigation was solely made in its own behalf, and in an endeavor to protect its own selfish interest; and the rule applies that in such cases there can be no allowance of counsel fees. This rule is aptly illustrated in *Boothe* v. *Coal Co.*, 72 Wash. 679, where it is said:

> In an action by a stockholder on behalf of himself and others similarly situated, in which there is a favorable termination, the benefit of which goes to the corporation, plaintiff is entitled to recover a reasonable attorney's fee and necessary disbursements, but such allowance will not be made to a stockholder owning half of the stock, in a controversy with the owner of the other half, in which a receiver was appointed on the theory of a partnership, and no one but the plaintiff was benefited by the result of the suit.

The same rule was applied in *Attorney General* v. *North American Life Ins. Co.*, 91 N. Y. 57, where the court said (p. 62):

> The intervening parties are termed quasi trustees, charged with a duty to protect the general interest, but nothing could be further from the truth. As parties to the action they represented nobody but themselves, and owed no duty to anybody else. If their interests came in collision with those of other policy-holders they fought for their own, as they had a right to do. They came in as individuals to guard their own personal rights. No one in any manner authorized them to speak for or act for any person but themselves, and they can-

> not become volunteer trustees for those who never asked or requested their interference. They had no fund in their hands for the preservation of which they were responsible. Their sole effort and aim was to get as much of it for themselves as possible, and if, in that effort, others were benefited, they cannot claim to be trustees for such others so as to get still more of the fund for themselves.

In *Savage* v. *Sherman*, 87 N. Y. 285, it is said:

> We are not aware of any rule or principle whereby any of these parties are entitled to call upon others to pay counsel fees which they incur on their own behalf for the protection of their personal interests.

In *Pike* v. *Cincinnati R. Co.*, 179 Fed. 97, 103, the court said:

> The practice of compensating the trustee out of the fund for his service in the care of it has no application to a case where the trustee is simply subserving the interests of one of the parties in a contest for the possession of the fund.

Other decisions of a similar nature are referred to under a subsequent heading.

V.

We strenuously insist that a Federal Court has no power in a suit in equity to tax attorneys' fees incurred or expended by one of the parties as costs to be paid by his adversary.

We are now speaking of taxable costs, and do not refer to allowances, which, under recognized rules, may be made to trustees and receivers in mortgage foreclosures and to creditors who bring suit in behalf of themselves and other creditors and create a fund and cause it to be distributed in accordance with equitable principles, or instances of a similar nature. Our contention is that the English system of taxing costs as between solicitor and client has never obtained a foothold in this country. Our courts in repeated instances have set their faces sternly against it.

The English system of taxing costs is fundamentally different from our own system. There, attorneys' fees or solicitors' fees, which are fixed by law, are taxed in every case, whether at law or in equity. Attorneys' fees are included in every taxation of costs as between party and party. The taxation of costs as between solicitor and client permits a somewhat larger proportion of actual expenditures than is allowed in taxation as between party and party.

In modern practice, however, the English system of taxation as between solicitor and client "gives little more than a taxation as between party and party" (*Giles* v. *Randall*, 1 K. B. D. 290, 296).

In *Daniell's Chancery Pleading & Practice*, Vol. 2, 6th Am. Ed., star page 1376, note 1, it is said:

> The importance of this distinction (party and party, or solicitor and client) has been somewhat diminished by Cons. Ord. 40, 32.

The practice of the English courts in taxing costs as between solicitor and client is discussed in Appendix B, page 120, of our original brief. We content ourselves here with stating our reasons for the contention that the English doctrine has been repudiated *in toto* by the federal courts of this country. We will briefly trace the historical development of the subject of taxing attorneys' fees as costs from the beginning of our government down to date.

Early statutes and rules of court.

On August 8, 1791, "the Chief Justice, in answer to the motion of the Attorney General, made yesterday, informs him and the bar, that this court consider the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary" (*Rules and Orders of the Supreme Court of the United States*, 2 L. Ed.). This in 1822 was expanded into Equity Rule 33, and in 1842, into Equity Rule 90, which latter was dropped from the equity rules February 1, 1913.

This Court, in its opinion, apparently takes the view that the effect of these equity rules was to import into our practice the English doctrine of taxation of costs as between solicitor and client. We contend that this cannot be so, and proceed to state our reasons.

Congress, by Act of September 29, 1789, provided that the rates of fees in the circuit and district courts of the United States, in equity cases, should be in accordance with those allowed by the chancery court of the state. The Act of May 26, 1790, continued the Act of 1789 until the end of the succeeding session, and it was again continued by the Act of February 18, 1791, until the end of the next session. The Act of March 1, 1793, provided for the taxation in the circuit courts of the United States of such attorneys' fees and counsel fees "as are allowed in the Supreme or Superior Courts of the respective States." The Act was continued another year by the Act of February 25, 1795, and was again continued by the Act of March 31, 1796, for the term of two years, and from thence until the end of the next session of Congress thereafter (Report of Mr. Justice Nelson, 1 Blatchford C. C. 652).

Is it not entirely clear that Congress, in these enactments, was declaring its own policy with respect to the taxation of attorneys' fees as costs? It deliberately adopted the policy of applying the rules of the state court where the Federal Court was sitting, as the rules in its own court. If it had desired to adopt the English practice, in that behalf, it seems certain that it would have said so. At that period in the development of our judicial system, the extent to which the forms, precedents and practice of the mother county should be followed, was receiving the earnest attention of Congress. Its failure to adopt the English practice can only be regarded as an intentional repudiation of it in favor of its own rules.

Early decisions of the Supreme Court.

The first case in which there was presented to the Supreme Court the question of whether or not attorneys' fees might be taxed as costs, was *Arcambel* v. *Wiseman*, 3 Dall. 306, 1 L. Ed.

613, decided in 1796. In that case an allowance of $1,600 as counsel fees had been included as a part of the damages allowed by the circuit court, but the Supreme Court ordered the disallowance of this item, saying:

> We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, until it is changed, or modified, by statute.

Then followed *The Apollon,* 9 Wheat. 362, decided in 1824, and *Canter* v. *Ins. Co.,* 3 Pet. 307, decided in 1830, in both of which the decision was rendered by Mr. Justice Storey, and in both counsel fees were allowed. Both cases, however, were explained, as we shall see later, as having been decided as they were because the Act of 1853 was not then in force. In *Day* v. *Woodworth,* 13 How. 363, decided in 1851, the court held that attorneys' fees could not be included in an award of exemplary damages.

Prior to the statute of 1853, the practice with respect to the taxation of attorneys' fees as costs may be said to have lacked uniformity; the general rule being that such costs were to be taxed in accordance with the varying practice in the state where the court was sitting. But this lack of uniformity is in itself conclusive evidence that the English system had not been adopted, for had that system been adopted, we would find uniformity, instead of uncertainty. The report of Mr. Justice Nelson, above referred to, was published in 1842, and disclosed not only the lack of uniformity in Federal Court practice, but the necessity for some uniform rule applicable to Federal courts wherever sitting.

The Act of 1853, and its construction by the Supreme Court.

The Act of 1853 was intended to meet this demand for uniformity. It provided that certain specified fees "and no others" shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, and that on a final hearing in equity or admiralty, a docket fee of twenty dollars shall be taxed. This statute is in itself conclusive

evidence of the complete repudiation of the English practice, if it ever existed in this country. Our courts thereafter recognized it as once and for all settling the question of the taxation of costs, and limiting the taxation of attorneys' fees in the stipulated manner.

The effect of the statute was before the Supreme Court in 1869, in *The Baltimore*, 8 Wall. 377. The court there reviewed not only the prior legislation, referred to above, but the practice which had prevailed prior to the Act of 1853, pointing out the lack of uniformity. It held, in effect, that the Act was intended to standardize the practice in Federal courts; that while attorneys might charge their clients reasonably for their services, nothing could be taxed as costs against the opposite party, as an incident to the judgment, except the costs and fees prescribed and enumerated. It also held that *The Apollon*, 9 Wheat. 362, and *Canter* v. *Ins. Co.*, 3 Pet. 307, which were cited in the brief of the appellees, were inapplicable because decided before the Act of 1853. The court said (p. 392):

> Fees and costs, allowed to the officers therein named, are now regulated by the Act of the 26th of February, 1853, which provides, in its 1st section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compensation shall be allowed.
>
> Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as cost against the opposite party, as an incident to the judgment, for their services, except the cost and fees therein described and enumerated. 10 Stat. at L. 161. They may tax a docket fee of $20 on a final hearing in admiralty, if the libelant recovers $50, but if he recovers less than $50, the docket fee of the proctor shall be but $10. The Canton, 21 Law. Rep. 473; The Liverpool Packet, 2 Sprague 37; The Connestoga, 2 Wall. Jr. 116.
>
> Reference is made to two cases where counsel fees were allowed, but it is a sufficient answer to those cases to say, that they were decided before the Act of Congress under consideration was passed. They do not, therefore, furnish the rule of decision in the case before us.

This decision would seem definitely to settle any question of the taxation of attorneys' fees as costs in excess of the amounts named in the statute. It is difficult to imagine the English doctrine as surviving after this decision.

But if there was any lingering doubt upon this subject, it was completely dispelled by the decision of the Supreme Court in *Oelrichs* v. *Williams*, 15 Wall. 211. This was an action on an injunction bond. The condition of the bond was that the obligor "should pay and satisfy all costs and damages that may accrue to the obligees, or either of them, by reason of said injunction, in case the same shall be denied." The question was squarely presented, therefore, as to whether counsel fees were included in the words "costs and damages." The injunction bond was in effect for a period of four years, eight months, sixteen days. Doubtless, it presented circumstances of great hardship. Both the master and the lower court allowed counsel fees, paid in securing a dissolution of the injunction, as a part of the costs and damages covered by the bond. This was reversed. The court, after referring to *Arcambel* v. *Wiseman*, *supra*, and other cases, said (p. 231):

> The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant, and assumpsit, damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the

> part of the court to scale down the charges, as might sometimes be necessary.
>
> We think the principle of disallowance rests on a solid foundation, and that *the opposite rule is forbidden by the analogies of the law and sound public policy.*

This comprehensive ruling should be accepted as completely settling and disposing of the question of the taxation of counsel fees, as costs, in this country. Such costs may not be taxed in equity cases, even where the litigation is unjust, on one side or the other, and however large the expense may be. The reasons are given. The parties stand upon a footing of equality. There is no fixed standard, in this country, by which counsel fees can be determined, as there is in England. Some counsel demand much more than others, and more counsel may be employed than are necessary. There is great danger of abuse if it be known in advance that fees, unregulated by law, are to be paid by the other party. Additional litigation would be necessary to determine the fees to be taxed. Counsel fees do not come within the designation of "costs," nor of "damages." Their disallowance rests on a solid foundation, and the opposite rule is forbidden by sound public policy as well as by the analogies of the law.

The Supreme Court, in subsequent cases, has assumed, without further re-examination of the question, that this decision has settled the law in this country. In *Tullock* v. *Mulvane*, 184 U. S. 497, the action was upon an injunction bond, which, as before, was conditioned to pay to defendant "all costs and damages." It was again insisted that attorneys' fees were properly allowed as an item of cost or damage upon the bond, and again denied. The court said (p. 511):

> . . . it remains only to consider whether the attorneys' fees were properly allowed by the court below as an element of damages on the bond. That they were not *is settled.*

The court then refers to *Oelrichs* v. *Williams, supra,* and concludes with the statement:

> It follows from what we have stated that there was error committed in allowing the recovery of attorneys' fees as an element of damage upon the bond in question.

The question next came before the Supreme Court in *Missouri, K. & T. R. Co.* v. *Elliott,* 184 U. S. 530, and was disposed of briefly in the following statement:

> Having thus disposed of the question of jurisdiction, we come to the merits of the case. It suffices to say, for the reasons given in the opinion in Tullock *v.* Mulvane, before referred to, 184 U. S. 497, that there was error committed by the Kansas City court of appeals in affirming the action of the trial court in allowing, in the judgment by it rendered, attorneys' fees as an element of damage upon the injunction bond contrary to the controlling rule on this subject enunciated by this court, by which the courts of the United States are governed in requiring the execution of such instruments.

This Court, in its opinion in this case, after referring to some of the cases above cited, among them, *Arcambel* v. *Wiseman, The Baltimore, Oelrichs* v. *Williams,* states that "such refusals (to tax attorneys' fees as costs) were not based upon any lack of power in the court, but because it was not deemed wise policy to allow attorney's fees to be taxed as costs in ordinary equity cases."

We respectfully submit, however, that it was a lack of "power" to impose attorneys' fees as costs which impelled the Supreme Court to decide as it did This is made entirely plain in *Missouri P. R. Co.* v. *Larabee,* 234 U. S. 459, where the question arose over the imposition of attorneys' fees by a state court in respect of an appeal prosecuted to the Supreme Court of the United States. The question is there stated by the court (p. 468):

> First. The question of the *power* of the court to make the allowance for professional services rendered in this court on the former writ of error.

It will be noted that the court was here discussing the *power* to make the allowance, and not the equitable principles which control some allowance which it has the power to make. The court held against the existence of the power, as follows:

> There can be no doubt that, tested by the general principles of law controlling in this court, by the *stat-*

utes of the United States relating to the subject, or the rules of this court concerning the same, the award for the attorneys' fees in question was *absolutely unwarranted.* We do not stop to review and expound the settled line of authority demonstrating this result because it would be wholly superfluous to do so, as the principles have been so long the settled rule of conduct in this court, and are so elementary as to require not even a reference to the cases. Some of the cases, nevertheless, we cite: Arcambel *v.* Wiseman, 3 Dall. 306; Day *v.* Woodworth, 13 How. 363, 372, Oelrichs *v.* Spain (Oelrichs *v.* Williams), 15 Wall. 211, 230, 231; Tullock *v.* Mulvane, 184 U. S. 497, 511 *et seq.*

It will be noted that the cases cited above are the same cases to which we have referred heretofore. They are referred to in the opinion of the Supreme Court as establishing a settled line of authority demonstrating the lack of *power* to tax counsel fees as costs. The prior interpretation of the Act of 1853 is reaffirmed. "It would be wholly superfluous," says the court, "to review and expound the settled line of authority . . . as the principles have been so long the settled rule of conduct in this court, and are so elementary as to require not even a reference to the cases."

In the recent case of *Sioux County* v. *National Surety Co.*, ... U. S. ..... (72 L. Ed. 240), to which reference has already been made, it is held that the term "costs," as used in the Act of 1853, does not include attorneys' fees.

Decisions of the Courts of Appeal.

The federal courts of appeals have, without exception, followed the statute of 1853, and the rule established by the Supreme Court of the United States in the foregoing cases, that, in the absence of authorizing statute, attorneys' fees in excess of $20 may not be taxed as costs as between solicitor and client, to be paid by one of the parties to the suit.

In *McIntosh* v. *Ward,* 159 Fed. 66, the Court of Appeals of the Seventh Circuit held that attorneys' fees could not be taxed as costs in a partnership accounting case. In its opin-

ion the court said, in reference to the allowable items of expense:

> Such allowances were of statutory origin. Our statute of 1853 . . . provides what shall, as costs, "be included in and form a portion of a judgment or decree against the losing party." . . . In our opinion the discretion of a court of equity does not authorize it to require one party . . . to pay to the other, under the name of costs, items paid from the fund for services and expenses in administering a suit properly in court, nor any other items not within the fee bill act.

Fraser v. *Cole,* 214 Fed. 556, was a suit by a legatee to enforce his claim against an executor and reach real estate fraudulently conveyed by her. The district court added to the decree an allowance of $1,000 solicitor's fees. The Court of Appeals for the Seventh Circuit said:

> No law of Illinois warranted the increase of Grace Fraser's indebtedness by such an addition . . . . Nor can equity in a suit upon a creditor's bill or a vendor's lien bill enlarge the defendant's debt in that way.

Leary v. *United States,* 257 Fed. 246, was a fraud case in which the successful party sought to have his attorneys' fees taxed against the losing party. The Court of Appeals for the Fourth Circuit said:

> The costs that can be taxed against the losing party . . . are little more than nominal, and the winner is therefore out of pocket for the fees of his counsel. If this be unjust to the one found to be in the right, it is because the law gives him only the amount of his recovery and the scanty sum allowed as taxable costs.

In *Motion Picture Patents Company* v. *Steiner,* 201 Fed. 63, the district court allowed an attorney's fee of $150.00 in each of two cases because of the vexatious conduct of plaintiff's counsel in the litigation. The Court of Appeals for the Second Circuit held that an attorney might be compelled to pay certain costs for vexatious conduct by virtue of Section 982 of the statutes, but that the costs could not be taxed against the client. If this Court be correct in its conclusions in this case, then the court in the *Steiner* case could have

taxed those costs under its equity powers. The two cases are in direct conflict.

In *Marks* v. *Leo Feist,* 8 Fed. (2d) 460, attorneys' fees were taxed as costs in a copyright case. The Court of Appeals for the Second Circuit held that while such fees were taxable under the copyright law:

> The general rule, which is subject to some exceptions, of course, is that each party to a litigation must pay his own counsel fees, no matter how unjust the litigation may have been, or how great may have been the *expensa litis* (citing the Arcambel and Oelrichs cases).

We respectfully contend that the decision of this Court is contrary to the statute, contrary to the decisions of the Supreme Court, and contrary to the decisions of federal courts of appeal in other circuits.

VI.

The Trust Company is not entitled to the taxation of costs as between solicitor and client with respect to the claim asserted against it as trustee in the Union Terminal mortgage.

As the Court has given what we regard as undue prominence to this item, which bore rather a minor part in the controversy, we desire to set forth the nature of the claim urged against the Trust Company, the defense interposed by the Trust Company, the findings of the master thereon, and the legal consequences following that finding, all of which, we insist, demonstrate that the Trust Company is not entitled to the taxation of costs as between solicitor and client.

The amended intervening petition of the Southern Company was filed pursuant to the following stipulation (S. C. Rec. 267):

> It is agreed between the parties to the intervening petition of the Kansas City Southern Railway Company that it may file its amended intervening petition setting up, in addition to the matters now contained in its intervening petition on file, its claim against the

Guardian Trust Company for alleged breach of trust as trustee in the mortgage made by the Union Terminal Railroad Company alleged to be accruing to it as the owner of all the bonds issued by the Union Terminal Railroad Company; and the Guardian Trust Company consents that the issues so made shall be referred to Shannon C. Douglass, Special Master and waives any objection it might make to said intervening petition on the ground of multifariousness or other formal matters; and the Guardian Trust Company further agrees to answer the said intervening petition within fifteen days from filing petition.

In paragraph 13 of the amended intervening petition (S. C. Rec. 288) it is alleged that the Union Terminal Railroad Company executed its mortgage to the Trust Company and another, as trustees, to secure bonds in the sum of $2,000,000; that at that time, the Union Company had not constructed its railroad, and the purpose of the issue of bonds, as the Trust Company well knew, was to provide funds with which to construct it, and it then became the duty of the Trust Company, "under the express terms of said mortgage, as well as by law", to see that as the bonds of the Union Company were sold, the proceeds thereof were used in the construction, completion and equipment of the railroad of the Union Company; but the Trust Company, unmindful of its duties, did from time to time sell said bonds to innocent purchasers for value and did unlawfully and improperly divert the said proceeds of said sales from the purposes for which they were intended, and did unlawfully and improperly use the said proceeds to diminish from time to time the alleged indebtedness from the Belt Company to it; and that the Trust Company, after the completion and equipment of the Union Company, did sell and put afloat certain bonds of the Union Company, when there was no occasion or necessity therefor; and the intervener, as the owner of all the outstanding bonds of the Union Company, was damaged by the acts and conduct of the Trust Company in the sum of $773,246.00.

The Trust Company, in its answer (S. C. Rec. 307) denied "that either by law or by the express terms of said mortgage it was the duty of respondent to see that as said bonds

were sold, the proceeds thereof should be used in the construction, completion and equipment of said railroad. On the contrary, respondent says that there was no such duty imposed either by the terms of said mortgage or by law."

The Trust Company then pleaded the five-year statute of limitation, and also the ten-year statute of limitation of the State of Missouri, and also pleaded laches.

The master (S. C. Rec. 876), after quoting the provisions of the mortgage, said:

> The plain provisions of the mortgage would seem to be explicit in relieving the trustees from the duty of inquiring into the use the railroad company intended to make of the bonds.

The master then proceeded to inquire whether such duty arose by implication of law. His conclusion was that "in as much as the provisions of the mortgage are explicit as to the requirements made of the trustees, it would seem to be clear that there can be no implied duties, which are inconsistent with the express covenants."

The master held that "the real cause of intervenor's action is simply a breach of duty on the part of the Trust Company, as trustee, in delivering the bonds of the mortgagor" (S. C. Rec. 880), and, accordingly, held that the five-year statute of limitation applied, and barred the action, saying (S. C. Rec. 883):

> . . . if the action of the Trust Company, in buying Union bonds from the Belt, constituted a breach of duty, on its part as trustee, it would follow that such breach was barred by the five year statutory limitation.

The master also sustained the defense of laches.

There are several considerations which, we believe, effectively dispose of the Trust Company's contention that any extraordinary allowance should be made to it on account of this claim.

(a) The claim against the Trust Company was filed by stipulation, as above set forth. It was in the nature of an action at law, as the master held (S. C. Rec. 880)—"simply

a breach of duty on the part of the Trust Company, as trustee, in delivering the bonds of the mortgagor". The Trust Company knew the nature of the action contemplated by the stipulation. Both parties knew that without the stipulation the claim could not be injected into the case. The Trust Company voluntarily agreed to litigate the claim in this action. The rule of *volenti non fit injuria* applies.

(b) As pointed out in our original brief (pp. 86-97), the Trust Company, at the time the claim was asserted by stipulation against it in 1905, had long ceased to be a trustee, and had long since ceased to have any trust property in its custody or control. It occupied the position of an ordinary litigant, seeking to shield itself from personal responsibility. The rule of indemnity, therefore, has no application.

(c) A complete answer to the Trust Company's claim for indemnity is found in the fact that the intervenor sought to impose upon the Trust Company the duties and obligations of a trustee with respect to the use of the Union Terminal bonds and their proceeds. It invoked the provisions of the mortgage itself, and the implications thought to arise from the terms of the mortgage, to establish this relationship, and so to make the Trust Company a trustee with respect thereto.

The Trust Company, although a trustee in the mortgage of the Union Company, in its answer denied the existence of any such trust relations, either by law or the express terms of the mortgage, and specifically denied that any duty rested upon it to see that, as said bonds were sold, the proceeds were used in the construction, completion and equipment of the railroad.

We have, therefore, on the part of the intervenor, an assertion of a trust relation with respect to the disposition of the bonds and their proceeds, and, on the part of the Trust Company, a denial that any such trust relationship existed. The master found this issue in favor of the Trust Company, and thereby it was established that no such trust relation existed, or ever had existed.

In other words, the intervenor sought to hold the Trust Company to the duties and obligations of a trustee, in respect

of the disposition of the bonds, or their proceeds, and failed to establish its claim in that behalf. The trustee relationship not being established, the authorities hold that there is no ground for a claim of indemnity. In *Lewin, Law of Trusts,* Twelfth Edition, page 1267, it is said:

> But if the plaintiffs take proceedings for the purpose of creating a fund, of which the defendants would be trustees for the plaintiffs if the plaintiffs succeeded, but the plaintiffs fail, the defendants are entitled as against the plaintiffs to costs only as between party and party.

In *Perry on Trusts,* 6th Ed., 1911, Sec. 896, the same rule is stated, in the following language:

> But where plaintiffs bring a bill against defendants for the purpose of creating a trust fund—as if they bring a bill to convert defendants into trustees under a constructive trust, or to compel the defendants to hold certain property in their hands in trust for the plaintiffs,—the defendants can have costs only as between party and party, if the plaintiffs fail; for the suit in such case turns out to be between strangers (citing Mohun *v.* Mohun, 1 Swanst. 20; Saunders *v.* Saunders, 3 Jr. (N. S.) 728).

Other authorities to the same effect are cited in our original brief (pp. 82-89).

VII.

The fact that complainants sought unsuccessfully to charge the Trust Company with the duties and obligations of a trustee, does not entitle it to the taxation of costs as beween solicitor and client.

The complainants charged that the Trust Company at all times dominated and controlled the Belt Company and the other corporations owned by it, and that by reason of such domination and control, the Trust Company assumed towards them the position and obligations of a trustee. In the Cambria bill, it is alleged that the Trust Company did

"assume the position of trustee and agent in managing and disposing of the bonds, stocks, funds, and other assets of said railroad companies, and auxiliary companies, in trust and for the use and benefit of the parties who might become concerned or interested therein; . . . including particularly creditors thereof and your orator" (S. C., Rec. 6). The Trust Company in its answer to the Cambria bill denied that it assumed the position or the obligations of a trustee in the following language (S. C., Rec. 42):

> Denies that in carrying out any of its plans and purposes, as alleged in the bill of complaint, the defendant assumed the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of said railroad companies and auxiliary companies, in trust, and for the use and benefit of the parties who might become interested therein, as alleged in the bill of complaint; and denies that as a consequence of any such alleged position the relation of this defendant to any of such railroad companies and auxiliary companies in any wise became or was as principal bound and charged with the duty to indemnify or protect any such railroad or auxiliary company in any transaction against any loss, burden or liability, as alleged in the bill of complaint. Denies that it became the duty of the defendant, as to persons becoming interested in any of said railroad companies or auxiliary companies as creditors, to dispose of the stock, bonds, funds or other assets of any such railroad companies or auxiliary companies for the use and benefit of the persons interested therein, or who might become interested therein as creditors or otherwise, as alleged in the bill of complaint.

The issue was thus made by the pleadings. On the one hand, it was alleged that the Trust Company had assumed the position and relation of a constructive trustee, and, on the other hand, this was emphatically denied.

The master found that the Trust Company did not thus assume the position and obligation of a trustee, and his finding was approved by the lower court.

In these circumstances, the law is plain that the rule imposing attorneys' fees as costs in favor of the defendant has no application. The reason is that there is no trustee, no

cestui que trust, and no fund that is being handled or administered. The parties therefore occupy the position of ordinary litigants.

The English and American authorities cited in our original brief (pp. 81-86), which it is unnecessary to again quote, ought, we respectfully submit, to be accepted as conclusive.

VIII.

The litigation conducted by the Trust Company for its own benefit with respect to the collateral security, does not entitle it to the taxation of costs as between solicitor and client.

The Trust Company, on March 21, 1899, the day before the receivership of the Gulf Company, took from the Belt Company, or received from it, the collateral security in question, consisting of stocks, etc.—everything, in fact, which the Belt Company had at the time, which could be used as collateral. All of this the Trust Company proceeded to hold as security for the debt which it alleged the Belt Company owed to it. When this litigation came on, on September 6, 1900, receivers were appointed of all the assets of the Belt Company, of every kind and nature. Later a receiver was appointed for the Northern Townsite Company, whose stock was a part of the collateral in question; and a receiver was also appointed for the Central Improvement Company, whose stock was also a part of the same collateral. A receiver was also appointed for the Elevator Company. Thereafter the litigation concerned solely the question of debt or no debt as between the Belt Company and the Trust Company. As this should be determined, the collateral automatically would remain with the Trust Company or return to the Belt Company.

It cannot be contended that the Trust Company, in litigating the issue of debt or no debt, was acting in the interest of the pledgor. *It was acting solely in its own interest, to protect its own individual claim.* Nor was it seeking to protect the collateral security itself, for it needed no protection. It simply remained throughout the litigation as the pawn or

pledge to be awarded to the successful party when the litigation should end. The only dealing with the collateral during the entire litigation was the sale by the Trust Company, under orders of the Court, of certain Northern Connecting bonds and coupons, for which $40,001.25 was realized and held by the Trust Company in special deposit until the final decree, in which it was ordered to be applied upon the Trust Company's debt (S. C. Rec. 907). That part of the collateral which possessed value, consisting of the property of the Central Improvement Company and, in lesser degree, of the Northern Townsite Company, was being administered by the receivers of those properties, under the direction of the Court (S. C. Rec. 914).

The Trust Company performed no services whatsoever for the benefit of the pledgor, or for the benefit of the collateral itself. It was performing no duties as trustee. An effort was made to establish an implied trust, but it was not successful. The Trust Company's services were rendered, and its efforts expended, in protecting its own interest. In these circumstances, there is, we respectfully submit, no rule of law which permits the Trust Company, as trustee or pledgee, to impose its disbursements for counsel fees upon its adversary.

The authorities which amply sustain our position are quoted in our original brief (pp. 95-98), and it appears unnecessary to do more at this time than merely to refer to them.

IX.

Request for the certification of questions to the Supreme Court.

When all is said and done, this case merely involves the proper execution of the mandate of the Supreme Court (Rec. 465), issued upon the former appeal to that Court, reported in 240 U. S. 166. Did that mandate contemplate and require the taxation of costs as between solicitor and client, or as between party and party? When this Court decides these

questions, it is, after all, merely stating its own conclusion as to what the Supreme Court really intended should be done.

In the last analysis, it is for the Supreme Court to place its own interpretation upon its mandate. Its practice, as we have seen (*St. Louis, K. C. & C. R. Co.* v. *Wabash R. Co.*, 217 U. S. 247, 251), is to issue its writ of *certiorari* to review the action of the Circuit Court of Appeals in passing upon the proper execution of its mandate, where controversies arise in reference thereto. It seems probable that this case, which is now in its twenty-eighth year, will not be finally settled until the Supreme Court has placed its authoritative construction upon its mandate. Should this not be done now? Is there any virtue in waiting longer, with the resulting inconvenience and consumption of time and substance, before this final goal is reached? We can see none.

We respectfully request the Court, therefore, to grant this motion for a rehearing and, if it then entertains any doubt as to the merits of our contentions, to certify to the Supreme Court for its determination the vital and fundamental questions in this case, which, we suggest, might be phrased substantially as follows:

1. Did the Supreme Court, in its opinion and mandate in *The Kansas City Southern Railway Company* v. *Guardian Trust Company*, 240 U. S. 166, direct the District Court to tax the costs as between party and party?

2. Did the Supreme Court, in its opinion and mandate in said cause, direct the District Court to tax the costs, or any part thereof, as between solicitor and client?

The Supreme Court, under Sec. 239 of the Act of 1925, may then either give binding instructions on the questions certified, or may require that the entire record in the case be sent up for its consideration.

Respectfully submitted,

July 14, 1928.

FRANK H. MOORE,
CYRUS CRANE,
A. F. SMITH,
Solicitors for Appellee.

SAMUEL W. MOORE,
of Counsel.

I hereby certify that I am of counsel for the appellee; that, in my opinion, the foregoing motion for a rehearing is well founded, and that it is not made for the purpose of delay.

SAMUEL W. MOORE.

822 • • • • • • •

Memorandum of Clerk:

Appendix A to the foregoing petition for rehearing is omitted pursuant to praecipe, being Petition of The Kansas City Southern Railway Company for leave to introduce Testimony, etc., which appears on pages 33 to 44, inclusive, of this printed record.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 16, 1928.

(Order Denying Petition for Rehearing and Application for Certification of Questions to Supreme Court.)

September Term, 1928.

Thursday, October 18, 1928.

On Consideration of the petition for a rehearing and application for certification of questions to the Supreme Court of the United States, filed by counsel for appellee, it is now here ordered by this Court that said petition and application, be, and they are each hereby denied.

October 18, 1928.

(Motion of Appellee for Stay of Issuance of Mandate.)

Now on this day comes the appellee in the above entitled cause and shows to the Court that it is its intention to apply to the Supreme Court of the United States for a writ of certiorari in the above entitled cause for the certification and transfer of the records and proceedings in this Court to the Supreme Court of the United States. Such application will be made to the Supreme Court of the United States within a reasonable time, and in any event within the time allowed by statute.

823

Wherefore, appellee prays that the mandate in the above entitled cause shall not issue, but that the same may be stayed pending said application for a writ of certiorari.

F. H. MOORE
CYRUS CRANE
A. F. SMITH
Solicitors for Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 7, 1928.

(Order Staying Issuance of Mandate.)

September Term, 1928.

Friday, November 9, 1928.

On Consideration of the motion of appellee for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein, be, and the same is hereby, stayed until January 15, 1929, and if within said period there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed and proof by affidavit of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

November 9, 1928.

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824 (Praecipe for Transcript for Supreme Court, U. S.)

To the Clerk of the said Court:

Confirming previous instructions, please prepare a transcript of the record in the above-entitled cause for filing with a petition for writ of certiorari in the Supreme Court of the United States, and include therein the following matters, viz:

1. Caption.

2. Printed transcript of the record filed in this cause upon appeal from the District Court of the United States for the Western District of Missouri, including the printed transcript of the record filed in the Supreme Court of the United States in cause No. 24092, entitled The Kansas City Southern Railway Company, appellant, versus Guardian Trust Company, et al., appellees (the said cause No. 24092 being cause No. 387, October Term, 1914, and No. 85, October Term, 1915, in said Supreme Court).

3. Order of Submission.

4. Decree of this Court.

5. Opinion of this Court.

6. Motion for rehearing, omitting Appendix A thereof, the latter being the "Petition of The Kansas City Southern Railway Company for Leave to Introduce Testimony", etc., since the said petition is printed in the transcript filed in this Court upon appeal from the said District Court, at pages 33 to 44 thereof.

7. Order denying motion for rehearing.

8. Motion for order staying issuance of mandate, and order entered thereon.

9. Any other orders, journal entries or proceedings in this Court, in their proper order.

10. Copy of this Praecipe.

FRANK H. MOORE
CYRUS CRANE
A. F. SMITH
Solicitors for The Kansas City Southern Railway Company.

825 Service of the foregoing praecipe for record, and receipt of a copy thereof, are hereby admitted and acknowledged this 14th day of November, 1928.

JUSTIN D. BOWERSOCK,
Solicitor for Guardian Trust Company, Henry C. Flower, Receiver.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 15, 1928.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for appellee, in a certain cause

in said Circuit Court of Appeals wherein the Guardian Trust Company, Henry C. Flower, Receiver, is Appellant and The Kansas City Southern Railway Company was Appellee,
826 No. 7784, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that a printed copy of the record filed in the Supreme Court of the United States on the appeal in the case of The Kansas City Southern Railway Company, Appellant, vs. the Guardian Trust Company, et al., Appellees, No. 387 October Term, 1914, File No. 24,092, referred to in the stipulation of parties appearing on page 139 of the printed record to which this certificate is attached and which stipulation is approved by the Order of this Court appearing on Page A of this printed record, and which printed record so filed in the Supreme Court was submitted to this Court with this cause No. 7784, is now being transmitted herewith to the said Supreme Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixteenth day of November, A. D. 1928.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 25, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,930. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 621. The Kansas City Southern Railway Company petitioner, vs. Guardian Trust Company, Henry C. Flower, receiver. Petition for writ of certiorari and exhibit thereo. Filed January 10th, 1929. File No. 33,930.

CLERK'S COPY
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A. C.

Vol. II

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 29

No. 621 22

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

GUARDIAN TRUST COMPANY, HENRY C. FLOWER, RECEIVER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(This volume, a part of the record in this case, is also the record upon which the case of Kansas City Southern Railway Company vs. Guardian Trust Company et al., No. 387, October Term, 1914, reported in 240 U. S., 166, was heard.)

PETITION FOR CERTIORARI FILED JANUARY 10, 1929

CERTIORARI GRANTED FEBRUARY 25, 1929

(33,930)

(24,092)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 387.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

GUARDIAN TRUST COMPANY, CENTRAL IMPROVEMENT COMPANY, CAMBRIA STEEL COMPANY AND KANSAS CITY SUBURBAN BELT RAILROAD CO.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 3, 1915.

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1913, of said Court, before the Honorable Walter H Sanborn, Circuit Judge, and the Honorable John A. Marshall and the Honorable William H. Munger, District Judges.

Attest·

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the sixth day of October, A. D. 1910, a transcript of record pursuant to appeals allowed by the Circuit Court of the United States for the Western District of Missouri was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein the Central Improvement Company, et al., are Appellants, and the Cambria Steel Company, et al., are Appellees, and the Guardian Trust Company is Appellant and the Cambria Steel Company, et al., are Appellees, which said causes were docketed in said Circuit Court of Appeals as Nos. 3489 and 3490 respectively, and which said transcript is in the words and figures following, to-wit:

1 UNITED STATES OF AMERICA, *sct:*

To Cambria Steel Company, The Kansas City Suburban Belt Railroad Company, Edward F. Swinney as Receiver of the Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Guardian Trust Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an order allowing an appeal from a decree of the Circuit Court of the United States for the Western Division of the Western District of Missouri, wherein Central Improvement Company, H. H. Crittenden Receiver of Central Improvement Company are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Smith McPherson, Judge of the Circuit Court of the United States for the Western Division of the Western District of Missouri, this 10th day of August in the year of our Lord one thousand nine hundred and ten.

[Seal U. S. Circuit Court, Western Division, Western District, Missouri.]

SMITH McPHERSON, *Judge.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, sct:

We hereby acknowledge due service of the within Citation this 23 day of August, A. D. 1910.

FRANK HAGERMAN,
Sol. for Cambria Steel Co., Appellee.
EDWARDI P. GATES & GEO. H. ENGLISH, JR.,
Solicitors for Guardian Trust Co.
S. W. MOORE & THOMAS R. MARKS,
Solicitors for K. C. Sub. Belt Ry. Co. & Edward F. Swinney, Its Receiver, and The Kansas City Southern Ry. Co.

2 2468. United States Circuit Court, Western District of Missouri, Western Division. Central Improvement Co. vs. Cambria Steel Co., et al. Citation. Filed August 24, 1910. Adelaide Utter, Clerk.

UNITED STATES OF AMERICA, *sct:*

To Cambria Steel Company, The Kansas City Suburban Belt Railroad Company, Edward F. Swinney as Receiver of the Kansas City Suburban Belt Railroad Company, The Kansas Southern Railway Company, Central Improvement Company, H. H. Crittenden as Receiver of Central Improvement Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an order allowing an appeal from a decree of the Circuit Court of the United States for the Western Division of the Western District of Missouri, wherein the Guardian Trust Company is appellant and you appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Smith McPherson, Judge of the Circuit Court of the United States for the Western Division of the Western District of Missouri, this 10th day of August in the year of our Lord one thousand nine hundred and ten.

[Seal U. S. Circuit Court, Western Division, Western District, Missouri.]

SMITH McPHERSON, *Judge.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, sct:

We hereby acknowledge due service of the within Citation this 23 day of August, A. D. 1910.

FRANK HAGERMAN,
Sol. for Cambria Steel Co., Appellee.
EDWARD P. GATES & GEO. H. ENGLISH, JR.,
Solicitors for H. H. Crittenden, Receiver for Central Improvement Co.
S. W. MOORE & THOMAS R. MARKS,
Solicitors for K. C. Sub. Belt Ry. Co. & Edward F. Swinney, Its Receiver, and Kansas City Southern Ry. Co.

3 & 4 2468. United States Circuit Court, Western District of Missouri, Western Division. Guardian Trust Co. vs. Cambria Steel Co., et al. Citation. Filed August 24, 1910. Adelaide Utter, Clerk.

5 UNITED STATES OF AMERICA, *sct:*

Be it remembered, that heretofore, to-wit, on the 6th day of September, A. D. 1900, there was filed in the office of the clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, a bill of complaint wherein Cambria Steel Company is complainant and The Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Town-site Company are defendants.

Said bill of complaint is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Town-site Company, Defendants.

Original Bill of Complaint.

To the Judges of the United States Circuit Court of the Western Division of the Western District of Missouri, in the Eighth Circuit, Sitting in Equity:

Your orator, the Cambria Steel Company, a corporation organized and existing under and by virtue of the laws of the State of

Pennsylvania and a citizen of said State, brings this its Bill of Complaint against the Kansas City Suburban Belt Railroad Company, Kansas City and Independence Air Line Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Town-site Company, each and all of them corporations organized and existing under and by virtue of the laws of Missouri and citizens and residents of said State, and each of them having their principal office and place of business at Kansas City in said State, and an inhabitant of the Western Division of the Western District thereof, and against The Union Terminal Railroad Company, a corporation organized and existing under and by virtue of the laws of the state of Kansas and a citizen and resident of said state, having its principal office and place of business at the city of Kansas City in said State, and an inhabitant of the First Division of the District of Kansas.

6

And thereupon your orator complains and says that your orator is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office in said state and is a citizen and resident of said state; that the defendants, The Kansas City Suburban Belt Railroad Company (hereinafter called the Belt Company), the Kansas City and Independence Air Line (hereinafter called the Air Line), the Guardian Trust Company (hereinafter called the Trust Company), the Missouri Elevator and Terminal Company (hereinafter called the Elevator Company), the Central Improvement Company (hereinafter called the Central Company), the Second Street Improvement Company (hereinafter called the Second Street Company), the Fairmount Amusement Company (hereinafter called the Amusement Company), and the Northern Town-site Company (hereinafter called the Town-site Company), are each and all of them corporations organized and existing under and by virtue of the laws of the state of Missouri; that each of them has its principal office in Kansas City in said State, and that each of them is a citizen and resident of said state of Missouri and an inhabitant of the Western Division of the Western District thereof, and that the defendant, The Union Terminal Railroad Company, (hereinafter called the Union Company) is a corporation organized and existing under and by virtue of the laws of the state of Kansas, has its principal office in the City of Kansas City in the county Wyandotte in said state of Kansas, and is a citizen and resident of said state of Kansas and an inhabitant of the First Division of the District of Kansas.

Your orator further shows that from the date of its incorporation about the year 1885, or prior thereto, until about the month of June, 1899, the name of the said Guardian Trust Company was "Missouri, Kansa s and Texas Trust Company," and that in or about said month of June, 1899, the said Missouri, Kansas and Texas Trust Company, did, in accordance with the provisions of the statutes of Missouri in such cases made and provided, change its name to Guardian Trust Company.

7

Your orator further shows that at various times between the first day of November, 1897, and the first day of March, 1898, the Belt Company became indebted to your orator for steel rails purchased, to the amount of about One Hundred Thousand ($100,000) Dollars, and that the larger part of said indebtedness being unpaid, your orator therupon brought suit in this Honorable Court against the said Belt Company upon the abligations given to evidence the balance then due upon said indebtedness, and in said suit did recover a judgment of this Honorable Court against the said Belt Company, to-wit: on the 6th day of September, 1900, for the sum of $100962.91, no part of which has been paid, but all of which remains due to your orator; that having so recovered said judgment, your orator caused a writ of execution to be issued thereon directed to the Marshal of the United States for the Western District of Missouri and against the said Belt Company, and the said Marshal, prior to the filing of this bill, did return the said execution wholly unsatisfied for want of property of the said Belt Company upon which to levy the same; and that the said Belt Company is utterly insolvent and has no property subject to be reached by legal process to be issued aganst it upon the judgment so recovered by your orator as aforesaid.

Your orator further shows that prior to the year 1887 the said Trust Company conceived and entered upon the plan and purpose to cause to be constructed a large number of railroads in and about Kansas City in the state of Missouri and leading from or to said city; that it was a part of the said plan and purpose of the said Trust Company to cause said railroads to be built, constructed and operated by various corporations to be organized by the said Trust Company and to elect various officers, agents and representatives of the said Trust Company to be the officers and directors of the said several railroad companies, so as at all times to absolutely dominate and control the actions of the said railroad companies and their several directors and officers; that it was still further a part of said plan and purposes of said Trust Company to organize a large number of auxiliary corporations, either in the way of construction companies to construct and build said several lines of railroad or in the way of companies to hold the legal title to lands, buildings, and other structures necessary to be used by the said railroad companies in their operations or for purposes incident thereto, and to also cause various officers, agents, employees and other representatives of said Trust Company to become the officers and directors of each
8 and all of the said last mentioned construction and auxiliary companies so as thereby to be enabled to completely dominate and control the actions of the said construction and auxiliary companies and of their several officers and directors; and that it was also a part of the plans and purposes of the said Trust Company to utilize and employ some one or more of the said railroad companies or auxiliary companies to act for and on behalf of the said Trust Company in carrying out various portions of the above said general plan and purpose of the said Trust Company, so as to gather unto said Trust Company all the profits and other advantages ac-

cruing in the premises and with the purpose and intent on its part to undertake to foist upon the said railroad company or auxiliary company so utilized, and upon those (other than said Trust Company) who might become interested in said railroad companies or auxiliary companies, or any of them, particularly by becoming creditors thereof, any and all losses, [burdends], or other liabilities which might result in the premises; and that in carrying out its said plans and purposes, the said Trust Company did assume the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of said railroad companies and auxiliary companies in trust and for the use and benefit of the parties who might become concerned or interested therein; and that consequently the relation of the said Trust Company to each and all of the said railroad companies and auxiliary companies, so far as the said Trust Company might employ the same, or either of them as agents and instrumentalities to further its own plans and purposes, was that of principal bound and charged with a duty to indemnify and protect the railroad Company or auxiliary company so employed and utilized in any particular transaction, against any and all losses, burdens and liabilities arising in the premises, and that so far as persons becoming interested in the said railroad companies and auxiliary companies, or either of them, as creditors or otherwise, it became and was the duty of the said Trust Company, as trustee, having charge of the management, disposition and control of the stocks, bonds, funds and other assets of said railroad companies and auxiliary companies, or either of them, to so handle, manage and dispose of the same for the use and benefit of the persons interested, or who might become interested, in the said railroad companies and auixliary companies, or either of them, including particularly creditors thereof and your orator.

Your orator further shows that in pursuance of the plans and purposes so conceived and entered upon by the said Trust Company as aforesaid, the said Trust Company did on or about the first day of January, 1887, cause a corporation to be formed
9 under the laws of the state of Missouri known as the "Kansas City Suburban Belt Railroad Company" (hereinafter called the Suburban Company) for the stated and avowed purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas, and that it did thereupon cause said Suburban Company to build a portion of said projected line, namely; from a point at or near Second Street and Broadway in Kansas City, Missouri, eastwardly and southwardly to a point at or near the mouth of Brush Creek, in Jackson County, Missouri; that it did also cause the said Suburban Company to place a mortgage upon its property, then held and to be thereafter acquired, to secure an issue of its bonds aggregating One Million Dollars ($1,000,000.) and to issue and deliver the said bonds to the said Trust Company; that as your orator is informed and believes, the said Trust Company thereupon proceeded to sell and dispose of the said bonds and all of the same are now outstanding; and that default having been made in the payment of interest heretofore accruing upon the said bonds,

the principal thereof has been reclared to be due and payable according to the terms and provisions of the mortgage securing the said bonds, and that a bill to foreclose said mortgage has been filed and is now pending in this Court; and that the said Trust Company likewise caused various of its officers, agents and employees to be elected and constituted the officers and directors of the said Suburban Company and by means thereof did absolutely dominate and control the affairs and *and* actions of the said Suburban Company continuously until its consolidation as hereinafter stated; that subsequently, to-wit; on or about the 21st day of May, 1891, the said Trust Company, instead of carrying out and completing the projects and purposes for which the said Suburban Company was stated to have been formed, and in order to benefit itself in the premises, did cause the Consolidated Terminal Railway Company (hereinafter called the Terminal Company) to be incorporated under the provisions of the laws of the state of Missouri for the purpose, as stated in its articles of incorporation, of likewise constructing and building a line of railroad to encircle the said cities of Kansas City, Missouri, and Kansas City, Kansas; that thereupon the said Trust Company did cause the said Terminal Company to place a mortgage upon all its property, constructed and to be constructed, owned and to be acquired, to secure an issue of its bonds aggregating $750,000, and to issue and deliver the said bonds to the said Trust Company; that the said Trust Company thereupon proceeded to sell and dispose of the said bonds and the same are now outstanding; that de-
10 fault having occurred in the payment of various installments of interest heretofore accruing upon said bonds, the principal of said bonds, as your orator is informed and believes, has been declared to be due and payable in accordance with the terms and provisions of said mortgage and a suit has been brought and is now pending in this court to foreclose the said mortgage; that the said Trust Company caused various of its officers, agents and employees to be elected as the officers and directors of the said Terminal Company and thereupon proceeded to absolutely dominate and control the actions and doings of the said company and its officers and directors continuously until its consolidation as hereinafter stated; and that instead of completing the line of railroad of said Terminal Company specified and mentioned in its articles of incorporation, said Trust Company caused only a part thereof to be built, to-wit; commencing at or about the said Western terminus of said Suburban Company above specified and running thence westwardly through Kansas City, Missouri to the state line between the states of Missouri and Kansas; that in further pursuance of its plans and purposes, the said Trust Company did on or about the 30th day of December, 1891, cause the defendant, The Union Terminal Railroad Company to be incorporated under the laws of the State of Kansas for the purpose of building that part of the belt railroad mentioned and outlined in the articles of association of the said Suburban Company and Terminal Company which would lie in and encircle the city of Kansas City in the state of Kansas, and did thereupon cause the said Union Company to place a mortgage upon

the railroad proposed to be built by it and upon its property then owned or to be thereafter acquired, to secure an issue of bonds aggregating Two Million Dollars, and to issue and deliver said bonds to the said Trust Company and to cause the said Union Company to build a part of the line specified in its articles of association, to-wit: beginning at the western terminus of the line so built by the said Terminal Company as aforesaid: namely: at the said line between the states of Missouri and Kansas, and running thence to the city—Argentine in the State of Kansas; that as your orator is informed and believes the said Trust Company did thereupon sell and dispose of all of said bonds and all of the same are now outstanding; that default having occurred in the payment of various installments of interest heretofore accruing upon said bonds, the principal has been declared to be due and payable according to the terms and provisions of said mortgage and a suit to foreclose said mortgage has been brought and is now pending in this court; that the said Trust Company caused various of its officers, agents and employees to be elected as the officers and directors of the said Union Com-
11 pany, and by means thereof did continuously, until about the month of April, 1900, dominate and control the actions and affairs of said Union Company and its officers and directors; that by means of its control and domination as aforesaid the said Trust Company did cause the said Suburban Company to endorse upon each of the bonds so issued by the said Terminal Company and said Union Company, its guaranty for the payment of the principal and interest thereof; and that the said Trust Company, by reason of its domination and control as aforesaid, did on or about the 25th day of July, 1892, cause the said Suburban Company and said Terminal Company to be consolidated in accordance with the provisions of the statute of the state of Missouri in such cases made and provided and thereby to form the defendant Belt Company; and that the said Trust Company caused various of its officers, agents and employees to be elected as the officers and directors of said Belt Company and by means thereof did continuously, until about the month of April, 1900, completely dominate and control the actions and affairs of said Belt Company and its officers and directors; and that in furthur pursuance of its plans and purposes as aforesaid the said Trust Company did cause the said Air Line to be incorporated under the laws of the state of Missouri on or about the 23rd day of January, 1891, for the purpose of building a line of railroad from and connecting with the line of the said Suburban Company to the city of Independence in the state of Missouri, and did cause the said Air Line to place a mortgage upon its property, then owned or to be thereafter acquired, to secure an issue of bonds aggregating Three Hundred Thousand ($300,000) dollars and to issue and deliver the said bonds to the said Trust Company; that the said Trust Company thereupon sold and disposed of the said bonds and the same are now outstanding; that default having occurred in the payment of various installments of interest heretofore accruing on said bonds, the principal thereof has been declared to be due and payable according to the terms and provisions of the mortgage securing

the same and suit to foreclose the said mortgage has been brought and is now pending in this court; that the said Trust Company likewise caused various of its officers, agents and employees to be elected as the officers and directors of the said Air Line so as to absolutely dominate and control the affairs of the said company and the actions of its said officers and directors; and that by means of its said domination and control the said Trust Company did cause the various lines of railroad of the said Suburban, Union Terminal and Belt Companies, respectively, and of the said Air Line to be operated as constituting one entire, allied, continuous system of railroad. And that at all times, up to said month of April, 1900, the said Trust Company caused all or substantially all of the shares of the
12 capital stock of said several railroad companies to be issued to and held and voted, either by some one or more of the railroad companies so controlled or dominated by it as aforesaid, or by and in its own name, or by and in the name of some one or more of its officers, agents and employees for and on its behalf and so as to serve its aforesaid plans and purposes and to enable it to effectuate the same and its absolute control of and dominion over said several railroad companies and each of them and their respective properties, actions and affairs.

Your orator is informed and believes that a total cost of the lines of said Suburban and Terminal companies consolidated into the Belt Company, as aforesaid, did not cost to exceed One Million Seven Hundred Thousand Dollars, and that there were issued and delivered to the said Trust Company, by the said three last named railroad companies, bonds and stocks aggregating, as your orator is informed and believes, over Five Million Dollars, and that the said Trust Company claims that it has applied the excess of said securities over the actual cost of said properties, in payment of its own commissions and services in the premises and by way of allowance of certain discounts in the sale and disposal of said securities; your orator is informed and believes that the cost of the railroad and other property of the said Union Company did not exceed Eight Hundred and Sixty Five Thousand Dollars, and that the said Trust Company received into its possession the bonds and stocks of the said Union Company to the amount of Four Million Dollars and claims that it has applied the excess of the amount of said bonds and stocks over the said cost of said road in payment of its own services and commissions in the premises, and in the way of an allowance of discounts in the sale and disposal of said securities; and that your orator is informed and believes that the cost of said Air Line did not exceed Two Hundred Thousand Dollars, and that said Trust Company received into its possession bonds and stocks of the said Air Line to the amount of Eight Hundred and Fifty Thousand Dollars and claims that it has applied the excess of said securities over the cost of said railroads, in payment of its own services and commissions in the premises, and in the allowance of certain discounts in the sale and disposal of said securities. Your orator is informed and believes that the said Trust Company has often been requested to make a true and correct accounting of its trusteeship

in respect of the sale and disposal of such bonds and stocks, but has hitherto failed and still fails and refuses to make such accounting; that the facts in respect of the sale and disposal of the said securities and the application of the proceeds thereof, are
13 peculiarly and solely within the knowledge of said Trust Company, and your orator is unable to state the said account, or how much is due by the said Trust Company, by reason of the premises, but alleges that upon a correct and proper accounting between the parties the said Trust Company owes the said Belt Company a large amount, by reason of the premises last mentioned, all of which is justly and equitably applicable to the payment of your orator's aforesaid judgment against the said Belt Company.

Your orator further shows that in pursuance of its aforesaid plans and purposes to organize auxiliary companies for the purpose of taking and holding the legal title to property necessary to be used in connection with the railroads of the said several railroad companies above mentioned or incidental thereto, and with the fraudulent intent and purpose of preventing the properties so taken in the names of said auxiliary companies, respectively, from being reached by the creditors of said railroad companies or either of them and particularly by the creditors of the said Belt Company, said Trust Company did contrive the formation of the said Elevator, Amusement, Central Second Street and Town-site companies, respectively; that the said Trust Company did caus various of its officers, agents and employees to be selected as the incorporators, stockholders, officers and directors of the said several auxiliary companies, and by means thereof, did at all times dominate and control the management of the said several auxiliary companies and the actions of the stockholders and boards of directors thereof; that, as your orator is informed and believes, all or substantially all, of the moneys invested in the purchase, improvement and acquisition of the several properties of the said auxiliary companies and each of them, was paid and supplied by the said Belt Company, and each and every one of the said auxiliary companies was a mere device or "dummy" contrived and provided by the said Trust Company as a means for taking and holding the naked legal title to such properties as might be vested in the said auxiliary companies, respectively, for the use and benefit of the said Belt Company, and that, as to the creditors of the said Belt Company and particularly as to your orator, the properties and shares of stock of each and every of the said auxiliary companies in equity belongs to the said Belt Company and are chargeable with the lien and payment of your orator's aforesaid judgment against the said Belt Company; a list of real estate in the name of the auxiliary companies so far as known to complainant, is attached hereto as "exhibit 2".

Your orator further shows that during the year 1897, the said Trust Company entered into contracts for the purpose of
14 gaining large benefits and advantages therefrom, with several railroad companies owning and operating lines of railroad in Northwestern Missouri and in Southwestern Iowa, to-wit; the Omaha & St. Louis Railroad Company and the Quincy, Omaha

& Kansas City Railroad Company, and the Omaha, Kansas City and Eastern Railroad Company, by which the said Trust Company agreed and bound itself to provide for each of the said last mentioned railroad companies a railroad connection with an entrance to Kansas City, Mo.; that such connection and entrance necessitated the construction on behalf of said Trust Company of a line of railroad from Kansas City, Missouri, to the town of Pattonsburg in said state; that said trust Company being desirous to gain and reap unto itself all the benefits and advantages of said contracts, and of relieving itself of all burdens, obligations and losses by reason thereof, did, by means of its domination and control of the said Belt Company and of its officers and directors, conclude and contrive that it would cause the said Belt Company to enter into a pretended contract for the construction of said line of railroad from said Kansas City to said Pattonsburg; that said Trust Company did, thereupon, cause to be formed a corporation under the laws of the state of Missouri, known as the Kansas City & Northern Connecting Railroad Company (hereinafter called the Northern Connecting Company), for the purpose of holding the title of said last mentioned link or line of railroad, and did cause certain of its officers, directors and agents to become the officers and directors of the said Northern Connecting Company, so as to absolutely dominate and control its management and affairs and the action of its officers and directors, and that, in pursuance of its said plans and to accomplish its aforesaid purposes and designs, the said Trust Company thereupon did cause the said Belt Company, as aforesaid, so dominated and controlled by it as aforesaid, on or about the — day of ——, 1896, to go through the form of entering into a contract with the said Northern Connecting Company, so dominated and controlled by the said Trust Company as aforesaid, for the construction in the name of said Belt Company, but as agent and for the use and benefit of said Trust Company of the said link or line of railroad as aforesaid; that the said Trust Company did cause the said Northern Connecting Company to issue its certain bonds and stocks for the purpose of paying for said construction, and the said Trust Company did cause the said stocks and bonds to be delivered partly into its own possession and control, and partly into the possession and control of the said Belt Company, so controlled and dominated by it as aforesaid; that in pursuance of its plans aforesaid, the said Trust Company did undertake to charge to the account of the said Belt Company all moneys expended by the said Trust Company for the purpose of constructing the said link or line of railroad of the said Northern Connecting Company, and went through the form of giving said Belt Company credit for the proceeds of all securities of the said Northern Connecting Company sold and disposed of by the said Trust Company, less such charges as the Trust Company saw fit to make in the premises for its own services and commissions in making said sale, and for such discounts as the said Trust Company saw fit to claim it had allowed in making said sale and disposition. That the result of the construction of said link or line of the Northern Connecting Company was a loss of over Three Hundred Thousand Dollars, which amount

your orator avers is justly and properly chargeable to the said Guardian Trust Company, and should be borne by it, but which the said Guardian Trust Company wrongfully claims constitutes a liability on the part of said Belt Company to it. Your orator says that the said Belt Company was without lawful power either to make said contract for the construction of the railroad of the said Northern Connecting Company, and that said contract was ultra vires the powers of the said Belt Company under its charter and the laws of the State of Missouri, all of which the said Trust Company well knew; and your orator further charges that by reason of the fact hereinabove alleged, the said Belt Line Company was a mere instrumentality and agency, designated and used by the said Trust Company in and about the construction by the said Trust Company, as principal, of the said link or line of railroad of the said Northern Connecting Company, and that, therefore, the said Trust Company was and is bound to assume and make good out of its own funds any and all losses resulting from the construction of said Northern Connecting Company, and that the act of the said Trust Company in undertaking to charge the said loss to the said Belt Company, and in claiming the same as a liability in its favor against the said Belt Company, was, as to the creditors of the said Belt Company, fraudulent in fact and in law.

Your orator further shows that in pursuance of its general plans and purposes hereinbefore outlined, the said Trust Company did also cause to be organized a corporation under the laws of the state of Missouri under the name of the Kansas City, Pittsburg & Gulf Railroad Company, for the purpose of constructing and operating a line of railroad, for the use and benefit of said Trust Company, from Kansas City in the state of Missouri, to a point on the Gulf of Mexico at or near Port Arthur in the state of Texas, and caused the said Kansas City, Pittsburg & Gulf Railroad Company
16 to make a mortgage to secure an issue of bonds therein specified; that prior to the first day of April, 1899, there were issued, and there were then outstanding bonds of the Kansas City, Pittsburg & Gulf Railroad Company, so secured by the mortgage aforesaid, aggregating the principal of Twenty Three Million Dollars; that on the first day of April, 1899, default was made in payment of an installment of interest due on said bonds, and the said Kansas City, Pittsburg & Gulf Railroad Company was wholly insolvent; that a bill to foreclose the said mortgage was thereupon filed and the property of the said Kansas City, Pittsburg & Gulf Railroad Company passed into the hands of receivers appointed by this Honorable Court and thereupon such proceedings were had that a decree of foreclosure was entered in said cause on or about the fifth day of February, 1900, and the property of said Kansas City, Pittsburg & Gulf Railroad Company sold under the terms thereof.

Your orator further shows that for some months prior to said first day of April, 1899, and all times thereafter, the said Trust Company was aware and had knowledge of the fact that said default, receivership, foreclosure and sale of the said Kansas City, Pittsburg

& Gulf Railroad company were inevitable and was also aware and had knowledge of the fact that such default, receivership, foreclosure and sale would necessarily and inevitably cause and result in default in the payment of installments of interest accruing on the said several mortgages of the said Suburban, Terminal, Union and Belt Companies, of the said Air Line, and of the said Northern Connecting Company, and would cause each and all of the said companies, and also the aforesaid auxiliary companies, and each of them, to become insolvent and to be unable to continue their respective operations and to pay their liabilities as the same matured; and that being aware and having knowledge of the facts aforesaid, the said Trust Company contrived and planned to gather and appropriate unto itself all of the stocks, bonds and other assets and property of the said railroad and auxiliary companies last mentioned, and particularly those of the defendant Belt Company, and to cause the same, under various pretenses and because of various false and unfounded claims and demands advanced by said Trust Company to be delivered to the said Trust Company, to be held by it as alleged collateral security for various pretended claims and demands which it fraudulently asserted to exist in its favor as against said Belt Company, and for the purpose of hindering, delaying and defrauding the creditors of the said Belt Company in the collection of their respective demands, and particularly your orator in the collection of its demands hereinbefore mentioned.

17 Your orator further shows that in pursuance of said last mentioned plan, the said Trust Company, so dominating and controlling the officers and directors of the said Belt Company as aforesaid, did cause the said Belt Line Company to go through the form, at various dates between the thirty-first day of March, 1899, and the ninth day of February, 1900, of executing to the said Trust Company a number of pretended negotiable promissory notes of the said Belt Company for amounts aggregating as your orator is informed and believes, about the sum of Five Hundred Thousand Dollars, and that for the pretended purpose of securing the payment of said pretended promissory notes, the said Trust Company, so dominating and controlling the said Belt Company and its officers and directors, did cause the latter to go through a form of delivering to the said Trust Company, to be held by it for the purpose of securing the said promissory notes, so in form made to it by the said Belt Company as aforesaid, all of the bonds, stocks and *and* other securities, and all of the movable personal property and other assets of the said Belt Company.

Your orator is informed and believes that among the pretended notes so fraudulently caused to be made, in form, by said Belt Company to said Trust Company and among the stocks of the said Belt Company so fraudulently caused to be delivered, in form, by said Belt Company to said Trust Company, and which are now claimed to be held by said Trust Company, are the following, to-wit:

Note dated March 31st, 1899, due July 2nd, 1899, for $50,000 with interest at the rate of 6% per annum from said date. On this note was credited on June 14th, 1900, $12,500.

Note dated November 7th, 1899, due January 9th, 1900, for $50,000 with six per cent interest per annum from said date. On this note is a credit of June 14th, 1900, of $12,500.

Note dated February 8th, 1900, due May 12th, 1900, for $109,500 with interest at the rate of eight per cent per annum from maturity.

Note dated July 26th, 1899, on demand for $203,900 with interest at the rate of six per cent per annum from date. On this note is a credit of June 11th, 1900, of $9,996.65.

A note dated September 21st, 1899, due on demand for $23,056.48 with interest thereon from date at the rate of eight per cent per annum.

A note dated October 23rd, 1899, due on demand for $7,162.40, with interest thereon at the rate of eight per cent per annum from date.

18 338 first mortgage thirty year 5% gold bonds of the Kansas City & Northern Connecting Railroad Company of the denomination of $1,000 dated January 1st, 1897, being bonds numbered 1467, 1769 to 1773 both inclusive; 1799 to 1818 both inclusive; 1324 to 1331 both inclusive; 1756 to 1768 both inclusive; 1184 to 1216 both inclusive; 1466, 1369 to 1400, both inclusive; 1431 to 1440 both inclusive; 1609 to 1658 both inclusive; 1659 to 1708 both inclusive; 1819 to 1851 both inclusive; 1774 to 1798 both inclusive; 1301 to 1323 both inclusive.

67.9 second mortgage thirty year five per cent income bonds of the Kansas City Northern Connecting Railroad Company of the denomination of One Thousand Dollars ($1,000.) each dated January first, 1897, being bonds numbered 1064 to 1098 both inclusive; 1149 to 1157 both inclusive; 1162 1173 both inclusive; 1192 to 1202 both inclusive; also certificate numbered 229 entitling the holder to 250/1000 of said mortgage income bonds and certificate No. 227 entitling the holder to 250/1000 of said second mortgage income bonds; and certificate No. 220 entitling the holder to 150/1000 of said second mortgage income bonds.

25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100 each as evidenced by certificates numbered 9, 6, 5 and 4.

1120 shares of the capital stock of the Central Improvement Company of the par value of $100 each as evidenced by certificates numbered 148, 149, 147.

439 shares of the capital stock of the Northern Townsite Company of the par value of $100 each as evidenced by certificate No. 11; and

425 shares of the capital stock of the Missouri Elevator & Terminal Company of the par value of $100 each as evidenced by certificates numbered 36, 34, 37, 40 and 38.

Your orator is informed and believes that said Trust Company as part and parcel of the scheme contrived by it as aforesaid has caused the said Belt Company to go through the form of fraudulently making to it certain other and further pretended promissory notes and has fraudulently caused said Belt Company to go through

the form of delivering to it certain other personal property for the pretended purpose of securing said fraudulent and alleged promissory notes of said Belt Company. Your orator is unable to give or obtain a description of said other alleged notes, but alleges that they aggregate a large sum, to-wit: more than $100,000.00. And your orator further shows that among the further property of the
19 Belt Company which the said Trust Company so fraudulently caused to be delivered to it, as aforesaid, was and is the following, to-wit:

19,997 shares of the 20,000 shares constituting the capital stock of the said The Union Terminal Railroad Company, and 4,994 shares out of the 5,000 shares constituting the capital stock of the said Kansas City & Independence Air Line, all of which shares the said Trust Company as your orator is informed and believes has heretofore undertaken to sell and dispose of, also, about 600 tons of the new steel rails heretofore purchased from your orator as hereinbefore averred, by and then belonging to said Belt Company and on store in its yards, which the said Trust Company has likewise sold and disposed of; also $76,000 in first mortgage bonds and $15,000 in second mortgage bonds of the Northern Connecting Company which are still held by or for said Trust Company. And your orator charges that in some way unknown to it, the said Trust Company has also appropriated fraudulently unto itself and for its advantage and without consideration or right, all the shares of the capital stock of the Second Street Improvement Company and a large number of the shares of stock of the Central Improvement Company, constituting, in connection with the 1120 shares above mentioned, all, or substantially all, of the capital stock of the said Central Improvement Company; and also a large number of the shares of the capital stock of the Northern Townsite Company, constituting, in connection with the 439 shares above mentioned, all, or substantially all, of the capital stock of the last named company; and also a large amount of other property of said Belt Company, consisting of other stocks and bonds, and of notes, claims and demands in favor of said Belt Company, and of various items of personal assets, a particular description of which is unknown to your orator and concealed by said Trust Company. Your orator charges that each and all of the aforesaid shares of stock, assets and other personal property so passing into the possession of the said Trust Company, constitute assets and property of the said Belt Company, equitably and justly chargeable with the lien and payments of your orator's aforesaid judgment, and that the said shares of stock and other property were fraudulently taken into the possession of said Trust -company without consideration moving from the said Trust Company, and that said Trust Company has no right to such possession or title to any part of said stocks, or property.

Your orator further shows that the said Trust Company is totally insolvent; that it has outstanding a large number of matured obligations, the holders of which are pressing the said Trust Company for payment thereof, and that the said Trust Company is wholly
20 unable to meet such demands; that said Trust Company has ceased the active conduct of business and its affairs are in

process of liquidation; that the said Trust Company is threatening to proceed to sell the negotiable promissory notes which it so fraudulently caused the said Belt Line Company to go through the form of executing to it as aforesaid and the various shares of stock and other property which it claims to hold as collateral thereto, all to the end that the creditors of said Belt Company, and particularly your orator, may be hindered, delayed and defrauded of their just rights and remedies in the premises; and your orator verily believes that unless enjoined from doing so, as hereinafter prayed, the said Trust Company will carry its said threats into execution.

And your orator is informed and believes that on or about the first day of September, 1900, by a notice, a copy of which is hereto attached as "Exhibit 1", the said Trust Company undertook to declare and advise said Belt Company that it, the said Trust Company, would without any reservation, proceed, on the 7th day of September, 1900, at twelve o'clock, noon, to sell to the highest bidder, at public auction the said 338 first mortgage bonds, 67.9 second mortgage bonds and three certificates of the Northern Connecting Company hereinbefore described; and, also, the 25 shares of the Amusement Company's stock, the 1120 shares of the Central Company's stock, the 439 shares of the Townsite Company's stock, and the 425 shares of the Elevator Company's stock hereinbefore described; all under the pretence that it was entitled so to do by virtue of the said alleged notes and alleged delivery of said securities which the said Trust Company so fraudulently caused the said Belt Company to go through the form of making to it as aforesaid.

Your orator further shows that the property held in the name of the Elevator Company, a corporation contrived by the said Trust Company as aforesaid, as a device and dummy to take and hold the legal title to said property for and on behalf of the Belt Company, and which property is equitably and justly chargeable with the debts and liabilities of the said Belt Company, consists, among other things, of three (3) elevators known respectively as the "Star", "Eclipse", and "Diamond" Elevators, which are located in the Northeastern part of Kansas City, Missouri, and adjacent to the railroad of said Belt Company, and that the same are necessary and indispensable to a proper operation of said Belt Company's property; that the property held in the name of said Central Company consists, among other things, of various tracts of real estate in Kansas City, Missouri, acquired for the use of the said Belt Line
21 and necessary and indispensable to such use, for station grounds, yards, switches, side tracks and necessary buildings, and that said property as hereinbefore alleged, is in equity the property of the said Belt Line, the said Central Company being a mere device and dummy contrived by the said Trust Company to hold and carry the legal title thereto for the use and benefit of the said Belt Line and its creditors; that the property held in the name of the said Second Street Company consists, among other things, of certain tracts of real estate in or near Kansas City, Missouri, and used and indispensably necessary to be used by the said Belt Company for depot grounds, necessary buildings, right of way, yards,

freight houses and machine shops; that the said Second Street Company was contrived by the said Trust Company as aforesaid, as a mere device and dummy to take and hold the legal title to said property for the use and benefit of said Belt Company, and that the said property in equity belongs to the said Belt Company and is chargeable with the debts and liabilities thereof, including the judgment of your orator as aforesaid; that the property and assets, the legal title to which is held by the said Amusement and the said Townsite Companies, respectively, are likewise essential and indispensably necessary to the successful operation of the property of the said Belt Line, and that the said two last mentioned companies are likewise devices and dummies contrived by the said Trust Company for the purpose of taking and holding the legal title to said assets and properties for the use and benefit of said Belt Company as the equitable owner thereof, and that such assets and property so held are equitably and justly chargeable with the claims and demands of the creditors of the said Belt Company, and particularly the judgment so obtained by your orator as aforesaid. Your orator further shows that the management and control of the assets and property of said auxiliary companies is still in the hands and under the domination and control of the said Trust Company by means of its various officers, agents and representatives acting as officers and directors of said auxiliary companies, and that by reason of holding possession of the said shares of stock in the said companies respectively, by means of the transactions as aforesaid, the said Trust Company is still [enable-] to and does control and dominate the management of the said several companies and the actions and doings of their respective officers and directors. Your orator further shows that it is necessary to the protection of the interests of the creditors of the Belt Company, and particularly of your orator,

22 in the premises that a receiver or receivers be appointed of and for all of the property and assets held by or in the name of or for the use and benefit of or in trust for the defendants Belt Company, Elevator Company, Amusement Company, Central Company Second Street Company and Townsite Company and of and for the several shares of stock in the said five last named companies held by or standing in the name of the said Trust Company, and also of and for the bonds of the said Northern Connecting Company so in the possession of the said Trust Company as aforesaid, and also for and of any and all other properties or assets passing from the said Belt Company to the said Trust Company by means of the transactions occurring between said thirty-first day of March, 1899, and ninth day of February, 1900, hereinabove set forth; and further that such receivership shall be extended to and made to cover the railroads and — of the other properties of the said Belt Company, Union Company, and Air Line respectively, as an entirety, so that the same may be operated as an allied and continuous system. Your orator further shows that the control and domination of the affairs of said Belt Company by said Trust Company hereinabove set forth, ceased during the month of April, 1900, when, by reason of an election held by the then stockholders of

said Belt Company the officers, agents and representative- theretofore controlling and managing the affairs and property of said Belt Company were displaced.

Your orator brings this bill as well for itself, as for the benefit of all other creditors and persons interested in said Belt Company, similarly situated, and willing to become parties to this action and to contribute to the expense thereof.

In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law and in relievable in a court of equity where matters of this kind are properly cognizable and relievable, your orator therefore prays the aid of this Honorable Court.

(*a*) That an accounting be taken of the various transactions and dealings between the said Trust Company and the said Belt Company, or by the said Trust Company for the use and benefit of and as trustee and agent for the said Belt Company, and that the said Trust Company be required to pay from the balance found to be due by it upon such accounting, and that in taking such accounting all claims and demands alleged or pretended by the said Trust Company to exist in its favor against the said Belt Company by reason of transactions in which the said Belt Company was used as an agency or instrumentality of the said Trust Company, be charged to and against the said Trust Company, and that the said Trust Company be decreed to make good any and all losses
23 defrayed or incurred in such transactions out of the assets or other property of said Belt Company.

(*b*) That the said Trust Company be decreed to hold the shares of stock hereinbefore described respectively in the Elevator Company, the Amusement Company, the Central Company, the Second Street Company and the Townsite Company, and the aforesaid bonds of the Kansas City & Northern Connecting Railroad Company, in trust for the use and benefit of the creditors of said Belt Company, and particularly of your orator, and that said Trust Company be decreed to account for the value of all other assets or property of said Belt Company which have come into its possession or control.

(*c*) That the property and assets, the legal title to which is held, respectively, by the said Elevator Company, Amusement Company, Central Company, Second Street Company, and Townsite Company be declared to be in equity the property of the said Belt Company and chargeable with the lien and payment of the debts and liabilities of the said Belt Company, and, particularly, the judgment aforesaid of your orator.

(*d*) That the assets and property of the said Belt Company, real, personal or mixed, and wheresoever situated, including all rights of action, legal or equitable, be marshalled for the benefit and protection of all persons concerned therein;

(*e*) That the rights and interests of all persons in and to the said assets of the said Belt Company, be ascertained, adjudicated and decreed.

(*f*) That the said assets and property, and each and every part

thereof, be sold and the proceeds thereof, after paying the costs and expenses of this proceeding and all allowances which may be made therein, be distributed among those found to be entitled thereto; and

(*g*) That your orator may have such further and other relief in the premises as the nature of this case may require and to this Court may seem meet.

And your orator further prays that a receiver or receivers be appointed according to the course of practice in this Court, with the usual powers of receivers in like cases, of and for all the property, equitable interests, choses in action, effects, money, receipts, earnings, rights, privileges, franchises, immunities; stocks; bonds; and securities of said Belt Railway, all the stocks and bonds, respectively, of the said Elevator Company, Amusement Company, Central Company, Second Street Company, Townsite Company
24 and Northern Connecting Company so passing in the hands of the said Trust Company, as hereinbefore alleged, and every part thereof, and of and for the property and assets, real, personal or mixed, the legal title to which is held, respectively, by the said Elevator Company, Amusement Company, Central Company, Second Street Company, and Townsite Company and that said receivers be authorized and directed by and with the consent of the court of appropriate ancillary jurisdiction, to assume also the operation and maintenance of the railroads and other property of said Union Company, and that said receivers be authorized and directed to institute all proper proceedings for the recovery of all assets and demands belonging to or existing in favor of the said Belt Company, and generally with powers and directions to take such steps as may be necessary for the full protection of all persons concerned and interested in the said Belt Company.

And your orator further prays that a writ of injunction may be issued out of and under the seal of this Honorable Court, or issued by one of your Honors, directing, commanding, enjoining and restraining the said defendants and each of them and all other persons from interfering with, transferring, selling or disposing of any of the property hereinbefore mentioned, and particularly that the said Trust Company and all other persons may be enjoined and restrained from selling or disposing of any part of the said negotiable promissory notes of the said Belt Company, so made to it as hereinbefore alleged, or of the stocks, bonds, or other securities claimed by the Trust Company to have been delivered to it as collateral security for the said notes, and likewise that the Elevator Company, Amusement Company, Central Company, Second Street Company, and Townsite Company, and all others be enjoined and restrained from in any wise incumbering, selling or disposing of any part of the property or assets, the legal title to which is held in the name of said companies respectively, and such other injunctions, orders and decrees as to the Court may seem meet and proper for the protection of the interests concerned.

And may it please your Honor to grant unto your orator the subpœna of the United States of America, issuing out of and under the seal of this Honorable Court, directed to the Kansas City Sub-

urban Belt Company, The Union Terminal Railway Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Fairmont Amusement Company, Central Improvement Company, Second Street Improvement Company, and Northern Townsite Company, the defendants herein respectively, therein and thereby commanding them on a day certain therein to be made, and under a certain penalty, to be and appear before this Honorable Court then and there to answer (but not under oath, an answer under oath being hereby expressly waived) all and singular the premises and to stand to and perform and abide by such orders, directions or decrees as may be made against them in the premises and as shall seem meet and agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray.

CAMBRIA STEEL COMPANY,
By L. C. KRAUTHOFF,
FRANK HAGERMAN,
Its Solicitors.

L. C. KRAUTHOFF,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

Frank Hagerman, being first duly sworn, deposes and says that he is one of the solicitors and of counsel for the complainant in the foregoing bill of complaint; that he has read said bill of complaint and knows the contents thereof; that the allegations therein contained are true so far as they relate to his own acts and the acts of the complainant; and as far as they relate to the acts of others, he believes them to be true; that the reason this verification is not made by said Cambria Steel Company is that the said complainant is a corporation of the State of Pennsylvania having its principal office in said State, and that no officer or director thereof competent to make this verification on behalf of said corporation, is within this jurisdiction.

FRANK HAGERMAN.

Subscribed and sworn to before me this 6th day of September, 1900.

[SEAL.]

OSCAR HOCHLAND,
Notary Public within and for Jackson County, Missouri.

My commission expires the 4th day of September, 1904.

EXHIBIT "I".

KANSAS CITY, MO., September 1, 1900.

To the Kansas City Suburban Belt Railroad Company:

The Guardian Trust Company begs again to call your attention to the fact that it holds a number of your promissory notes
26 which are past due and unpaid, and that among said notes are the following:

1. Note dated March 31st, 1899, due July 2nd, 1899, for $50,000, with interest at the rate of 6% per annum from said date. On this note was credited on June 14th, 1900, $12,500.

2. Note dated November 7th, 1899, due January 9th, 1900, for $50,000. with six per cent interest per annum from said date. On this note is a credit of June 14th, 1900, of $12,500.

3. Note dated February 8th, 1900, due May 12th, 1900, for $109,500. with interest at the rate of eight per cent per annum from maturity.

4. Note dated July 26th, 1899, on demand for $203,900, with interest at the rate of six per cent per annum from date. On this note is a credit of June 11th, 1900, of $9,996.65.

5. A note dated September 21st, 1899, due on demand for $23,056.48 with interest thereon from date at the rate of eight per cent per annum.

6. A note dated October 23rd, 1899, due on demand for $7,162.40 with interest thereon at the rate of eight per cent per annum, from date.

All of the above notes were duly executed and delivered by the Kansas City Suburban Belt Railroad Company for value received payable to the order of the Guardian Trust Company, either in its present name or in its former name, Missouri, Kansas & Texas Trust Company.

All of said notes are long since due and unpaid.

We also again call your attention to the fact that you heretofore delivered to the Guardian Trust Company and it accepted and now holds as collateral security for the payment of the said notes the following described choses in action, stocks and bonds, to-wit:

388 first mortgage thirty-year 5% gold bonds of the Kansas City Northern Connecting Railroad Company of the denomination of $1,000, dated January 1st, 1897, being bonds numbered, 1467, 1769 to 1773 both inclusive; 1799 to 1818 both inclusive; 1358 to 1368 both inclusive; 1582 to 1595 both inclusive; 1600 to 1608 both inclusive; 1324 to 1331 both inclusive; 1756 to 1768 both inclusive; 1184 to 1216 both inclusive; 1466, 1369 to 1400 both inclusive; 1431 to 1440 both inclusive; 1609 to 1658 both inclusive; 1659 to 1708 both inclusive; 1819 to 1851 both inclusive; 1774 to 1798 both inclusive; 1301 to 1323 both inclusive.

27 67.9 second mortgage thirty-year five per cent income bonds of the Kansas City Northern Connecting Railroad Company of the denomination of One Thousand Dollars ($1,000.) each dated

January first, 1897, being bonds numbered 1064 to 1098 both inclusive; 1149 to 1157 both inclusive; 1162 to 1173 both inclusive; 1192 to 1202 both inclusive; also certificate numbered 229 entitling the holder to 250/1000 of said second mortgage income bonds, and certificate No. 227 entitling the holder to 250/1000 of said second mortgage income bonds; and certificate No. 220 entitling the holder to 150/1000 of said second mortgage income bonds; and certificate No. 231 entitling the holder to 250/1000 of said mortgage income bonds. 25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100, each as evidenced by certificates numbered 9, 6, 5, and 4.

1120 shares of the capital stock of the Central Improvement Company of the par value of $100 each as evidenced by certificates numbered 148, 149 and 147.

439 shares of the capital stock of the Northern Townsite Company of the par value of $100 each as evidenced by certificate No. 11; and

425 shares of the capital stock of the Missouri Elevator & Terminal Company of the par value of $100 each as evidenced by certificates numbered 36, 34, 37, 40 and 38.

The Guardian Trust Company hereby again requests and demands that you forthwith pay the amounts due on each and all of said notes at its office at Seventh and Wyandotte Streets in Kansis City, Missouri, where all of said notes except the one for $109,500 are made payable, and where they are all now held ready for delivery to you upon the payment and satisfaction thereof, the note for $109,500 by its terms payable at the National Bank of Commerce, Kansas City, Missouri, where it will be ready for delivery to you in case you should indicate that you prefer to pay it there rather than at the office of the Guardian Trust Company.

The Guardian Trust Company hereby notifies you that unless the amounts of money due on each and all of the said notes above described shall have been fully paid to it on or before twelve o'clock noon on Friday the 7th day of September, 1900, it will at that hour on that day at public auction at the office of Houston, Fible & Co., 723 Delaware Street, Kansas City, Jackson County, Missouri, cause to be sold to the highest bidder for cash all of the above named choses in action, stocks and bonds so held as aforesaid as
28 collateral security for said notes, or so much thereof as may be necessary to satisfy and pay said notes and the costs of said sale.

[SEAL.] GUARDIAN TRUST COMPANY,
By T. L. CHADBOURNE, JR.,
Vice President.

EXHIBIT "2".

List of Known Real Estate Belonging to Auxiliary Companies Upon Which Also Are Various Improvements, All in Jackson County, Missouri.

To Central Improvement Company.

(1) That part of Northwest quarter of Section 6, Township 49, North Range 33, West, in Jackson County, Missouri, described as follows:

Beginning at a point 36 poles south and 208.5 feet east of the Northwest corner of said Section 6; thence south along the east line of Armour Packing Company's addition to a point on the North line of a 28 foot strip of right of way, conveyed to the Suburban Belt Railroad Company by West Kansas City Land Company said point being 111.5 feet north of the southeast corner of Lot D in said Armour Packing Company's Addition; thence in a southeasterly direction on the Northerly line of said right of way to the East line of Wyoming Street, produced north; thence north along said Extension of the East line of Wyoming Street to the South line of the right of way of main line of the Kansas City Suburban Belt Railroad Company; thence westerly along such right of way to an intersection of a line 36 poles south of the north line of said Section 6 thence West parallel to the north line of said section 6, and 36 poles therefrom, to the point of beginning; all of which was conveyed by warranty deed from West Missouri I and Company to Central Improvement Company, dated February 17th, 1896, consideration $5,500.00 recorded in Book B, 523, page 165.

(2) A tract of land beginning at a point on the east line of the west half of the northwest quarter of section 6, Township 49 Range 33, which is 36 poles south of the north line of said Section 6; thence west parallel to the said north line of section 6, and at a uniform distance of 36 poles therefrom, about 700 feet to an intersection with the north line of the right of way of the Kansas City Suburban Belt Railroad Company; thence southeasterly along said north right of way line to the said east line of the west half of the northwest quarter of Section 6; thence north about 65 feet to beginning.

29 (3) A tract of land beginning at a point in the north extension of the east line of Hickory street, 8 feet south of the center line of the Kansas City Suburban Belt Railroad; thence in a southeasterly direction on a line parallel to the center line of the Kansas City Suburban Belt Railroad and 8 feet therefrom 192.8 feet to a point in the north extension of the east line of lot 8, block 16, West Kansas Addition No. 1; thence south along said line 55.9 feet to a point; thence in a straight line southwesterly 192.8 feet to a point in the north extension of the east line of Hickory Street, 526 feet north of the north line of Ninth Street; thence north along said line 87.6 feet to place of beginning, containing 0.308 acres.

(4) A tract of land lying between the north line of the right of way of the Kansas City Suburban Belt Railroad and a line parallel to and 30 feet north therefrom, and between the east line (extended north) of Lot 16, and the west line (extended north) of lot 14, all of block 16, West Kansas Addition No. 1.

(5) A tract of land beginning at the northeast corner of lot 16, block 16, West Kansas Addition No. 1; thence west along north line of block 16, to the northwest corner of Lot 14, Block 16; thence north on extension of west line of Lot 14, to the south line of right of way of the Kansas City Suburban Railroad; thence easterly along said right of way line to a point in the northerly prolongation of the east line of Mulberry Street thence south along said east line of Mulberry Street to a point on the prolongation of the north line of Block 16, West Kansas Addition No. 1; thence west along said line to a point of beginning.

(6) A tract of land beginning at the northeast corner of Lot 1, Block 15, west Kansas Addition No. 1; thence north along the prolongation of the east line of Mulberry Street to the south line of the right of way of the Kansas City Suburban Belt Railroad Company; thence northeasterly along said right of way to a point on the prolongation of the east line of Lot 8 (said block and Addition); thence south along said prolongation of the east line of lot 8 to the northeast corner of said lot; thence west along the north line of said Block 15 to a point 99 feet, more or less, east of the northwest corner of said block, said point being 6 feet measured at right angles from the center line of the most northerly switch track of the Kansas City, Fort Scott & Memphis Railroad Company; thence in a southwesterly direction on aline parallel to said center line of switch track and 6 feet distant therefrom, to the west line of Mulberry Street; thence north along said line to the northeast corner of Block 16, West Kansas Addition No. 1; thence east along the north line of blocks 15 and 16, to the point of beginning.

(7) A tract of land beginning at a point in the west line of block 14, West Kansas Addition No. 1, which is 120 feet north of the north line of Eighth Street; thence west 40 feet; thence north to the Missouri River; thence easterly following the meanderings of said river to the west line of said Block 14, extended north; thence south along said line to the beginning.

(8) All of lots 1, 2, 3, 4, 5, 6, and 7 in Block 14, West Kansas Addition No. 1, also commencing at the northwest corner of said Lot 1; thence running due north to the Missouri River; thence easterly following the meanderings of said river to a point due north of the northeast corner of Lot 5; thence due south to the northeast corner of Lot 5; thence west to place of beginning; also beginning at the southwest corner of Lot 11, in said Block 14; thence north along the east line of Santa Fe Street 86.87 feet to the northwest corner of Lot 8, in said Block 14; thence east along the north line of said Lot 8 a distance of 98.2 feet; thence southwesterly, making an interior angle with the last described line of 50 degrees 35 minutes 112.2 feet to the south line of lot 11, being the north line of

Eighth Street; thence west 26.2 feet to beginning. Subject to right of way of Kansas City Suburban Belt Railroad Company.

(9) A triangular piece of ground in the northwest corner of Block 3, Coates & Hopkins Addition to Kansas City, bounded as follows: Beginning at a point on the west side of Block 3, which is 16 feet from the northwest corner thereof; thence north 16 feet to said northwest corner; thence easterly along the north line of said Block 3, a distance of 70 feet; thence southwesterly to beginning. Also a portion of Block 7, in said Coats & Hopkins Addition described as follows: Beginning at a point on the east side of Block 7, which [—] 252.4 feet from the northwest corner of Eighth and Henning Streets; thence northerly 46 feet along the east side of said Block to the northeast corner thereof; thence northwesterly along the northerly side of said Block 7, a distance of 144.7 feet to the northwest corner of said Block; thence south along the west line of said Block 84 degrees, 4 minutes, included angle 244.3 feet; thence northeasterly 35 deg. 20 min. included angle; 118.1 feet; thence northeasterly 187 degrees, 15 minutes included angle 67.5 feet; thence northeasterly 188 degrees, 26 minutes included angle 68.7 feet to beginning. Containing 0.487 acres.

(10) All of lot 4, Block 5, Lykins Addition to Kansas City.

31 (11) All of lot 7, Block 4, Lykins Addition to Kansas City.

(12) All of Lot 124, Block 12, Old Town, now Kansas City, Missouri.

(13) All of lots 139, 140, 319 and 320 in Block 13, Old Town, now Kansas City, Missouri, subject to right of way of Consolidated Terminal Railroad.

(14) All of Lots 31-47 and 48 of Hurck's Subdivision of Guinotte Farm.

(15) All of lot 32 Hurck's Subdivision of Guinotte Farm, line between right of way of the Kansas City Suburban Belt Railroad and the Missouri River.

(16) All of Lots 1-45 and 46 in Block 2, Modern Mutual Place, an Addition to Kansas City, Missouri, and so much of lots 2 and 44 in Block 2, and so much of Lots 6-7 and 8 in Block 1, as lie north and northwest of a line parallel to and 50 feet south of the most southerly track of the Kansas City Suburban Belt Railroad as now located across said lots.

(17) A tract of land beginning at the northeast corner of the northwest quarter of the southeast quarter of Section 27, Township 50, Range 33; thence south 255.61 feet; thence west 255.61 feet; thence north 255.61 feet; thence east 255.61 feet to beginning. Subject to right of public in Monroe Avenue on the East and County Road on the North.

(18) All of southeast quarter of the southeast quarter of Section 28, Township 50, range 33, lying south of the Missouri River, except right of way of Kansas City Suburban Belt Railroad.

(19) Lot 21, Block 29, Centropolis.

To Missouri Elevator and Terminal Company.

(1) A tract of land beginning at a point in the west line of Lot 34, of Hurck's Subdivision of Gumotte Farm, said point being 122.7 feet north of the southwest corner of said lot 34; thence north, along the west line of said lot 74.8 feet, to the south line of the right of way of the Kansas City Suburban Belt Railroad Company; thence in a northeasterly direction, along said right of way line, 164.6 feet, to the east line of the west one-half of said lot 34; thence southerly 74.8 feet to a point 220 feet north of the southeast corner of the west one-half of said Lot 34; thence southwesterly 164.6 feet to point of beginning, containing 0.227 acres.

(2) A tract of land commencing at a point on the south line of the right of way of Kansas City Suburban Belt Railroad Company 620 feet north of the southeast corner of the northeast quarter of Section 26, Township 50, north, Range 33, West of the
32 Fifth Principal Meridian; thence east with the south line of the said right of way 163.6 feet to a point; thence south 80 degrees, 28 minutes west, 150.95 feet to a point 25 feet south of the said right of way; thence west and parallel with said right of way 221.2 feet to a point; thence south 75 feet to a point; thence west and parallel with said right of way 150 feet to a point; thence north 75 feet to a point 25 feet south of said right of way; thence west and parallel with said right of way 221.2 feet to a point; thence north 80 degrees and 28 minutes west; 150.95 feet to the south line of said right of way; thence east with the south line of said right of way 726.4 feet to beginning, containing 68/100 of an acre.

(3) A tract of land commencing at a point in the north line of the right of way of the Kansas City Suburban Belt Railroad Company, 700 feet north of the southeast corner of the northeast quarter of Section 26, Township 50, Range 33, West of the Fifth Principal Meridian; thence East with the north line of the said right of way 398 feet to a point; thence north 80 degrees, 28 minutes west, 120.75 feet to a point 20 feet north of the said right of way; thence west and parallel with the north line of said right of way 250.9 feet to a point; thence north 80 feet; thence west 150 feet to a point; thence south 80 feet to a point 20 feet north of the north line of said right of way; thence west and parallel with said right of way 250.9 feet to a point; thence south 80 degrees and 28 minutes west 120.75 feet to the north line of said right of way; thence east with the north line of the said right of way 492 feet to beginning, containing 63/100 of an acre.

To Second Street Improvement Company.

A strip of land containing one-half acre, described and bounded as follows: Beginning at a point which is 300 feet southwesterly, measured at right angles from the center line of the right of way of the Kansas City Suburban Belt Railroad Company, at station 356.07, 7; thence turning an angle of 90 degrees from a line parallel to said center line of right of way and running in a southwesterly direction,

on a line at right angles to said center line, 147.58 feet; thence turning an angle of 90 degrees to the right and running at right angles to said last mentioned line 147.58 feet; to a point 300 feet from the center line of right of way; thence turning an angle of 90 degrees to the right, and running at right angles to said last mentioned line 147.58 feet, to point of beginning.

To Central Improvement Company.

All that part of Lot 41 in Hurck's Subdivision of Guinotte Farm described as follows: Beginning at a point in the west line of
33 said lot 55 feet south of the northwest corner thereof; thence south on said west line 88 feet; thence east on a line parallel to the north line of said lot 150 feet; thence north on a line parallel to the west line of said lot 88 feet; thence westerly 150 feet to place of beginning. Land for National Elevator.

To Central Improvement Company and Fairmount Amusement Company.

(1) Fairmount Park, being all of the northwest quester of the southeast quarter of Section 33, Township 50, Range 32, containing 40 acres.

(2) Also a tract commencing at the southwest corner of the southeast quarter of Section 33, Township 50, Range 32; thence north along the west line of the southeast quarter of said Section 33, 986.7 feet; thence east and parallel to the south line of the section, 750.42 feet; thence south and parallel with the west line of the southeast quarter of Section 33, 986.7 feet to the south line of the section; thence west along the said south line 750.42 feet to beginning; less easement in Independence Avenue containing 17 acres more or less.

(3) A tract of land beginning at the southeast corner of the southwest quarter of Section 33, Township 50, Range 32; thence west on the section and township line for a distance of 1000 feet thence north on a line parallel to the east line of said quarter section for a distance of 1742.4 feet; thence east on a line parallel to said township line 200 feet; thence north on a line parallel to the east line of said quarter section 435.6 feet; thence east on a line parallel to said township line 800 feet; thence south on the east line by said quarter section 861.5 feet to the northwest corner of the southwest quarter of the southeast quarter of said section 33; running thence east 16 poles; thence south 20 poles; thence west 16 poles; thence south 900 feet, more or less, to beginning; making in all 50 acres, more or less, except three acres, conveyed by deed.

Afterwards, to-wit, on the 6th day of September, 1900, the Entry of appearance of the Kansas City Suburban Belt Railroad Company, et al. was filed. Said entry of appearance is in words and figures as follows:

34 In the United States Circuit Court for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Entry of Appearance of The Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company and Kansas City & Independence Air Line.

Now come the defendants, The Kansas City Suburban Belt Railroad Company, the Union Terminal Railroad Company and Kansis City & Independence Air Line, and enter their appearance herein.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY,
THE UNION TERMINAL RAILROAD COMPANY,
KANSAS CITY & INDEPENDENCE AIR LINE,
By C. W. LUCAS, *Their Solicitor.*

Afterwards, to-wit, on the 6th day of September, 1900, the following order was filed, and entered of record:

In the United States Circuit Court for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Order.

Now on this 6th day of September, 1900, this cause coming on to be heard upon the application of the complainant for the appointment of a receiver or receivers for the several properties and purposes mentioned in the bill of complaint and for an injunc-
35 tion as prayed in said bill, come the complainant by its solicitors, and the defendants The Kansas City Suburban Belt

Railroad Company, The Union Terminal Railroad Company and the Kansas City & Independence Air Line, by their solicitors, and the court doth take under consideration and advisement the said several motions, except so far as the same may stand granted by the provisions hereof, and thereupon it is ordered, adjudged and decreed as follows:

1. That Stuart R. Knott and Edward F. Swinney who have heretofore been appointed receivers of the property of The Kansas *S*ity Suburban Belt Railroad Company described in the decretal orders of appointment entered in the causes numbered respectively 2464, 2465, 2466 and 2467 on the docket of this court, be and they are appointed receivers generally of all the assets, property, rights, titles and interests, legal or equitable, of the said The Kansas City Suburban Belt Railroad Company, with all the rights, powers, duties and obligations set forth in said several decretal orders of appointment, and that the receivership decreed and *and* established in and by said three several decretal orders be extended to and over this cause and the properties hereinafter described.

2. That said receivers be and they are hereby authorized, empowered and directed to collect and take into possession all of said assets and property of said The Kansas City Suburban Belt Railroad Company, or to which the same is entitled, at law or in equity, including all notes, accounts, claims, demands, rights of action, certificates for shares of stock, bonds, coupons, books, vouchers and other papers, and that said receivers be authorized and empowered to institute such suits or other proceedings as may be deemed proper and advisable by counsel to recover any and all such property held by others and also to sue upon and recover any and all claims, demands nad rights of action against any person whatsoever in favor of said The Kansas City Suburban Belt Railroad Company, or any of its creditors, and also to bring suits for an accounting, or to enforce any other proper remedy, against any and all persons whatsoever based upon or arising out of past dealings or relations on the part of said The Kansas City Suburban Belt Railroad Company, or on its behalf, with any other person whatsoever, all to the end that the assets, rights of action and other property may be reduced to the control and possession of said receivers subject to the order and decrees of this court. And the court reserves to itself the right to make any and all further orders that may appear to it to be proper and meet to effectuate the true purpose and intent hereof.

Each of the said receivers shall within thirty days file herein his bond in such form and with such surety as may be approved
36 by a judge of this court, in the sum of Ten Thousand Dollars, for the faithful performance of his duties as receiver.

3. The application of the complainant for the appointment of a receiver of and for the property mentioned in the bill of complaint herein as being in the possession of the defendant Guardian Trust Company, and of and for the property of the defendants, the Missouri Elevator and Terminal Company, the Northern Townsite Company, the Fairmount Amusement Company, the Central Improvement Company and the Second Street *Street* Improvement Company,

and the application of complainant for an injunction against said parties, are hereby continued to and set for the 27th day of September, A. D. 1900, at 10 o'clock a. m. without prejudice to the rights of any of the persons named or concerned.

4. The said Guardian Trust Company and all persons claiming by, through or under it, and each of them, and their several and respective officers, agents, employes and representatives, are in the meantime, and until the further order of this court, restrained from in any manner, directly or indirectly, selling, transferring, assigning, pledging or otherwise disposing or parting with the possession of control of (*a*) any of the property, assets, notes, stocks, bonds, claims and demands mentioned and referred to in the bill of complaint herein.

(*b*) Any of the following described property:

1. Note dated March 31st, 1899, due July 2nd, 1899, for $50,000 with interest at the rate of 6% per annum from said date. On this note was credited on June 14th, 1900, $12,500.

2. Note dated November 7th, 1899, due January 9th, 1900, for $50,000 with six per cent interest per annum from said date. On this note is a credit of June 14th, 1900, of $12,500.

3. Note dated February 8th, 1900, due May 12th, 1900, for $109,500, with interest at the rate of eight per cent per annum from maturity.

4. Note dated July 26th, 1899, on demand for $203,900 with interest at the rate of six per cent per annum from date on this note is a credit of June 11th, 1900, of $9,996.65.

5. A note dated September 21st, 1899, due on demand for $23,-056.48 with interest thereon from date at the rate of eight per cent per annum.

6. A note dated October 23rd, 1899, due on demand for $7,162.40 with interest thereon at the rate of eight per cent per annum from date.

37 338 first mortgage thirty year 5% gold bonds of the Kansas City & Northern Connecting Railroad Company of the Denomination of $1,000 dated January 1st, 1897, being bonds numbered 1467, 1769 to 1773, both inclusive; 1799 to 1818, both inclusive; 1358 to 1368, both inclusive; 1582 to 1595, both inclusive; 1600 to 1608, both inclusive; 1324 to 1331, both inclusive; 1756 to 1768, both inclusive; 1184 to 1216, both inclusive; 1466, 1369 to 1400, both inclusive; 1431 to 1440, both inclusive, 1609 to 1658, both inclusive; 1659 to 1708, both inclusive; 1619 to 1851, both inclusive; 1774 to 1798, both inclusive; 1301 to 1323, both inclusive.

87.9 second mortgage thirty year five per cent income bonds of the Kansas City & Northern Connecting Railroad Company of the denomination of One Thousand Dollars ($1,000) each, dated January 1st, 1897, being bonds numbered 1064 to 1098, both inclusive; 1149 to 1157, both inclusive; 1162 to 1173, both inclusive; 1192 to 1202, both inclusive; also certificate numbered 229 entitling the holder to 230/1000 of said mortgage income bonds, and certificate No. 227 entitling the holder to 250/1000 of said second mortgage income bonds; and certificate No. 220 entitling the holder *of*

150/1000 of said second mortgage income bonds; and certificate No. 231 entitling the holder to 250/1000 of said mortgage income bonds. 25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100 each as evidence by certificates numbered 9, 6, 5 and 4.

1120 shares of the capital stock of the Central Improvement Company of the par value of $100 each, as evidenced by certificates numbered 148, 149 and 147.

439 shares of the capital stock of the Northern Townsite Company of the par value of $100 each, as evidenced by certificates No. 11; and

425 shares of the capital stock of the Missouri Elevator & Terminal Company of the par value of $100 each as evidenced by certificates numbered 36, 34, 37, 40 and 38.

(*c*) The notes of The Kansas City Suburban Belt Railroad Company for $25,000, dated January 25th, 1900, payable to the order of Guardian Trust Company, 50 first mortgage and 15 second mortgage bonds of the Kansas City & Northern Connecting Railroad Company securing same.

(*d*) The note of The Kansas City Suburban Belt Railroad Company for $10,400, dated February 9th, 1900, and 26 first
38 mortgage bonds of the Kansas City & Northern Connecting Railroad Company.

Said parties are also likewise restrained from taking any steps to make the sale or disposition of property threatened to be made on September 7th, 1900, by the notice a copy of which is attached to the bill herein as "Exhibit 1".

The Missouri Elevator and Terminal Company, the Northern Townsite Company, the Fairmount Amusement Company, the Central Improvement Company and the Second Street Improvement Company, and each of them, and their several and respective officers, agents, employes and representatives, are also in the meantime, and until further order herein, hereby restrained and enjoined from in any manner, directly or indirectly, selling, encumbering, pledging, transferring, assigning, or otherwise disposing or parting with the possession or control of any part of the assets, property, moneys or demands of said companies respectively.

5. That notice of the application for the appointment of a receiver and of the restraining order mentioned and contained in the third and fourth paragraphs hereof and of the further hearing of said application be given to each of the defendants in said paragraphs named by serving upon each of them, respectively, a copy of this order; complainant shall file forthwith bond for ten thousand dollars conditioned in form & with surety to be approved by a Judge hereof.

(Signed) JNO. F. PHILIPS,
District Judge.

Afterwards, to-wit, on the 1st day of October, 1900, the entry of appearance of the Guardian Trust Company was filed. Said entry of appearance is in words and figures as follows:

UNITED STATES OF AMERICA:

In the Circuit Court for the Western Division of the Western District of Missouri.

No. 2468.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, GUARDIAN TRUST COMPANY et al., Defendants.

Now comes the defendant Guardian Trust Company, one of the defendants in the above entitled cause and enters it- appearance in this cause as such defendant.

GUARDIAN TRUST COMPANY,
By TRIMBLE & BRAILEY,
Its Solicitors.

39 THOS. L. CHADBOURNE, JR.,
Of Counsel.

Afterwards, to-wit, on the first day of October, 1900, the following Entry of Appearance of the Second Street Improvement Company et al., was filed:

In the United States Circuit Court for the Western Division of the Western District of Mo.

In Equity. #2468.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RD. CO. et al., Defendants.

Now comes the Second Street Improvement Company, the Missouri Elevator & Terminal Company, the Central Improvement Company, the Fairmount Amusement Company, and the Northern Townsite Company, by their attorneys and hereby and herewith enter their separate appearances in the above entitled cause.

THE SECOND STREET IMPROVEMENT COMPANY,
THE MISSOURI ELEVATOR & TERMINAL COMPANY,
THE CENTRAL IMPROVEMENT COMPANY,
THE FAIRMOUNT AMUSEMENT COMPANY,
THE NORTHERN TOWNSITE COMPANY,
By TRIMBLE & BRALEY, *Their Attorneys.*

Afterwards, to-wit on the 5th day of November, 1900, the Guardian Trust Company, filed its answer to the original bill of complaint of the Cambria Steel Company.

Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Answer of the Defendant, Guardian Trust Company, to the Bill of Complaint of the Cambria Steel Company, Complainant.

40 This defendant now and at all times hereafter saving and reserving to itself all benefit and advantage of exceptions which can or may be had or taken to the many errors and uncertainties and other imperfections in the said bill contained, for answer thereto, or to so much and such portions thereof as this defendant is advised it is material or necessary for it to answer unto, answering says:

That this defendant admits that the complainant is a corporation and citizen of the state of Pennsylvania, and that the defendants are

41 all corporations and are all citizens of the state of Missouri, and inhabitants of the Western Division of the Western District of Missouri, as alleged in the bill of complaint, except the defendant, The Union Terminal Railroad Company, which is a citizen of Kansas, and an inhabitant of the First Division of the District of Kansas, as alleged in the bill of complaint.

This defendant admits that its name was "Missouri, Kansas & Texas Trust Company," from the date of its incorporation until about June, 1899, when it was duly changed to that of "Guardian Trust Company," as alleged in the bill of complaint; but this defendant denies that the date of its incorporation was about the year 1885.

This defendant admits that the defendant, the Kansas City Suburban Belt Railroad Company, became indebted to the complainant prior to the institution of this sum in a large sum, for steel rails purchased by said Belt Company from the complainant, but this defendant has not sufficient knowledge or information to enable it to form a belief as to whether or not the amount of said indebtedness was about One Hundred Thousand Dollars, nor as to whether the said steel rails were so purchased by the said Belt Company between the first day of November, 1897, and the first day of March 1898, as alleged in the bill of complaint.

This defendant admits that a suit was brought in the name of

complainant, upon the obligation given it by the said Belt Company evidencing the balance due upon said indebtedness, and this defendant avers the fact to be that said obligation consisted of a promissory note executed and delivered by the defendant, the Kansas City Suburban Belt Railroad Company to the complainant, on January 15th, 1900, for Ninety Eight Thousand, Seven Hundred and Forty Four and 23/100 Dollars ($98,744.23), which note was a renewal in whole or in part of former notes executed by the said Belt Company to the complainant, for the purchase price of steel rails.

This defendant admits that a judgment was recovered in this Honorable Court on the said note in the name of the complainant on the sixth day of September, 1900, against the said Belt Company for the sum of One Hundred Thousand, Nine Hundred, and Sixty Two and 91/100 Dollars ($100,962.91), but this defendant has no knowledge or information sufficient to enable it to form a belief as to whether or not any part of said judgment has been paid, hence demands proof of the complainant's allegation that no part of the same has been paid.

This defendant admits that an execution was issued on said judgment, directed to the Marshal of the Western District of
42 Missouri, and against said Belt Company, and that the said Marshal did make return of said execution, which return as written, shows upon its face that the execution was wholly unsatisfied for want of property of the said Belt Company upon which to levy the same, but this defendant states and avers the fact to be that said suit on said note was instituted in this Honorable Court on the said sixth day of September, 1900; that by a prearrangement the said defendant, Belt Company, entered its appearance on the same day and consented to said judgment's being rendered against it, which was done on the same day and hour, and that counsel appearing as the attorneys for the complainant in that suit, without any purpose or desire of collecting said judgment, did, on the same day go through the form of causing an execution to be issued on said judgment, and wrote a pretended return of nulla bona thereon, and placed said execution in the hands of said Marshal, solely for the purpose of having him sign the said pretended return which had been so written and prepared for him, and the said Marshal, without making any search for property on which to levy said execution, and without making any demand on the said Belt Company for the payment thereof, and without in any way attempting to collect the same, did on the same day, at the request and direction of those persons who appeared as attorneys for the plaintiff in said execution, through one of his deputies, sign said pretended return of nulla bona which had been previously written and prepared for his signature, as aforesaid.

This defendant denies that the said defendant, Kansas City Suburban Belt Railroad Company was or is insolvent, and denies that it had or has no property subject to be reached by legal process to be issued upon the said judgment so secured by the complainant as aforesaid, as alleged in the bill of complaint; but this defendant states and shows that on the contrary the truth is that the

said Belt Company then had and still has ample money and means provided and at its command to pay the said debt of the complainant and all its other liabilities which was fully known to the complainant prior to and at the time of the institution of the said suit on said note, and at all times since.

This defendant further states *t*nd shows to the Court that in addition to the fact that the said Belt Company had and has ample money and means provided and at its command to pay the complainant's said debt, as aforesaid, the complainant itself ever since the execution of the said note, has held and still holds in its own hands a large amount of valuable property of the said Belt Company as collateral security to secure the payment of the said
43 note, duly pledged by the said Belt Company to complainant for that purpose. This defendant does not know the exact amount or description of the said personal property so pledged to and held as collateral security by the complainant, but avers that it was and is of sufficient value upon foreclosure to pay a large part, if not the whole of the complainant's said debt; that a part of said collateral security consists of one hundred and fifty-four (154) First Mortgage, Thirty Year, Five Per Cent Gold Bonds of the Kansas City and Northern Connecting Railroad Company of the denomination of One Thousand Dollars ($1,000.00) each, which are secured by a first lien on about one hundred miles of first class, standard gauge railroad, between Kansas City and Pattonsburg, Missouri, at the rate of Twenty Thousand Dollars in bonds to each mile of said railroad; that said bonds could have been and can now easily be subjected to the payment of the complainant's debt and to the satisfaction of a large part thereof, but the complainant has made no attempt whatever to collect its debt in any way, but has failed and refused to even appropriate, as it lawfully might and could have done, that part of the Belt Company's property which was and is in its own hands for that express purpose.

This defendant further answering unto that part of the complainant's bill of complaint which refers to the recovery of the said alleged judgment against the said Belt Company and the alleged issuance and return of execution thereon, states and *and* shows that the said suit was not instituted and the said judgment was not recovered, and the said execution was not issued in good faith for the purpose of collecting the complainant's said debt, but that upon the contrary, the said Belt Company, and its attorneys, agents and officers, and The Kansas City Southern Railway Company, who completely dominates and controls them, and certain other persons having the charge and control of some of its business and financial affairs, hereinafter called the Philadelphia Committee, whose personnel and connection with the Belt Company and its affairs will be more definitely hereinafter stated, unlawfully conceived the fraudulent purpose and design of hindering, delaying and defrauding the creditors of the said Belt Company, including this defendant, in the collection of their just debts by procuring the appointment of receivers at the hands of this Honorable Court to take possession of all of the property of the said Belt Company, and by procuring

restraining orders and injunctions from this Honorable Court, preventing such creditors, except the complainant, from in any way subjecting any of the assets or property of the Belt Company to the payment of their debts, upon the false and fraudulent pretense that the appointment of receivers and the granting of said restrain-
44 ing orders and injunctions against such creditors were necessary to the protection of the interests of said creditors, and further by seeking to foreclose certain mortgages on separate parts of the Belt Company's property on the false and fraudulent pretense that there had been a demand for and default in the payment of certain installments of interest thereon, so as to cut out by foreclosure and defeat, the unsecured creditors of said Belt Company, including this defendant in the collection of their debts; that in pursuance of said fraudulent purpose and design the said Belt Company in connection with and through the said Kansas City Southern Railway Company, and the said Philadelphia Committee, approached the complainant and requested it to allow them to bring a suit in its name on said note and recover a judgment thereon against the Belt Company and afterwards to allow them to bring this suit, in its name, so as to make it falsely appear that a bona fide judgment creditors was diligently and in good faith attempting to enforce the collection of its debt through the instrumentality of this creditor's bill and its accompanying receivership, whilst in truth and reality it would me and was intended to be in substance and effect the Belt Company suing for and obtaining a judgment and execution against itself, and procuring the appointment of receivers for its own property for the fraudulent purpose aforesaid.

That this defendant is informed and believes, and upon such information and belief avers the fact to be that the said Belt Company, the said The Kansas City Southern Railway Company, and the said Philadelphia Committee promised and agreed with the complainant that if it would allow them to bring the said suit in its name, they would see to it that its debt was fully paid, and would indemnify and save it harmless against any and all costs and expenses on account of said suits so to be conducted in its name; that the complainant, with full knowledge of the said fraudulent purpose and design, and participating therein, for the purpose of carrying the same out, did consent that they might institute, conduct and prosecute in its name the said suits; that the said Belt Company and the said The Kansas City Southern Railway Company and the said Philadelphia Committee then employed counsel, whether in their own name or not or in the name of the complainant, this defendant does not know, and has no present means of ascertaining, to institute and prosecute the said suit on said note to judgment and execution and to present this bill of complaint based thereon; but whatever form may have been used in the employment of said counsel, that the fact is that the said Belt Company, the said The Kansas City Southern Railway Company and the said Philadelphia
45 Committee are the real employers and are by agreement to bear the expense thereof.

That in the further prosecution of their said fraudulent purpose

and design of hindering, delaying and defrauding the unsecured creditors of the said Belt Company, they, the said Belt Company, the said The Kansas City Southern Railway Company, and the said Philadelphia Committee, requested and procured the Provident Life & Trust Company of Philadelphia, who, at their instigation was and still is claiming and asserting itself to be the trustee in four certain mortgages which are liens or apparent liens on separate portions of the property heretofore operated by by the Belt Company, but now operated by the said The Kansas City Southern Railway Company, to institute four suits for the foreclosure of said mortgages in this Honorable Court, on the false pretense that there had been a default in the payment of the interest on the bonds in said mortgages described. That the person who owns and holds all or substantially all of the bonds described in all of the said mortgages, to-wit, The Kansas City Southern Railway Company, is the same person who controls and directs the business and affairs of all the companies that executed said mortgages, and who owns and holds all or substantially all, of the Capital Stock of all of said Companies, and is the same person who has the possession and management of the property of all *the property of all* of said companies, and who controls and operates all of the railroads covered by said mortgages, and who collects and receives all the earnings and income thereof, so that the same person who holds or owns substantially all of said bonds, is the same person who is equitably charged with the duty of paying whatever may be lawfully due on any of said bonds, if anything.

That said foreclosure suits were brought at the instance and request of those persons only who are so responsible for the alleged default and were fraudulently and collusively brought to sell said property for the fraudulent purpose aforesaid of cutting out and defeating the unsecured creditors, and not for the purpose of enforcing the payment of said bonds.

That the said suit in the name of the complainant to recover judgment on said note, and this bill of complaint in this cause, and each of said four suits brought in the name of the Provident Life & Trust Company to foreclose said mortgages, were all brought against the Belt Company, and its property, at the solicitation and request of the Belt Company, and of those said persons who dominate and control its action; that they were all drawn and prepared
46 simultaneously by the same counsel, and were all instituted at the same time; by the same counsel, and the Belt Company, together with all of the other defendants which it controls were present in Court at the time of the filing of all of the said suits, and voluntarily entered their appearance therein, and fraudulently and collusively consented to the relief sought in each case, but the defendants who were not controlled by the said Belt Company, were not present and were not notified that each and all of the said suits are parts of one and the same transaction, collusively and fraudulently contrived and instituted by the Belt Company and those said persons who control its action, with the fraudulent purpose and in-

tent of hindering, delaying and defrauding all of its unsecured creditors excepting the complainant.

This defendant prays leave to refer to and use upon any hearing of this cause, any and all of the files and records in any and all of said causes, as fully as if they were set out herein and made a part of the record in this cause.

This defendant further states and shows that on April 1st, 1899, and prior thereto, the Kansas City, Pittsburg and Gulf Railroad Company, a Missouri corporation, was operating a railroad from Kansas City, Missouri, to Port Arthur, Texas, and under a rental contract was using the lines, tracks, station houses, yards and depots of the said Belt Company and its associated lines as its Kansas City Terminal, and was using the canal of the Port Arthur Channel & Dock Company in Texas as its southern terminals, so as to get its freight to and from the open sea.

That on April 1st, 1899, the said Kansas City, Pittsburg & Gulf Railroad Company defaulted in the payment of the interest on its mortgage bonds and a suit to foreclose its mortgage on account of said default was instituted in this Honorable Court on the 6th day of April, 1899, and receivers were appointed and operated the railroad pending the foreclosure.

That a certain number of persons about that time got together and appointed themselves as a committee herein called the Philadelphia Committee to reorganize the Kansas City, Pittsburg & Gulf Railroad Company and readjust its securities so that it would be thereafter burdened with a less interest charge and one clearly within its ability to earn.

That said Philadelphia Committee, after some resignations and substitutions was composed of Wm. F. Harrity, A. Heckscher, Herman Sielcken, William Edenborn, Max Pam, Samuel R. Shipley, Silas Petitt and Winthrop Smith.

47 That the said Philadelphia Committee, in pursuance of said purpose, adopted and published a plan and agreement for the reorganization of the said Kansas City Pittsburg & Gulf Railroad Company and the said Temrinal Companies, which provided among other things, for the formation of a new railroad company, which would issue its bonds and stocks in exchange for the bonds and stocks of the said Kansas City, Pittsburg & Gulf Railroad Company and in exchange for the stock and bonds of the Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, the Consolidated Terminal Railroad Company of Kansas City, the Kansas City & Independence Air Line, and the Port Arthur Channel & Dock Company, in order, as stated in said published plan, "to merge these three corporate managements into one so that the system shall be capable of operation as a whole under one management, from Kansas City to the ship's side at Port Arthur," so that said new railroad company which would after the reorganization own the main line and property of the said Kansas City, Pittsburg & Gulf Railroad Company, would also own the bonds and capital stock of the Kansas City Suburban Belt Railroad Company, and its operated lines at Kansas City, and of the Port Arthur Channel &

Dock Company in Texas and that hereby "all three parties would be under one corporate ownership, management and control.

That the Provident Life & Trust Company, complainant in said four foreclosure suits filed simultaneously with this suit, was a party to the said plan and agreement or reorganization, and its president, Samuel R. Shipley, was a member of the said Philadelphia Committee.

That the said Philadelphia Committee, in furtherance of its said plan of reorganization, caused the proposed new railroad to be incorporated under the laws of the state of Missouri under the name of The Kansas City Southern Railway Company, and placed three of its members on the Board of Directors of said New Company, and two others of its members, one of whom is the said Samuel R. Shipley, President of the said Provident Life & Trust Company, as aforesaid, on a Board of Voting Trustees, who were to be and are vested with the absolute and unlimited power of voting all of the stock of The Kansas City Southern Railway Company for the next five years.

That the said Philadelphia Committee, for and on behalf of the said The Kansas City Southern Railway Company, as well as on its own account, did invite and request the owners and holders of the stock and bonds of the Kansas City, Pittsburg & Gulf Rail-
48 road Company, the Port Arthur Channel & Dock Company, and the said Kansas City Suburban Belt Railroad Company and its operated lines at Kansas City, to deposit their said stock and bonds with the said Provident Life & Trust Company and to receive in payment therefor the stocks and bonds of the said The Kansas City Southern Railway Company, at a ratio prescribed in said published plan.

That in response to said invitation and request, the respective owners and holders of the stock and bonds of all of the said companies, and particularly of the Kansas City Suburban Belt Railroad Company and its operated lines at Kansas City, for the purpose of converting them into the stock and bonds of The Kansas City Southern Railway Company, to the end that the said purpose of said reorganization plan might be carried out, did deposit all or substantially all of their stocks and bonds so as to enable the said Philadelphia Committee to consummate its said plan of reorganization, and the same was thereupon declared effective and carried out as proposed.

That after the said plan of reorganization had been declared effective, and the said The Kansas City Southern Railway Company had thereby acquired substantially all of the stocks and bonds of the Kansas City Suburban Belt Railroad Company, and its operated lines at Kansas City, to-wit, on or about the first day of April, 1900, a majority of the then directors and officers of the Kansas City Suburban Belt Railroad Company resigned their respective offices, and persons who were directors, officers and agents of the said The Kansas City Southern Railway Company, were chosen in their stead so that from that time ever since the said The Kansas City Southern Railway Company and the said Philadelphia Committee have had

and exercised full and unrestrained control, direction and management of all of the corporate affairs of the said defendant, the Kansas City Suburban Belt Railroad Company.

That on or about the said first day of April, 1900, the said The Kansas City Southern Railway Company in furtherance of said plan of reorganization, took actual possession of all of the railroad, tracks, shops, depots, station houses, rolling stock, and other equipment and appurtenances, and appliances of the Kansas City Suburban Belt Railroad Company and its operated lines at Kansas City, and has ever since that time been and still is managing, controlling and operating the same and receiving and collecting all of the earnings and income thereof.

That it was a part of the said plan and agreement of reorganization that the said Philadelphia Committee should cause a syndicate of capitalists to be formed who would buy enough of the stock
49 and bonds of the said The Kansas City Southern Railway Company which would not be needed to retire and convert the stock and bonds of the old companies sought to be unified, to pay off and discharge all of the floating debts and other unsecured obligations of all of the old companies, including those of the Kansas City Suburban Belt Railroad Company. That said syndicate was formed and enough of the securities of The Kansas C[illegible]y Southern Railway Company were sold to said syndicate to provide money to satisfy and discharge all of the floating and unsecured debts and obligations of all of said companies so sought to be united under the ownership and control of The Kansas City Southern Railway Company, including those of the said Kansas City Suburban Belt Railroad Company and the said Philadelphia Committee, and the said The Kansas City Southern Railway Company, which it controls, have wrongfully withheld said money and have unlawfully and fraudulently failed and refused to apply the same to the purposes for which it was raised, to-wit, to the payment of the floating and unsecured debts and obligations of the Kansas City Suburban Belt Railroad Company, and the other old companies so amalgamated as aforesaid under said plan of reorganization.

This defendant further states and shows that one Max Pam, of Chicago, Illinois, was and is a member of the said Philadelphia Committee, and was and is also a member of the Board of Directors of the said The Kansas City Southern Railway Company, and a member of its Executive Committee; that said Max Pam was and is the General Counsel and legal adviser of the said Philadelphia Committee and the General Counsel and legal adviser of the said The Kansas City Southern Railway Company, and the General Counsel and legal adviser of the said Kansas City Suburban Belt Railroad Company, and the General Counsel and legal adviser of The Union Terminal Railroad Company, and the General Counsel and legal adviser of the Kansas City & Independence Air Line, and the General Counsel and legal adviser of the Consolidated Terminal Railway Company, and as such had and has the general supervision, direction and control of the affairs and legal proceedings of the said Philadelphia Committee and of all of the said last

named railroad companies, including the question as to which of their debts, if any, they should pay, and which of their debts they should avoid or escape the payment of, and of the legal proceedings necessary to accomplish the avoidance and escaping of the payment of such debts.

That C. W. Lucas, who entered the appearance of the Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, the Consolidated Terminal Railroad Company, and the Kansas City & Independence Air Line in this cause, and who on their behalf consented to the appointment of receivers for their properties, is an appointee of the said Max Pam, as an assistant attorney for the said Kansas City Southern Railway Company and for all of the other said railroad companies, and his salary is fixed by and is dependent upon the wishes and word of the said Pam, and that his said action in appearing for the said defendants and consenting to the appointment of receivers was in obedience to the direction of the said Max Pam, and in accordance with the wishes, and for the furtherance of the fraudulent purpose whongfully and wickedly conceived by the said Philadelphia Committee and the said Kansas City Southern Railway Company, and the said Kansas City Suburban Belt Railroad Company whom they control to avoid and escape the payment of the unsecured debts of the said Belt Company by means of the said four foreclosure suits, and by means of this suit so simultaneously and collusively instituted as aforesaid.

This defendant denies that prior to the year 1887, or at any other time, it conceived or entered upon the plan and purpose to construct, or cause to be constructed a large number of railroads in and about Kansas City, as alleged in the bill of complaint. Denies that it was a part of its plan and purpose to cause railroads to be constructed and operated by various corporations to be organized by this defendant and officered by its agents and representatives so as to absolutely dominate -nd control the actions of said railroad companies and their directors and officers, as alleged in the bill of complaint. Denies that it was a part of any such plan of this defendant to organize a large number of auxiliary corporations either in the way of construction companies to build railroads or companies to hold legal titles to lands, buildings or other structures necessary to be used by such railroad companies, as alleged in the bill of complaint. Denies that it so officered such construction and auxiliary companies with its own officers and agents so as thereby to enable it to dominate the actions of such construction and auxiliary companies, and of their several officers and directors, as alleged in the bill of complaint. Denies that it was a part of any plan or purpose of this defendant to utilize and employ any one or more of such railroad companies or auxiliary companies to act for or on behalf of this defendant in carrying out the various portions of the general plan as alleged in the bill of complaint, or for the purpose or plan of carrying out any other plan or purpose, so as to gather to itself the profits and advantages accruing from any of their transactions. Denies that this defendant at any time organized any railroad corporation or other

corporation, with the purpose and intent on its part to un-
51 dertake to foist upon such railroad Company or other corporation, or upon those who might become interested therein as creditors or otherwise any loss, burden or other liability which might result from any of their transactions as alleged in the bill of complaint. Denies that in carrying out any of its plans and purposes as alleged in the bill of complaint the defendant assumed the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of said railroad companies and auxiliary companies in trust, and for the use and benefit of the parties who might become interested therein, as alleged in the bill of complaint; and denies that as a consequence of any such alleged position the relation of this defendant to any of such railroad companies and auxiliary companies in any wise became or was as principal bound and charged with the duty to indemnify or protect any such railroad or auxiliary company in any transaction against any loss, burden or liability, as alleged in the bill of complaint. Denies that it became the duty of the defendant, as to persons becoming interested in any of said railroad companies or auxiliary companies as creditors, to dispose of the stock, bonds funds or other assets of any such railroad companies or auxiliary companies for the use and benefit of the persons interested therein, or who might become interested therein as creditors or otherwise, as alleged in the bill of complaint.

This defendant further answering states and shows that in the management and discharge of its business as a trust company it accepted the trusteeship in a number of mortgages given by some of said railroad companies to secure bonds issued by them, and as such trustee did certify the bonds, and in some cases did underwrite and purchase some of said bonds, and in some cases did act as agent for said railroad companies in the sale and disposition of their bonds to others, and in some cases acted as the agent of said railroad companies, and other companies, in the sale and disposition of their stocks, and in some cases subscribed to some of the stocks of other corporations, all of which, in so far as it affects the matters and things referred to in the bill of complaint will be more definitely and particularly hereinafter stated

The defendant denies that in pursuance of the alleged plans and purposes, or otherwise, it did, on or about the first day of January, 1887, or at any other time, cause the corporation to be formed known as the Kansas City Suburban Belt Railroad Company for the stated and avowed purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri and Kansas City, Kansas, as alleged in the bill of complaint, or for any other purpose. Denies that it caused said Suburban Com-
52 pany to build a portion of its projected line, as alleged in the bill of complaint, and denies that it caused the said Suburban Belt Company to place a mortgage upon its property to secure an issue of its bonds aggregating a million dollars, and to issue and deliver the sa-d bonds to this defendant as alleged in

the bill of complaint. Denies that it thereupon proceeded to sell and dispose of the said bonds as alleged in the bill of complaint. Denies that there has been, or is, any default in the payment of any interest heretofore accruing upon any of said bonds, and denies that the principal of any of the said bonds has been declared to be due and payable according to the terms and provisions of the mortgages securing the same, as alleged in the bill of complaint. It admits that a bill to foreclose said mortgage has been filed and is now pending in this court.

This defendant states and shows that all, or substantially all, of the said bonds have been taken up and are now in the possession of and held by the persons who own and control all the stock of said Suburban Company, and who have possession and management of its property, and who control and operate its property and railroad and receive all of the income and earnings thereof, and that said persons have attempted and pretended to make a default in the payment of the interest on said bonds and have attempted and pretended, by reason of said fictitious default to declare the principal of said bonds due, and have caused the said foreclosure suit to be instituted, which alleged default and pretended declaring of the principal due on account thereof, and the suit to foreclose the mortgage by reason thereof, were all made, done and instigated by the persons whose duty it was to pay whatever might be due on any of said bonds for the fraudulent purpose of cutting out all the unsecured creditors of said Belt Company, by means of such foreclosure.

This defendant denies that it caused various of its officers, agents and employes to be elected and constituted the officers and directors of the said Suburban Belt Railroad Company, and denies that by means thereof it did dominate and control the affairs and actions of the said Suburban Belt Company continuously until its consolidation, as alleged in the bill of complaint. Denies that instead of carrying out and completing the projects and purposes for which the said Suburban Company is alleged in the bill of complaint, to have been formed, and in order to benefit this defendant, it caused the consolidated Terminal Railway Company to be incorporated for the purposes stated in the bill of complaint, or for any other purpose whatever. Denies that it caused the said Consolidated Terminal Railway Company to place a mortgage upon its prop-
53 erty, as alleged in the bill of complaint, to secure the issue of its bonds aggregating Seven Hundred and Fifty Thousand Dollars. Denies that it caused said company to issue and deliver said bonds, or any of them, to this defendant.

The said Consolidated Terminal Railway Company did execute and deliver to this defendant, as trustee, a mortgage on its said road and property to secure an issue of bonds aggregating Seven Hundred and Fifty Thousand Dollars, but this defendant denies that it at any time proceeded to sell or dispose of any of said bonds except as agent for the Kansas City Suburban Belt Railroad Company, as will hereafter be more particularly stated, and

denies that said bonds are now outstanding. Denies that default having occurred in the payment of installments of interest heretofore accuring upon said bonds, the principal of said bonds has been declared to be due and payable in accordance with the terms and provisions of said mortgage.

This defendant states and shows to the court that all or substantially all of the said bonds have been taken up and are now held by the persons who own all of the stock of the said Consolidated Terminal Company, and who own, manage, control and operate all of its property, including its railroad, and who collect and receive all of the earnings and income thereof, and who are charged with the duty of paying whatever may be due on any of said bonds; that the said persons assert and claim that there has been a default in the payment of inter-st on the said bonds and have pretended to have the principal of said bonds, declared due on account of such fictitious default, and have procured a foreclosure suit to be brought which is now pending in this court, but this defendant states and shows that the alleged default, and the pretended declaring of the principal due on account thereof, and the subsequent institution of the foreclosure suit, were all made, done and instigated by the persons who own said bonds, and who practically own the property which is mortgaged to secure them and who are chargeable with the duty of paying whatever may be due on any of said bonds, and that the said foreclosure suit was brought at their instigation for the fraudulent purpose of hindering, delaying and defrauding the unsecured creditors of the Belt Company, particularly this defendant.

This defendant denies that it caused various of its officers, agents and employes to be elected as officers and directors of the said Terminal Company, and denies that it thereupon proceeded to
54 dominate and control the action of said company and its officers and directors continuously until its consolidation as alleged in the bill of complaint, and denies that instead of completing the said line of railroad of said Terminal Company specified and mentioned in its articles of incorporation, this defendant caused only a part thereof to be built, as alleged in the bill of complaint. Denies that in further pursuance of its alleged plans and purposes, or in any other way, it did, on [*of*] about the 30th day of December, 1891, or at any other time, cause the Union Terminal Railroad Company to be incorporated as alleged in the bill of complaint, and for the purposes stated in the bill of complaint or for any other purpose whatever. Denies that it thereupon caused the said Union Terminal Company to place a mortgage upon the railroad proposed to be built by it, and upon its property, to secure an issue of bonds, aggregating Two Million Dollars, as alleged in the bill of complaint, and denies that it caused the said Union Terminal Company to issue and deliver the said bonds to this defendant. Denies that it caused the said Union Company to build a part of the line specified in the articles of association, as alleged in the bill of complaint. Denies that this defendant did thereupon sell and dispose

of said bonds, and denies that the same are now outstanding. Denies that default having occurred in the payment of various installments of interest heretofore accruing upon said bonds, the principal has been declared to be due and payable according to the terms and provisions of said mortgage. Admits that a suit to foreclose said mortgage has been brought and is now pending in this Court. Denies that it caused various of its officers, agents and employes to be elected as the officers and directors of said Union Company, and denies that by means thereof it did continuously until about the month of April, 1900, dominate and control the action and affairs of said Union Terminal Company and its officers and directors. Denies that by means of such alleged control and domination or otherwise, this defendant caused the said Kansas City Suburban Belt Railroad Company to endorse upon each of the bonds of the Union Company its guaranty for the payment of principal and interest thereof and denies that by reason of its domination and control, as alleged, did, on or about the 25th day of July, 1892, or at any time, cause the said Suburban Company, and the said Terminal Company, to be consolidated in accordance with the provisions of the statutes of the State of Missouri, as alleged in the bill of complaint. This defendant states that it is true that the said Suburban Company and the said Terminal Company were duly consolidated in accordance with the statutes of the State of Missouri, but that such consolidation was not the result of any domination or control on the part of
55 this defendant, and denies that this defendant caused various of its officers, agents and employes to be elected as the officers and directors of the said Belt Company, and by means thereof, continuously until the month of April, 1900, completely dominated and controlled the actions and affairs of said Belt Company and its officers and directors.

This defendant states and shows that the Union Terminal Railroad Company did duly execute and deliver to this defendant, as trustee, a mortgage upon the railroad proposed to be built by it, to secure an issue of bonds aggregating Two Million Dollars; that all, or substantially all, of the said bonds have been taken up and are now held and owned by the same persons who own and hold all of the stock of The Union Terminal Railroad Company and who own, control and manage its property, and who control and operate its railroad, and collect and receive all the earnings and income thereof, and who are charged with the duty of paying anything that may be due on any of said bonds. The said persons have pretended that there was a default in the payment to them of some of said interest, and on account of said fictitious default have undertaken to declare the principal of said bonds due, and have procured a foreclosure suit to be brought in this court on account thereof, but this defendant states and shows that the alleged default and pretended declaring of the principal due on account thereof, and the institution of said foreclosure suit were all made, done and instigated by the said persons who practically own the property sought to be foreclosed, for the fraudulent purpose of hindering, delaying and defrauding un-

secured creditors of the Belt Company and particularly this defendant.

This defendant denies that in furtherance of its alleged plans and purposes, it caused the Kansas City & Independence Air Line to be incorporated on or about the 23rd day of January, 1891, or at any other time, for the purpose of building a line of railroad described in the bill of complaint, or for any other purpose. Denies that it caused said Air Line to place a mortgage upon its property to secure an issue of bonds aggregating Three Hundred Thousand Dollars, and to issue and deliver the said bonds to this defendant. Denies that it thereupon sold and disposed of the said bonds, and denies that the same are now outstanding. Denies that default having occured in the payment of various installments of interest heretofore accruing upon said bonds, the principal thereof has been declared to be due and payable according to the [term-] and provisions of the mortgage securing the same. Admits that a suit to foreclose said mortgage has been brought and is now pending in this Court. Denies that it caused various of its officers,
56 agents and employes to be elected as officers and directors of the said Air Line, so to absolutely dominate and control the affairs of said company, and the actions of its officers and directors, and denies that this defendant did cause the various lines of railroad of said Suburban, Union Terminal and Belt Companies respectively, and of the said Air Line, to be operated as constituting one entire allied continuous system of railroad. It is true that *that* said railroads were so operated as constituting on- entire allied continuous system of railroad, but it was not the result of the domination, direction or control of this defendant.

This defendant states and shows that said Air Line Company did execute and deliver to this defendant, as trustee, a mortgage on its property to secure an issue of Three Hundred Thousand Dollars of bonds; that all, or substantially all, of said bonds have been taken up and are now held and owned by the same persons who hold and own all of the stock of said company, and who have the possession, management and control of all of the property of said company, and who manage and operate the railroad of said company, and collect and receive all of the income and earnings thereof, and who are chargeable with the duty of paying anything that may be due upon any of said bonds; that the said persons have pretended to assert that there was a default in the payment of some of the interest on said bonds, and have pretended to have the principal of said bonds declared due on account of such alleged and fictitious default of interest, and have procured the said foreclosure suit to be brought on account thereof, and this defendant states and shows that the said alleged default and pretended declaring of the principal to be due and the institution of said forcelosure suit, were all made, done and instigated by the persons who own, possess, control and manage the property covered by the said mortgage, and which is sought by said suit to be foreclosed for the fraudulent purpose of hindering, delaying and defrauding unsecured creditors of the Belt Company, particularly this defendant.

This defendant denies that at all times until the said month of April, 1900, or during any part of said time, it caused all, or substantially all of the shares of the capital stock of the said several railroad companies to be issued to and held and voted either by some one or more of said railroad companies so alleged to be controlled or dominated by it, or by or in its own name, or by or in the name of some one or more of its officers, agents and employes, for and on its behalf, so as to serve its alleged plans and purposes and to enable it to effectuate the same, and its absolute control of
57 and domination over said railroad companies and each of them, and their respective properties, actions and affairs as alleged in the bill of complaint.

This defendant denies that the total cost of the lines of the said Suburban and Terminal Companies, consolidated into the Belt Company as aforesaid, was not to exceed $1,700,000.00. Denies that there were issued and delivered to this defendant by the said last named railroad companies bonds and stocks aggregating over Five Million Dollars, and denies that this defendant claims that it has applied the excess of such securities over the actual cost of such properties in the payment of its own commissions and services in the premises, and by way of allowance of said discounts in the sale and disposal of said securities as alleged in the bill of complaint. Denies that the cost of the railroad and other property of the said Union Terminal Company did not exceed $865,000.00 and denies that this defendant received into its possession the bonds and stocks of said Union Company to the amount of Four Million Dollars, as alleged in the bill of complaint, and denies that it claims that it has applied the excess of the amount of said bonds and stocks over the said cost, in payment of its own services and commissions in the premises and in the way of an allowance of discounts in the sale and disposal of said securities as alleged in the bill of complaint, and denies that the cost of said Air Line did not exceed $200,000.00 and denies that this defendant received into its possession bonds and stocks of the said Air Line to the amount of $850,000.00 and denies that it claims that it has applied the excess of said securities over the cost of said railroad in payment of its own services and commissions in the premises, and in the allowance of discounts in the sale and disposal of said securities as alleged in the bill of complaint.

This defendant denies that it has ever been requested to make an accounting of its alleged trusteeship in respect to the sale and disposal of any of said bonds and stocks, and has hitherto failed and still fails and refuses to make such accounting, as alleged in the bill of complaint, and denies that the complainant, or any of the persons representing it, or any of the persons who brought and are prosecuting this suit in its name, as aforesaid, ever had any information or belief that any such request for an accounting had been made and refused as alleged; and denies that the facts in respect to the sale and disposal of said securities, and the application of the proceeds thereof are peculiarly and solely within the knowledge of this defendant, and denies that the complainant was or is unable to state

the account between this defendant and the said Belt Com-
58 pany. Denies that upon a correct and proper accounting between the parties this defendant owes said Belt Company a large sum of money, or any amount whatever, and states that even if this defendant did owe the Belt Company anything on an accounting, the complainant is not entitled in this proceeding to subject the same to the payment of its said judgment, for the reason that this suit is not brought in good faith for that purpose, but is collusive and brought for the fraudulent purpose aforesaid.

This defendant further states and shows that at all times since the beginning of its connection with the affairs of said Belt Company, up to the time that the securities of the Belt Company and its property changed hands by reason of the reorganization herein referred to, being a period of over ten years, commencing in 1889, and ending about April, 1900, the said Belt Company and all of its officers, directors and stockholders had full knowledge and information as to everything which this defendant then was doing or had donei n respect to any of said bonds or stocks, and as to the true state of the account between the Belt Company and this defendant, and at all times fully approved of, consented to and ratified the same, and that the said Belt Company, and also all of its present officers, directors and stockholders, who brought and are now prosecuting this suit in the name of the complainant, as aforesaid, since they succeeded to the powers, duties and rights of their predecessors and assignors, by reason of such reorganization, have at all times since about the first day of April, 1900, had the means and the full opportunity of knowing all about all of the transactions between this defendant and the said Belt Company, during the said ten years, and have on divers occasions by their expert accountants fully examined all of the papers, books and accounts in any way bearing upon any and all of such transactions, including the books and papers of this defendant, and after such examination, and after having full information and knowledge as to the true condition of the said account, have admitted that the said Belt Company justly owed this defendant large sums of money, aggregating Five Hundred Thousand Dollars, and more, and frequently promised to pay the same.

That this defendant never had any knowledge or information that there was any claim or pretense in any quarter that this defendant owed said Belt Company anything, or that the said Belt Company did not owe this defendant the large sums of money claimed by it, until after the filing of the bill of complaint in this cause. Notwithstanding the fact that the said Belt Company has at all times had full and true accounts and knowledge of all the transactions between it and this defendant as aforesaid; yet,
59 if, for any reason it desires further accounting or information as to any of the said matters or things, this defendant is ready and willing and hereby offers again to render a full and true account and to furnish all such information, whenever thereunto lawfully and properly requested. But this defendant denies that the complainant under the facts and circumstances of this case, as

hereinbefore and hereinafter set out, is entitled to the accounting prayed for, and denies that the complainant either in good faith desires or needs any such accounting in order to collect its said judgment.

This defendant denies that it contrived the formation of the said Elevator, Amusement, Central and Second Street and Townsite Companies, or either of them, for the uses and purposes, or with the intent alleged in the bill of complaint; and denies that it caused various of its officers, agents and employes to be selected as the incorporators, stockholders, officers and directors of the said so-called auxiliary companies; and denies that it by means thereof dominated and controlled the management of the said so-called auxiliary companies and the actions of the stockholders and Boards of Directors thereof; denies that all or substantially all of the moneys invested in the purchase, improvement or acquisition of the several properties of the said so-called auxiliary companies, or either of them, was paid or supplied by the Belt Company; denies that all of any of the said Companies were mere devices or dummies contrived and provided by this defendant as a means for taking title to such property as might be vested in them for the use and benefit of the Belt Company, and denies that the properties and shares of stock of the said so-called auxiliary companies in equity belong to the Belt Company and are therefore chargeable with the lien of the complainant's said judgment as alleged in the bill of complaint.

This defendant denies that it at any time entered into any contract with the Omaha & St. Louis Railroad Company, the Quincy, Omaha & Kansas City Railroad Company, or the Omaha, Kansas City & Eastern Railroad Company whereby — agreed or bound itself to furnish to either of said companies an entrance into Kansas City, or which in any way necessitated the construction on behalf of this defendant of a line of road from Kansas City to Pattonsburg. Denies that being desirous to gain and reap unto itself the profits and advantages of said alleged contracts, and of relieving itself of the burdens, obligations and losses by reason thereof, did, by means of the alleged domination and control, or by any other means, conclude and contrive that it would cause the said Belt Company to enter into a contract for the construction of said line of railroad from Kansas City to Pattonsburg as alleged in the bill of complaint.

60 Denies that this defendant did cause to be formed the corporation known as the Kansas City and Northern Connecting Railroad Company for the purpose of holding title to said last mentioned line of road, or for any other purpose. Denies that it caused certain of its officers, directors, and agents to become officers and directors of the said Northern Connecting Company so as to dominate and control its management and affairs, and of the action of its officers and directors, as alleged in the bill of complaint.

Denies that in pursuance of said alleged plans and to accomplish the alleged purpose and designs of this company, it caused the said Belt Company, on or about the — day of — 1896, or at any other time, to go through the form of entering into a contract, or to make a contract, with the said Northern Connecting Company for the

construction, in the name of said Belt Company, but as agent for the use and benefit of this defendant, of the said line of railroad to Pattonsburg, and denies that it dominated and controlled the said Connecting Company and the said Belt Company in and about the making of any such contract with the intent and for the purposes alleged in the said bill of complaint, or for any other purpose or intent. Denies that it caused the Northern Connecting Company to issue its certain bonds and stocks for the purpose of paying for the said construction, though it is true that the said Northern Connecting Company did issue its certain bonds and stocks for the purpose of paying for the construction of its said railroad. Denies that this defendant caused the said stocks and bonds to be delivered partly into its possession and control, and partly into the possession and control of the Belt Company, but on the contrary states that the said Northern Connecting Company did deliver all of its said stock and bonds to the said Belt Company in payment for the construction and completion of its said line of railroad. It is true that this defendant did undertake to charge, and did charge to the account of the Belt Company all the money expended by this defendant by way of advance to the Belt Company for the purpose of constructing the said line of railroad, and did give the said Belt Company credit for all property and moneys which came into the hands of this defendant as the proceeds of the sale of any of said stocks and bonds of said Northern Connecting Company, or of any other property of the Belt Company, less proper and reasonable commissions for this defendant's services in the premises, as hereinafter will be more particularly stated. That the making of said charges, and the giving of said credits were in no sense mere matters of form and pretense, as alleged in the bill, but represented actual and proper transactions. This defendant denies that the result of the

61 construction of said Northern Connecting Railroad was a loss of over $300,000.00, or of any other sum. Denies that there was any loss incurred by the Belt Company in carrying out its contract for the building of said road. Denies that this defendant in any way, in fact or in law, became principal in the building of said Northern Connecting Road through the instrumentality of the Belt Company, as its agent or otherwise, or that this defendant in any way became liable for any losses that might have occurred, or entitled to any profits that accrued from the building of said road, but that upon the contrary whatever loss might have been incurred would have been properly chargeable to the Belt Company and all profits belonged to it alone.

This defendant denies that the said Belt Company was without lawful power to make the said contract with the Northern Connecting Company for the building of the latter's road. Denies that the same was without the power of the Belt Company, under its charter and laws of the state.

This defendant states and shows that the Belt Company purchased all the steel rails which it put into the Northern Connecting road from the complainant, and the complainants sold the said rails to the Belt Company knowing the uses and purposes for which they

were bought, and to which they would be put; that the note on which the complainant procured its said judgment was given by the Belt Company for part of the purchase price of said rails; that the complainant ought not to be allowed to claim that the contract of the Belt Company with it for the purchase of rails necessary to carry out its said contract is valid and binding, and at the same time assert that the contract which the Belt was carrying out with the knowledge and consent of the complainant was invalid because ultra vires. If the making of the contract to build the road was ultra vires, the purchasing of material to fulfill the contract would also be ultra vires, but this defendant states and shows that the said contract was within the power of the Belt Company and that it was entered into and fully carried out without any loss, and that the said contract has long since been fully executed, carried out and completed by both of the parties thereto.

This defendant further answering denies that in pursuance of any of the general plans or purposes alleged in the bill of complaint, or otherwise, it caused to be organized the corporation known as the Kansas City, Pittsburg & Gulf Railroad Company, for the purpose of constructing a road from Kansas City to the Gulf of Mexico, for the use and benefit of this defendant, as alleged in the bill
62 of complaint. It is true that the Kansas City, Pittsburg & Gulf Railroad Company did make a mortgage to secure an issue of bonds therein specified, but the defendant denies that it caused the said Kansas City, Pittsburg & Gulf Railroad Company to make said mortgage. It is true that there were issued and outstanding prior to the first day of April, 1899, Twenty Three Million Dollars of bonds of the said Kansas City, Pittsburg & Gulf Railroad Company secured by its said mortgage; that default was made in the payment of the interest due on said bonds, and that the said Kansas City, Pittsburg & Gulf Railroad Company became and was insolvent. It is true that a bill to foreclose the said mortgage was thereupon filed, and that the property of the said Kansas City, Pittsburg & Gulf Railroad Company passed in to the hands of receivers appointed by this Honorable Court. It is true that such proceedings were thereafter had, which upon their face appear to show that a foreclosure of such mortgage was decreed and the property of the said Kansas City, Pittsburg & Gulf Railroad Company sold under the terms thereof.

This defendant denies that it was at any time aware, or had knowledge of the fact that the default, receivership and foreclosure of the Kansas City, Pittsburg & Gulf Railroad Company's property would cause or result in the default of the payment of any of the installments of interest accruing on the several mortgages of the Belt Railroad and its operated lines, or of the said Northern Connecting Company, or that it would cause any of the said companies or any of the said auxiliary companies, to become insolvent or to be unable to conduct their respective operations and pay their liabilities as the same matured; that upon the contrary thereof said default, receivership and foreclosure of the Kansas City, Pittsburg & Gulf Railroad Company's property had no such effect. Denies that this de-

fendant on account of such alleged knowledge contrived and planned to gather unto itself the stocks and bonds and other assets of the property of the said railroad and auxiliary companies, including the Belt Company, with any such intent or for any such purposes, as are alleged in the bill of complaint. Denies that this defendant under any fraudulent pretense caused to be delivered to it any of the securities or property of any of said companies, or of said Belt Company, for the purpose of securing any alleged false and unfounded claim made and advanced by this defendant, but it states and shows that it did receive from the Belt Company certain property and securities as collateral security to secure the payment of the just demands which this company had and still has against the Belt Company.

63 That the execution and delivery by the Belt Company to this defendant of the promissory note mentioned in the bill of complaint, and the pledge by the Belt Company of the stocks and bonds and property as collateral security for the payment of said notes, were all done in good faith for the purpose of evidencing and securing just debts due to this defendant from the Belt Company, and were not made or pledged for the fraudulent purposes alleged in the bill of complaint, or for any other purpose than that of justly evidencing and securing this defendant's debt due it from the Belt Company. Denies that the defendant dominated and controlled the Belt Company to go through the form of executing the said notes and delivering said collateral security for the purpose of hindering and delaying the complainant in the collection of its debt, for the purpose of hindering or delaying any other creditor of the Belt Company, or for any other unlawful or fraudulent purpose, but that the Belt Company, as in justice and good conscience it ought to have done, did execute and deliver the said notes and pledge the said collateral to this defendant in all respects as it did execute and deliver to the complainant during the same time, and pledge property as security therefor, the promissory note which the complainant has made the basis of this suit, namely for the purpose of properly securing its creditors, and not otherwise. This defendant admits that the bill of complaint in so far as it undertakes to definitely specify the notes executed by the Belt Company to this defendant has correctly stated them, but states that some of them had been sold and rediscounted prior to the institution of this suit, and that one of them has since been paid, and that in addition to the notes specifically mentioned and described in the bill of complaint, this defendant holds two other notes executed and delivered by the Belt Company to it, one of which is dated on the 11th day of June, 1900, for the sum of $10,400.00 due October 11th, 1900, the other of which notes was dated on the 25th day of May, 1900, due on the 25th day of September, 1900, for $25,000.00; that both of these notes had been sold and rediscounted by this defendant prior to the institution of this suit.

This defendant further answering states that it is true that the Belt Company delivered to this defendant as collateral security for the payment of said indebtedness, among other things, 19,997 shares of capital stock of The Union Terminal Railroad Company, and

4,994 shares of the capital stock of the Kansas City & Independence Air Line but denies that this defendant has heretofore undertaken to sell and dispose of the said last named securities, although it had the lawful right to do so had it chosen, but this defendant states and shows that it, on the 14th day of June, 1900, released the said shares of stock of The Union Terminal Company, and the
64 said shares of stock of the said Air Line Company to the Belt Company upon its request and upon the payment to this defendant of $25,000.00 which was duly credited on said note, and the said Belt Company now still has and holds such shares of stock. This defendant admits that the Belt Company assigned to it as a collateral security for the said indebtedness a quantity of new steel rails to-wit, about Three Hundred and Forty Four tons, and not Six Hundred tons as alleged in the bill of complaint, and it is true that this defendant has sold said Three Hundred and Forty Four tons of steel rails and credited the proceeds of the sale upon the Belt Company's said indebtedness to it. This defendant denies that it has appropriated fraudulently or otherwise, unto itself, without consideration or right, all or any of the capital stock of the Second Street Improvement Company or a large number of, or any, of the shares of stock of the Central Improvement Company or all or any of the capital stock of the Northern Townsite Company, or all or any of the other property, stocks, bonds, notes, claims or choses in action of the Belt Company, as alleged in the bill of complaint. That this defendant has in its possession and under its control none of the stocks and bonds and property of the said Belt Company except as hereinbefore stated, which it holds as collateral security duly pledged for the Belt Company's indebtedness to it, as aforesaid.

This defendant, further answering, denies that it was, or is insolvent; denies that it has outstanding a large number of matured obligations, the holders of which are pressing this defendant for payment. Denies that this defendant is unable to meet all of the demands against it. Denies that this defendant has ceased the active conduct of business and denies that its affairs are in process of liquidation, but on the contrary states and shows to the court that it is worth Two Million Dollars and more over and above its debts and liabilities, that it has no outstanding matured obligations whose holders are pressing for payment; and none which are not amply and satisfactorily secured; that this defendant is actively engaged in the prosecution of its legitimate and proper business for which it was incorporated, and is perfectly solvent and able to meet and satisfy any judgment which the Belt Company or the complainant might obtain against it by reason of the facts set out in the bill of complaint.

This defendant denies that it was or is threatening to sell the said notes which it holds against the Belt Company, or the property which it holds as collateral thereto, to the end or for the purpose
65 that the creditors of the Belt Company, including the complainant, might be hindered, delayed or defrauded in their just rights and remedies, as alleged in the bill of complaint.

This defendant further answering states that it is true that on or before the first day of September, 1900, this defendant served notice upon the Belt Company that it would at a time therein specified sell certain of the said collateral securities, a copy of which said notice is filed with the bill of complaint and marked "Exhibit 1", all of which this defendant was in law and equity entitled to do.

This defendant further answering admits that the property held in the name of the Elevator Company consists among other things, of three elevators, known as the Star, Eclipse and Diamond, but denies that said elevators, or any other property in the name of the Elevator Company is held for and on behalf of the Belt Company, except in so far as the Belt Company holds stock of the Elevator Company which is represented by certificates duly issued to it. This defendant denies that the property of the said Elevator Company, or any part of it, is indispensable or even convenient in the operation of the Belt Company's property, though it is true that the proximity of said elevators to the line of the Belt Railroad enables the Belt Company to make greater earnings than it would otherwise do.

This defendant admits that the property held in the name of the Central Improvement Company consists of various [tracks] of real estate in Kansas City, Missouri, some of which are convenient and necessary for the use of the Belt Company, and which are now being occupied and used by it; but denies that any of the property standing in the name of the Central Improvement Company is held in trust for the Belt Company, and denies that the Belt Company has any interest therein except as a stockholder, as aforesaid, by certificates of stock duly issued to it by the said Central Improvement Company, and except as before stated, the said Belt Company is occupying and using a part of the lands of the said Central Improvement Company, but inasmuch as this defendant holds and owns three promissory notes aggregating the principal sum of Five Thousand Dollars, which are secured by a deed of trust in the nature of a mortgage on some of the property of the said Central Improvement Company, to-wit: Lots 31, 47 and 48 in Hurck's Subdivision of Guinotte Bluff, an addition to Kansas City, on which notes the Central Improvement Company fails and refuses to pay interest long since due, and in as much as this defendant holds promissory notes of

66 the said Missouri, Elevator & Terminal Company, aggregating the sum of $32,000.00, which are secured by separate deeds of trust on the said three elevators and property pertaining thereto, on which said notes the said Missouri Elevator & Terminal Company refused to pay interest long since due and payable; and in as much as this defendant also holds a majority of the stock of the said Central Improvement Company, and the said Missouri Elevator & Terminal Company as collateral security duly pledged to it as such for the securing of debts other than the said notes last above mentioned, and in as much as the said Belt Company is not paying any rent for the use of the property of the said Central Improvement Company, so occupied and used by it, this defendant does not object t the appointment of a receiver for the

property of the said defendants the Central Improvement Company and the Missouri Elevator & Terminal Company, provided an impartial receiver, not in any way connected with or influenced by the said Belt Company, or by the said The Kansas City Southern Railway Company be appointed, and when appointed shall be directed by this Court to collect rents from all companies or persons who occupy or use any of the lands or property of the said Central Improvement Company and the Missouri Elevator & Terminal Company and hold the same to be paid out under the order of this Court to whomsoever may be found to be entitled thereto.

This defendant admits that the property held in the name of the Second Street Improvement Company consists of certain tracts of real estate in or near Kansas City, Missouri. Denies that the said Second Street Improvement Company holds title to any of its property in trust for or for the use and benefit of the Belt Company. Denies that the Belt Company has any interest in any of the property of the Second Street Improvement Company, as a stockholder or otherwise, except that it occupies and uses certain tracts of land as a lessee and others as a licensee of said Second Street Improvement Company. This defendant denies that the property and assets the title to which is held by the said Fairmount Amusement Company and the said Townsite Company are in any way essential or necessary to the successful operation of the property of the said Belt Company and denies that the said Belt Company has or ever had any other rights or interest in any of said property, except such as arises from the fact that it is a stockholder in each of said companies, together with other stockholders, except that the said Townsite Company holds the title to certain tracts of land for the Belt Company as stated in the answer of said Townsite Company filed herein. This defendant denies that it is necessary to the protection of the interests of the complainant, or of any of the creditors of the Belt Company for the alleged reasons assigned in the bill of com-
67 plaint to appoint a receiver for any of the said auxiliary companies, or to restrain this defendant as prayed for in the bill but admits that a receiver might properly be appointed for the property of the Central Improvement Company and the Missouri Elevator & Terminal Company.

This defendant further answering, denies that the officers, agents and representatives of the Belt Company prior to the month of April, 1900, were in this month displaced by reason of the election then held by the stockholders of the Belt Company as alleged in the bill of complaint, but avers and shows that upon the taking effect of the said plan of reorganization, whereby the present owners of the stock and bonds of the Belt Company became entitled to the possession of its railroad and to the management and control thereof enough of the former directors and officers of the Belt Company voluntarily resigned and persons representing the present owners and holders of the stock of said Belt Company were chosen by the remaining directors to fill the vacancies thus occasioned.

This defendant denies that the complainant brought this bill of complaint for itself, or for any creditors of the Belt Company simi-

larly situated, and states and shows that the said bill of complaint was collusively brought in the name of the complainant at the instance and request of the said Belt Company and of the persons in charge and control thereof, for their own benefit and purposes as aforesaid. That this defendant is informed and believes and upon such information and belief states and avers the fact to be that the Belt Company since its reorganization has paid off and satisfied all its notes and bills payable and debts which were given and created prior to its said reorganization except those of this defendant and that of the complainant, and that the Belt Company was ready and able to pay the complainant's said note, and would have done so but for the fact that the complainant collusively consented to allow its said note to be used as a basis for this proceeding, for the fraudulent purpose aforesaid, and that the complainant can still collect and receive the full amount of its said debt, whenever it in good faith insists upon the payment thereof by the Belt Company.

This defendant denies that the complainant was without an adequate remedy at law, for the collection of its said debt, inasmuch as it could lawfully have sold the property of the Belt Company which was in its hands as collateral therefor, as aforesaid, and inasmuch as it could and would have received payment of its debt if it had in good faith demanded the payment thereof by the Belt Com-
68 pany; so that this defendant says that the complainant should not be allowed to use a Court of Equity in the collection of its said debt when it has an adequate remedy at law to collect the same.

Further answering unto the said bill of complaint, and to the several parts thereof, to the end that this Honorable Court may have a connected statement of the substantive and controlling facts which constitute the history of the various transactions extending over a period of ten years, which are now sought to be called in question by the bill of complaint, this defendant states and shows:

That it had nothing whatever, either directly or indirectly to do with the creation or incorporation of the said Kansas City Suburban Belt Railroad Company; that the said Kansas City Suburban Belt Railroad Company was formed and incorporated more than two years before the formation and incorporation of this defendant. That said Kansas City Suburban Belt Railroad Company was incorporated under the laws of the state of Missouri on the 8th day of January, 1887, with a capital stock of Five Hundred Thousand Dollars, and with nine directors, for the purpose of building a belt railroad around Kansas City, to be used as a switching and terminal road; that is to say, for the purpose of transferring cars, loaded and empty, from one trunk line to another and from the several trunk lines entering said city to the various warehouses, elevators, factories and other industries in the city and back again, for the usual switching charges, and also to furnish to such of the trunk lines then reaching Kansas City as might desire to avail themselves of it, improved terminal facilities and to others which might afterwards come the means of getting into the business portions of the city under favorable conditions for a compensatory rental.

That the said proposed use of the said Belt Railroad was of such a nature that in order to reap the fullest fruits of the enterprise it would be desirable to so build its road as to connect directly with all of the trunk lines entering the City, and also to have its tracks reach all of the important warehouses, elevators, factories and other industries that received and discharged their commodities in car load lots, and to aid and encourage the construction of other roads that would use its tracks and terminal facilities and pay rental therefor.

That the said Kansas City Suburban Belt Railroad Company has at all times covered by the transactions referred to in the bill of complaint been directly interested in so building and extending its roads and branches as to meet these conditions and in inducing other lines to use its tracks either by building out to meet
69 them or by aiding them to build in, and that some of the railroad companies which are charged in the bill of complaint to have been created and dominated by this defendant for its own profit, use and benefit, namely, the Consolidated Terminal and the Northern Connecting Company, were in truth and in fact created and controlled by officers of the Belt Company for its profit, use and benefit, so as to extend its usefulness and increase its earnings, and the said Belt Company afterwards became as it was originally intended it should become, the owner of all of the capital stock of each of the said companies and still owns and holds the same, and also became the owner and holder of the most of the bonds of the said companies, most, if not all of which it subsequently sold and disposed of.

This defendant has an authorized capital stock of Two Million, Five Hundred Thousand Dollars, and was incorporated on February 14th, 1889, with twenty-one directors, under the laws of the state of Missouri providing for the incorporation of Trust Companies, and as such had the power to buy and sell stock and bonds and other commercial securities either on its own account or as agents for others, and to act as trustee and financial agent for others.

That the said Suburban Belt Company for the first two years of its existence had done considerable preliminary work in the way of procuring franchises to use certain streets of Kansas City along which to build its railroad, making surveys and locating its line, and did some work in the way of constructing its roadbed, but it had been unable to make any arrangement whereby it could dispose of its securities or otherwise raise money to build and complete its road or any considerable portion of it; being in that condition, it did, about April or May, 1889, apply to A. E. Stilwell, who was one of the Vice-Presidents of this defendant Trust Company, and who then did not have and never prior thereto had had and connection with or interest whatever in the said Suburban Belt Company, but who had an extended and favorable acquaintance with men of capital and had great skill in soliciting and procuring capitalists to subscribe to and invest in ventures which he would propose, and who had but recently procured all of the subscribers to all of the large capital stock of this defendant and procured its incorporation, all of which was known to the said Belt Company, its officers and managers.

Knowing these things the said Belt Company did about April or May, 1889, apply to the said Stilwell and request him to use his efforts to procure the money with which to build the said Belt Railroad from a point on Second Street near Broadway in Kansas
70 City to Cecil Station on the Missouri Pacific Railway, a distance of about four and one-half miles. That negotiations were then had [be-en] the said Belt Company and the said Stilwell which resulted in a contract between the said Belt Company and the said Stilwell, whereby the said Belt Company agreed to issue and deliver to said Stilwell Four Hundred and Fifty Thousand Dollars of its first mortgage bonds, out of the total issue then contemplated of Five Hundred Thousand Dollars, and Nine Hundred Thousand Dollars of its capital stock, if the said Stilwell would build or cause to be built the said portion of the said railroad; that the said contract was duly authorized by the Board of Directors of the Belt Company at a meeting lawfully called, and by its stockholders at a stockholders' meeting duly called and convened on May 31st, 1889.

That at the time of making the said contract, none of the directors or stockholders of the said Suburban Belt Company except E. L. Martin had any connection with or interest in this defendant, and none of the directors, officers or stockholders of this defendant, except E. L. Martin, had any interest in or connection with the said Suburban Belt Railroad Company. That the said contract was made at arms' length between the said parties, free of any domination, direction or control whatever on the part of this defendant.

That a large majority of the Board of Directors of the said Suburban Belt Company continued to be composed of persons wholly disconnected with this defendant until the said portion of said railroad was completed and paid for in accordance with the terms of said contract.

That the said Stilwell thereupon procured subscribers to the stock of and the incorporation of a Construction Company, known as the Kansas City Terminal Construction Company, under the laws of the State of Missouri, which did the work of carrying out said contract which the said Belt Company made with the said Stilwell.

That upon the completion of said contract the said Four Hundred and Fifty Thousand Dollars of bonds and Nine Hundred Thousand Dollars of stock were delivered to the said Construction Company and distributed by it to its stockholders in proportion to their holdings therein, and that then and thereby the persons who were stockholders in the said Construction Company became the owners and holders of the said Four Hundred and Fifty Thousand Dollars of bonds and the said Nine Hundred Thousand Dollars of stock, which was a majority of the stock of the said Kansas City Suburban Belt Railroad Company, and afterwards, as such stockholders, they, together with their fellow stockholders, elected directors of
71 their own choice, as they had a right to do. which choice fell upon persons, a majority of whom were also directors of this defendant; but it is in no sense true, as alleged in the bill of complaint, that this defendant caused its directors and officers to be chosen as directors and officers of the Belt Company, but they were

chosen by the stockholders of the Belt Company, as aforesaid, without any domination, control or influence on the part of this defendant, and were so chosen because the persons who had subscribed to the stock of said Construction Company and had thereby become stockholders in the Belt Company, had previously become stockholders in this defendant, and were willing to trust the persons so chosen by them as Directors of the Belt Company, to look after and properly care for their interests as stockholders thereof.

This defendant is informed and believes, and upon such information and belief states the fact to be that the said Suburban Belt Company delivered to its old directors and Officers, or to some of them, Fifty Thousand Dollars of its said Bonds, and Eighty Four Thousand, Five Hundred Dollars or more of its capital stock in compensation and payment for their services rendered in and about its business and for moneys expended by them in its behalf prior to the time of the making of the said contract with said Stilwell. That during the progress of the work covered by the said contract with said Stilwell, the said Suburban Belt Company determined upon immediate extension of its said line of road some six miles further to the South.

That after paying its said contract price to said Stilwell, and compensating its former officers and directors for moneys laid out and expended by them as aforesaid, the said Belt Company had in its Treasury, Five Hundred Thousand Dollars of an increased bonded indebtedness, and Five Hundred Thousand Dollars of its increased capital stock, with which to build its said extension to Brush Creek; that the Belt Company did this work itself, and requested this defendant to sell and dispose of the said Five Hundred Thousand Dollars in bonds to raise the money for building the same; that on account of the incomplete condition of the property and the uncertainty of its outcome this defendant was unable at that time to sell and dispose of the said bonds without great sacrifice, and this defendant, having faith in the enterprise bought the said Five Hundred Thousand Dollars of Bonds from the Suburban Belt Company and paid it therefor at the rate of Nine Hundred and Thirty Dollars for each One Thousand Dollar bond, which was a full, fair
72 and liberal price therefor; that this defendant held said bonds for two or three years without being able to sell them at a profit, and did finally sell them at the same price which it paid therefor.

That the Belt Company thus exhausted all of its one million dollars of bonds and stock in the building of its railroad from a point on Second Street near Broadway, to a point South of Kansas City, on the Missouri Pacific, now known as Belt Junction.

That the Belt Company found it necessary in order to increase its business and its earnings to extend its road from Second and Wyandotte Streets into what is known as the West Bottoms, so as to reach the packing houses and other large industries in that locality; it had no money with which to do it, and had already encumbered its property with a mortgage for one million dollars, hence that company conceived the idea of organizing a new company to be called the Consolidated Terminal Railway Company to build a railroad

from a point on Second Street near Walnut in Kansas City, Missouri, in a Westerly direction to the State Line, between Kansas and Missouri. This corporation was organized on the 16th day of May, 1891, with a capital stock of Seven Hundred and Fifty Thousand Dollars, and eight directors, a majority of whom were at that time directors of the said Suburban Belt Company; that said Consolidated Company was conceived and organized by the Suburban Belt Company and for its purposes, for the purpose of *the* building what was practically an extension of the Suburban Belt Company's railroad which it was unable to build without the organization of a new company. That the said Consolidated Terminal Company afterwards authorized the issuance of Seven Hundred and Fifty Thousand Dollars in bonds and secured the same by a mortgage made to this defendant, as Trustee; that at the request of the Belt Company this defendant undertook to sell and dispose of said bonds and of the capital stock of the said Consolidated Terminal Company for the purpose of raising money with which to build the said extension of road, and to act as its financial agent in financeering the building of its extension, and to assist in procuring the necessary franchises for the use of public highways; and the Belt Company promised to pay this defendant therefor a sum equal to twelve per cent of such of the said Seven Hundred and Fifty Thousand Dollars of bonds as this defendant might sell, three fifths of which amount was to be paid in cash out of the proceeds of such sales, and the other two fifths to be paid in the stock and bonds of the said company at the same price at which they were disposed of by this defendant to other people;

73 that this defendant did sell seven hundred of the bonds of the said Consolidated Company at and for the price of eight hundred dollars each with eight shares of stock as a bonus to each bond. That the price at which the said bonds were sold was the best that could be obtained after persistent and diligent efforts to sell them, and the commissions which the Belt Company promised to pay this defendant for its services in that behalf out of the proceeds of the sale of the said securities was a just, fair and reasonable commission and compensation, but this defendant did not receive the full commission and compensation promised, but received less than six per cent of the par value of the securities so sold by it.

That the complainant sold to the said Suburban Belt Company, and to the said Consolidated Terminal Railroad Company, prior to the time of their consolidation, nearly all, if not all, of the rails and other steel used in the construction of their respective roads in the years 1889, 1890 and 1891, and the complainant was fully paid therefor.

That all of the transactions of whatsoever nature had between this defendant and the said Suburban Belt Company, and between this defendant and the said Consolidated Terminal Railway Company, including the transactions concerning the sale and disposition of their respective stocks nad bonds, and the application of the proceeds thereof, and the compensation and commission paid this defendant therefor, were fair, open and public and were fully known and consented to and ratified and approved by all of the officers, di-

rectors and stockholders of each and both of said companies, more than eight years prior to the institution of this suit, hence by the statute of limitations of the state of Missouri any attempt to inquire into the same is barred, and this defendant now pleads said statute in bar of the complainant's suit.

That in July, 1892, after the railroad of the Suburban Belt Company had been completed from Second & Broadway to Belt Junction, on the Missouri Pacific Railway, a distance of about twelve miles, and after the road of the said Consolidated Terminal Railroad had been completed from Second and Walnut Streets to the State Line between Missouri and Kansas, a distance of about two miles, and after all of the transactions between this defendant and each of said companies had been fully completed, approved and ratified as aforesaid, the said Suburban Belt Company and the said Consolidated Company, without any domination or direction by this defendant, duly united themselves together by a formal consolidation under the statutes of the State of Missouri, thereby forming a new company under the name of the Kansas City Suburban
74 Belt Railroad Company, called in the bill of complaint the Belt Company; that it was this new, or resulting company which five years afterwards became indebted to the complainant for steel rails purchased to be used in the building of said Kansas City & Northern Connecting Railroad, which indebtedness is made the basis of the creditors bill in this cause.

That the building of the Kansas City & Northern Connecting Railroad from Kansas City to Pattonsburg by the said Belt Company in 1897 and 1898, in connection with which the complainant became a creditor of the said Belt Company, was not contemplated or thought of by this defendant, or any one else, prior to the time of the said consolidation of the said two constituent companies in 1892, so that there was and could have been no intent or purpose on the part of this defendant in connection with any of its said transactions with either of the said two constituent companies to hinder, delay or defraud the complainant in respect of its said debt, which was contracted more than five years thereafter, and in connection with a matter that was then thought of or contemplated as aforesaid. That at the time of said consolidation the complainant had no interest in or connection with, either of the said constituent companies, as a creditor or otherwise, and has had none since. So this defendant says that the complainant's attempt to inquire into said transactions had between this defendant and either of said constituent companies, and to compel this defendant to render an account thereof, is an unwarranted and impertinent meddling with affairs in which the complainant has no legitimate or proper concern and is collusively made for the fraudulent purpose of hindering, delaying or defrauding this defendant in the collection of its said debt from the said Belt Company as aforesaid.

That on December 29th, 1891, at the suggestion and by the procurement of the said Suburban Belt Railroad Company, the said The Union Terminal Railroad Company was duly incorporated under the laws of the State of Kansas with a capital stock of Two Million

Dollars, and with nine directors, a majority of whom were also directors and officers of the said Suburban Belt Company, for the purpose of building an extension from the State Line between Missouri and Kansas, where the said road built by the said Consolidated Railroad Company ended, through Kansas City, Kansas, and on to Argentine, in said State of Kansas, so as to connect with the trunk lines coming in from the West, and so as to reach the packing houses, foundries, factories, elevators and other like industries located in the Kaw Valley, to be used when built as an extension of the Suburban Belt road. The organization of The Union Terminal Railroad Company was necessitated by the fact that none but a
75 Kansas corporation could exercise the power of eminent domain within the state of Kansas.

That the said the Union Terminal Railroad Company did issue its bonds to the amount of Two Million Dollars, and secured the same upon its road by a mortgage which was executed to this defendant and another as trustees, that this defendant accepted the trust and was employed by said Union Terminal Company to sell and dispose of its said bonds and stock, or enough thereof to build its said road; that this defendant, for and on behalf of said Union Terminal Company, did afterwards from time to time sell certain of the stock and bonds of said company, aggregating at the par value thereof, about Two Million Dollars and did duly account to said company for the proceeds thereof, less proper and reasonable charges and commissions for its services, which were agreed upon, and which aggregated less than six per cent for the part value of the said securities so sold; that any and all sales which this defendant made of any of the securities of the said Union Terminal Company were made at a fair and at the best obtainable price, and the commissions and compensation which this defendant charged therefor were reasonable and fair, and all of the transactions between this defendant and the said The Union Terminal Railroad Company, of whatsoever nature, including all acts and transactions concerning the sale and disposition of any of the stocks and bonds of said company, the application of the proceeds thereof, and the compensation and commissions paid this defendant, therefor, were open, public and fair, and were fully known and pefrectly satisfactory to, and were ratified and approved by all of the officers, directors and stockholders of the said Union Terminal Company and were fully carried out, completed, settled and fully known, ratified and approved as aforesaid more than five years before the institution of this suit and hence any attempt by any one who might otherwise have been entitled to ask for an accounting in respect thereof is barred now by the statute of limitations of both the states of Missouri and the State of Kansas, which statutes the defendant now pleads in bar of his suit.

That whilst it is a fact that the complainant sold to the Union Terminal Railroad Company all, or nearly all, of the rails and steel used in the construction of its said road, yet it is also a fact that the said company long since fully paid the complainant therefor, and the complainant never since has had any connection with the

said Union Terminal Company as creditor or otherwise, nor has it any interest therein now as a creditor of otherwise, and its attempt to criticise and inquire into any of its transactions, business or affairs in connection with this defendant, or any one else,
76 is purely gratuitous and without any right or claim of right, but is impertinently made in collusion with the said Belt Company and those who control its affairs for the collusive and fraudulent purposes aforesaid.

That on the 23rd day of January, 1891, at the suggestion and by the procurement of the said Suburban Belt Company the Kansas City and Independence Air Line Company was incorporated under the laws of the State of Missouri, with a capital stock of one hundred and fifty thousand dollars, and with eleven directors, a majority of whom were directors of the said Suburban Belt Company, for the purpose of building a railroad from a point on the line of the Suburban Belt Company's road near the mouth of Blue River in Jackson County, to the City of Independence, a distance of some six or eight miles; that the said Air Line Company soon afterwards increased its capital stock to Three Hundred Thousand Dollars and issued its bonds to the amount of Three Hundred Thousand Dollars and secured the same by a mortgage to this defendant, as Trustee; that the said Independence Air Line afterwards entered into a contract with the Kansas City Terminal Construction Company for the building and completion of its said road, the terms of which contract were fair and reasonable and that said road was fully built and completed by the said Construction Company.

That this defendant acted as the financial agent and Trustee for said Air Line and rendered it valuable services in procuring franchises for using public highways for its tracks and received in full compensation therefor stocks and bonds of said Air Line of the then value of $13,100.00 which was a fair and reasonable charge.

That all of the transactions between the said Air Line and the said Construction Company, and between the Air Line Company and this defendant, were fair, open and public, and were all known to, and ratified and approved by, all of the officers, directors and stockholders of the said Air Line Company more than eight years prior to the institution of this suit; hence any attempt to inquire into the same is barred by the statute of limitations of the state of Missouri, which statute this defendant now pleads in bar of this suit.

That whilst it is true that the complainant did sell to the said Construction Company, all, or nearly all, of the rails which were used in the construction of the said Air Line road, yet it is also true that the complainant was fully paid therefor; that the complainant is not, and never has been, interested in the said Air Line Company, as a creditor or otherwise; that its attempt to
77 inquire into the transactions between this company and said Air Line Company is without right or claim of right, and is an unwarranted meddling with the affairs in which the complainant has no legitimate or proper concern, but is collusively made for the fraudulent purposes aforesaid.

That, as hereinbefore stated, it is untrue, as alleged in the bill

of complaint, that this defendant entered into a contract with the Omaha & St. Louis Railroad Company, the Quincy, Omaha & Kansas City Railroad Company, and the Omaha, Kansas City & Eastern Railroad Company whereby this defendant bound itself to furnish those railroads an entrance into Kansas City, by building a railroad from Kansas City to Pattonsburg, Missouri.

This defendant states and shows that the facts connected with the building of the said railroad from Kansas City to Pattonsburg known as the Kansas City and Northern Connecting Railroad, were and are as follows:

Prior to 1895, the Omaha & St. Louis Railway extended from Council Bluffs, Iowa, to Pattonsburg, Missouri, and the Quincy, Omaha & Kansas City Railroad extended from Quincy, Illinois, to Trenton, Missouri, so that the building of a railroad from the Western terminus of the Quincy, Omaha & Kansas City Railroad at said town of Trenton, to the eastern terminus of the Omaha & St. Louis Railway at the said town of Pattonsburg, a distance of about thirty miles, would make a continuous line of railroad from Quincy, Illinois, to Council Bluffs, Iowa.

That a syndicate was formed, composed of Gilman, Son & Company of New York, this defendant and its associates, and John Lowber Welsh and E. T. Stotesbury, of Philadelphia, the said Welsh and Stotesbury between them taking one third interest in said syndicate, for the purpose of acquiring, uniting and improving the said properties and the said syndicate entered into contracts which entitled them to become the owner of the said Quincy, Omaha & Kansas City Railroad, and they then caused a corporation to be formed under the laws of the state of New York, with a capital stock of Three Hundred Thousand Dollars, called the Missouri Railway Construction Company, to buy the Omaha & St. Louis Railway, and to build in the link of thirty miles between Trenton and Pattonsburg; that said John Lowber Welsh and the said E. T. Stotesbury between them took one third of the capital stock of the said Missouri Railway Construction Company, the said Gilman, Son & Company taking one third, and this defendant and its associates taking the remainder thereof.

78 That the said Missouri Railway Construction Company then made a contract with the said Omaha & St. Louis Railway Company which entitled said Construction Company to become the owner of and entitled to a conveyance to a railroad company to be formed by it, of all of the property of the said Omaha & St. Louis Railway Company, and also entered into a contract to build and equip the thirty miles of railroad between Trenton and Pattonsburg with the Omaha, Kansas City & Eastern Railroad Company which it caused to be formed for the purpose of taking the legal title thereto, and did build and equip the said thirty miles of railroad in pursuance of said contract and took all of the stock and bonds of the said Omaha, Kansas City & Eastern Railroad Company in payment therefor, so that by reason of said contracts of the said syndicate and of the said Missouri Railway Construction Company, the said John Lowber Welsh and the said E. T. Stotesbury

practically became the owner of or entitled to the ownership of a one third interest in all of the property of the said three railroad companies, and of their united and continuous lines of railroad from Quincy, Illinois, to Council Bluffs, Iowa, a distance of something over three hundred miles.

That it was largely to the interest of the owners of the said line of railroad from Quincy to Council Bluffs, that the said Road should have a direct connection with and an entrance into Kansas City.

That the said Missouri Railway Construction Company by its said contract with the said Omaha & St. Louis Railway Company, and as a part thereof did promise, bind and obligate itself to build or cause to be built a railroad which would furnish such an entrance into Kansas City, which necessitated the construction of the said Kansas City and Northern Connecting Railroad from Pattonsburg to Kansas City.

That during the time covered by the making and carrying out of the said contracts of said syndicate and the said construction company, and in the building of the said Kansas City and Northern Connecting Railroad, the said John Lowber Welsh was and still is a large stockholder in and a director and Vice President of the complainant, the Cambria Steel Company, and as such was and is actively engaged in the management, direction and control of its business and affairs, and the said E. T. Stotesbury then was and still is a large stockholder in and a director of the said complainant, and as one of the managers of the large banking house of Drexel & Company, or Drexel, Morgan & Company of Philadelphia and New York, was and is the financial adviser and banker of the said complainant, and that the said E. T. Stotesbury was during all
79 of the said time and still is a director of the said Kansas City Suburban Belt Railroad Company against whom the complainant collusively obtained its said judgment and execution as aforesaid; that the said John Lowber Welsh and the said E. T. Stotesbury were during said time the holders of a large amount of the stock and bonds of the said Belt Company and of its said allied and operated lines and they and the complainant were largely interested in having the said Belt Company make profits and increase its earnings.

That with the consent of the said Missouri Railway Construction Company and with the knowledge and consent of the complainant, the said Kansas City and Nrothern Connecting Railroad Compa-y, was, on May 28th, 1895, at the instance and by the procurement of the said Belt Company duly incorporated under the laws of the State of Missouri, with power to build the said railroad from Kansas City to Pattonsburg, with seven directors, a majority of whom were directors and officers of the said Belt Company.

That it was to the interest of the said Belt Company to have the said Kansas City and Northern Connecting Railroad Company so located and built that it would when completed connect with the tracks of the Belt Company and use its said tracks and terminal facilities, as an entrance into Kansas City, and thereby largely in-

crease the earnings of the Belt Company by way of rentals and switching charges.

That it was also supposed that the Belt Company would make a large profit by building the said Northern road and taking its stock and bonds in payment therefor.

That afterwards, to-wit, on or about the 30th day of June, 1896, for the purpose of reaping the said profits and permanently increasing its income and earnings, the said Belt Company with the full knowledge of the complainant, duly entered into a contract with the said Kansas City and Northern Connecting Railroad Company to build and complete the said road from Kansas City to Pattonsburg, in consideration of the stock and bonds of the said Northern Connecting Company, a copy of which contract is herewith filed and marked "Exhibit A"; and also entered into a contract whereby the Northern Connecting Company bound itself when built to use the Belt Company's tracks as its Kansas City Terminals, and to pay a very profitable rental therefor.

That the said Northern Connecting Company then issued its first mortgage bonds to the extent of Twenty Thousand Dollars per mile of its said road, and secured the same by a mortgage to this defendant, as Trustee and also issued its second mortgage
80 income bonds, to the extent of Fifteen Thousand Dollars per mile of its said road, and secured the same by a second mortgage to this defendant as Trustee.

That the said complainant with full knowledge of all of the facts aforesaid, and for the purpose of enabling the said Belt Company to carry out its said contract for the building of the said Northern Connecting Road, and with full knowledge of this defendant's connection with the said Northern Connecting Company, and with the said Belt Company, in respect to the building of said road, did sell to the said Belt Company all of the rails and other steel necessary to be used in the construction of said Northern Connecting Road, well knowing the purpose for which they were sold and where and under what contract they were to be used; that in selling the said rails and other steel to the said Belt Company, the said complainant gave credit to the said Belt Company alone, and that the said Belt Company afterwards paid to the complainant by far the larger part of the purchase price of the said rails and other steel and gave the complainant its note for the balance thereof, which is the note on which the complainant recovered a judgment as aforesaid in this court, which judgment is now made the basis of its bill of complaint in this cause.

That the said contract between the said Northern Connecting Company and the said Belt Company for the building of the said road had long prior to the filing of the bill of complaint herein been fully carried out and consummated by both of the parties thereto.

That at the request of the said Northern Connecting Company and the said Belt Company, this defendant acted as their financial agent in the sale and disposition of so much of the said stock and bonds of the said Northern Connecting Company as was necessary to supply the Belt Company with the money needed to build and

complete the said road under its said contract; that as said financial agent this defendant did sell and dispose, of approximately Two Million, Five Hundred and Fifty Two Thousand Dollars of the first and second mortgage bonds of the said Northern Connecting Company, and charged and received as its commissions therefor and in compensation for other services as financial agent and Trustee, $70,803.55, being less than three per cent of the par value of the securities so sold and disposed of by and through this defendant. That the said bonds and stocks were sold and disposed of at and for the price and sum of Seven Hundred and Fifty Dollars for each first mortgage bond, and that with each said first mortgage bond were sold Three Hundred and Fifty Dollars of second mortgage bonds, and five shares of stock. That the price at which said
81 securities were so disposed of was the best obtainable price, after the exercise of due diligence by this defendant to sell them, and no greater amount could have been procured therefor, and this defendant duly and fully accounted to the said Northern Connecting Company and to the said Belt Company therefor, and the remainder of said stock and bonds were duly delivered to the said Belt Company all of which was duly ratified and approved by all of the officers, directors and stockholders of the said Belt Company long prior to the institution of this suit, and all of which was fully known to and acquiesced in by the complainant.

That the said Belt Company did not sustain any loss in carrying its said contract for the building of the said Northern Connecting Railroad to completion; that its profits therein were not as much as expected at the time of making the said contract, but this was due to the fact that the stock and bonds which it received were greatly depreciated in their market value by the happening of subsequent events which were not and could not have been foreseen.

That the said Belt Company has been since the completion of the said contract and still is receiving largely increased earnings on account thereof, to-wit Fifteen Hundred Dollars and more per month, by way of rentals and switching charges from the said Northern Connecting Railroad Company and other railroads now using its tracks as an entrance into Kanssa City.

This defendant further states and shows that the said John Lowber Welsh, and the said E. T. Stotesbury, being connected with and interested in the complainant, the Cambria Steel Company, as aforesaid, in order to better secure for the complainant large and valuable contracts for the sale and furnishing of rails and other steel for the said Belt Company and its operated lines, and for the Kansas City and Northern Connecting Railroad Company, and for the purpose of keeping the complainant at all times advised as to the business and financial condition of each and all of said railroad companies, caused the said E. T. Stotesbury to be elected as director of the said Belt Company, and the said John Lowber Welsh, and the said E. T. Stotesbury as directors of the said Kansas City, Pittsburg & Gulf Railroad Company, and that said Stotesbury and Welsh were directors in said companies respectively, for six years

and more prior to the institution of this suit, and still are directors in each of said companies.

That said Stotesbury and said Welsh are intimately connected in various business enterprises and meet together and consult several times every day, and by reason of their connection with the said Belt Company, and the said Kansas City, Pittsburg & Gulf
82 Railroad Company, they secured for the complainant, the Cambria Steel Company, contracts for the sale of rails, and other steel that went into the various railroads hereinbefore named, of the amount and value of several millions of dollars. That by reason of their said connection with said railroads, the said complainant, the Cambria Steel Company, was at all times fully informed as to all of the contracts and business of the said Belt Company, and of all the transactions and dealings of this defendant with said company and consented thereto.

This defendant further states and shows that from and after the first day of January, 1898, continuously up to the first of April, 1900, at divers and frequent times, this defendant loaned and advanced to the said Belt Company, at its instance and request, large sums of money, aggregating more than half a million dollars, for the purpose of making necessary improvements on its road and paying its operating expenses, and meeting its interest charges and also for the purpose of encouraging and securing the location of industries along its line to the end that its earnings and income might be increased; that all of said facts were fully known to the complainant at the time, and acquiesced in by it.

That the said Belt Company from time to time repaid to this defendant parts of the money loaned and advanced by it as aforesaid, but left unpaid about five hundred thousand dollars thereof, for which the said notes which this defendant now holds against the said Belt Company were duly given, and secured by the collateral deposits aforesaid. That the said notes were all given for so much money loaned and advanced by this defendant to said Belt Company, since the first day of January, 1898.

This defendant further states and shows that it is ready and willing, if in the judgment of this court it ought and should do so, to render a full, true and correct accounting of all of its transactions with any and all of the said companies; but this defendant says that by reason of the premises, this defendant should not now be compelled to make such an accounting at the instance and suit of said complainant.

All of which matters and things hereinbefore stated this defendant is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that the temporary restraining order heretofore issued against this defendant in this cause be dissolved, and that the receivers appointed herein by this court of the property of the said Kansas City Suburban Belt Railroad Company, said The Union Terminal Railroad Company, and the said Kansas City
& Independence Air Line be discharged, and that this de-

83 fendant be dismissed with its reasonable costs and charges in that behalf most wrongfully sustained.

GUARDIAN TRUST COMPANY,
By WING & CHADBOURNE,
TRIMBLE & BRALEY,
Its Solicitors.

THOS. L. CHADBOURNE,
J. McD. TRIMBLE,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

E. L. Martin, of lawful age, being duly sworn, upon his oath states that he is one of the vice-presidents of the above named defendant, the Guardian Trust Company; that he has read the above and foregoing answer and knows the contents thereof, and that the allegations and averments therein made are true except that as to such matters and things as are therein stated and alleged on information and belief, he believes them to be true.

E. L. MARTIN.

Subscribed and sworn to before me this 5th day of November, 1900. My commission expires May 25, 1904.

[SEAL.] FLORENCE APPLEGATE,
Notary Public in and for
Jackson County, Missouri.

EXHIBIT "A".

This Agreement, made and entered into this 30th day of June A. D. 1896, by and between the Kansas City & Northern Connecting Railroad Company, a corporation organized and existing under and by virtue of the laws of the state of Missouri, and hereinafter called the Northern Company, party of the first part, and the Kansas City Suburban Belt Railroad Company, a railroad corporation organized and existing under and by virtue of the laws of the state of Missouri, and hereinafter called the Belt Company, party of the second part,

Witnesseth: That whereas, the Northern Company is authorized under and by virtue of its articles of association and charter to build, construct, complete, equip and operate a line of railroad from a point at or near Kansas City, Missouri, in a general northerly direction to and into the state of Iowa, and is desirous at the present time of constructing, or causing to be constructed, so much of its railroad as extends from a point at or near Kansas City, Missouri, in a general northerly direction to a point at or near Pattonsburg, Missouri, a distance of about seventy (7-) miles, and

84 Whereas, the said Northern Company has not in its treasury sufficient funds with which to build, construct and operate said portion of its road, and proposes, for the purpose of said con-

struction, to issue its first mortgage five per cent gold bonds on its railroad, at the rate of twenty thousand dollars ($20,000) per mile for each mile of main line and yard tracks, its second mortgage five per cent gold bonds at the rate of fifteen thousand dollars ($15,000) per mile for each mile of its main line and yard tracks, and to issue its capital stock at the rate of thirty-five thousand dollars ($35,000) per mile; and

Whereas, the Belt Company, the party of the second part, has, through its officers, made a proposition to procure all of the right of way, pay the costs of organization, attorney's fees and fully construct, at its own expense, the first party's railroad for a distance of not less than seventy (70) miles at and for $20,000 of the first mortgage bonds, $15,000 of the second mortgage bonds and $35,000 in capital stock each per mile for each and every mile of main line and yard tracks by it constructed for the said Northern Company; and

Whereas, the directors of the parties hereto, at special meetings held for that purpose on June 27th, 1896, duly authorized the respective presidents and secretaries of both of said parties to execute a contract substantially upon the above and foregoing terms.

Now, therefore, it is hereby agreed between the parties hereto, as follows:

Article 1. First. In consideration of the sum of one dollar to the Northern Company paid by the said Belt Company, the receipt whereof is hereby acknowledged, and in consideration of the promises and agreements of the said Belt Company to furnish and supply all money for said Northern Company which may be needed to procure the right of way and to construct, complete and improve said portion of said Northern Company's railroad, the said Northern Company has this day sold, assigned and set over unto the Belt Company, its successors and assigns, and does hereby sell, assign and set over unto the Belt Company, its successors and assigns, for each and every mile of main line and yard track, so constructed by said Belt Company, three hundred and fifty shares, subject to the deduction hereinafter stated, of the said Northern Company's capital stock each of the par value of one hundred dollars ($100) and without any liability for calls and assessments and hereby agrees to cause proper certificates of stock to be issued for said shares and delivered to the said Belt Company, its successors or assigns, whenever demanded, so as to give the absolute evidence of ownership of said stock in said Belt Company, its successors and assigns, with the right, however, reserved to exchange share for share the stock of the Northern Company for the stock of a new company to be formed by the consolidation of the Quincy, Omaha and Kansas City Railway, the Omaha & St. Louis Railroad Company and the Kansas City & Northern Connecting Railroad Company, hereinafter called the Consolidated Company. It is understood, however that there shall be deducted from the total amount of shares of stock due the Belt Company, under the provisions hereof, the entire amount of capital stock already outstanding and issued to officers and others for services in organizing said Northern Company.

Second. For the consideration aforesaid, the said Northern Company has this day sold, assigned and set over and does hereby sell, assign and set over unto the said Belt Company, its successors and assigns, all the right, title and interest which the said Northern Company now has and such as it may hereafter acquire, in and to any and all moneys, lands, bonds, chattels, choses in action and donations donated or granted to the Northern Company or to any other person or persons for it, for its projected railroad, except such land and grants as may be needed and used for depot grounds, shops, switch yards, and rights of way for the said railroad, and the Northern Company does hereby sell and assign to the Belt Company, its successors and assigns all its rights of action, which have accrued, as well, as also, those which may yet accrue, arising out of any of said donations or grants, so the Belt Company may institute and maintain suits to enforce the performance of any or all contracts or promises made by any person or persons with the Northern Company, to give, donate or grant to it any money, lands, property, bonds, or other thing in aid of said projected railroad, or bring and maintain suits to recover damages for the breach of any of said contracts or promises, either in the name of the Northern Company or in the name of the Belt Company, as may be by law required. It is the intention of this agreement to fully assign, transfer, and convey to the Belt Company, its successors and assigns, all the land, choses in action, bonds, grants and donations of whatever kind, character or description, that have been granted, made or promised, and which may hereafter be granted, made or promised, to the Northern Company, or any other person or persons for it in aid of said projected railroad, as fully as if each grant, chose in action and donation were separately and specifically described (except the right of way, lands for depots, shops and yards, as aforesaid) and it is the intention of this agreement to fully authorize and
86 empower the Belt Company, its successors and assigns, to sue for, receive and receipt for any and all lands, choses in action, and donations as fully as the Northern Company could or might do, and when recovered and received to have and to hold the same unto it, the said Belt Company, its successors and assigns forever.

3rd. And for the consideration herein stated and set forth the said Northern Company has this day sold, assigned and set over and agreed to deliver, and does hereby sell, assign and set over and agree to deliver, as soon as executed, unto the said Belt Company, for each and every mile of main line and yard track constructed by said Belt Company, twenty of its first mortgage coupon bonds, payable thirty years from the date thereof, at the financial agency of the company wherever it may be established, each bond to be of the denomination of one thousand dollars ($1,000) and to bear interest at the rate of five per cent per annum, as per semi-annual coupons attached, secured by a first mortgage on all the property and franchises of said Northern Company now owned, or which may hereafter be owned by it, as more fully set forth or to be set forth in said mortgage to which reference is hereby made for further description of said bonds and mortgage; said bonds, however, being subject to

the right of retirement on the part of the Northern Company by exchanging them and each of them for an equal amount of like bonds in the Consolidated Company.

And as a further consideration, the said Northern Company has this day sold, assigned, set over and agreed to deliver unto, and does hereby sell, assign, set over and agree to deliver unto said Belt Company, for each and every mile of main line and yard track so constructed by it, fifteen of its second mortgage coupon bonds, numbered from one consecutively, bear- date of January 1st, 1897, and payable thirty years after date thereof, at the financial agency of the Northern Company, wherever it may be established, each of the denomination of one thousand dollars ($1,000) bearing interest at the rate of five per cent per annum, as per semi-annual coupons attached, and secured by a second mortgage on all the property and franchises of said Northern Company now owned or which may hereafter be owned by it, as more fully set forth in said second mortgage to which reference is hereby made for a further description of said bonds and mortgage, with the right, however, to retire or exchange said bonds for an equal amount of the bonds of said Consolidated Company.

Article II. In consideration of the said shares of stock so, as aforesaid sold, assigned, transferred and to be delivered by
87 said Northern Company to the said Belt Company, and of the sale, transfer and assignment of said grants, donations, lands and bonds hereinbefore set forth, and of the sale and transfer of *of* the said first and second mortgage bonds by said Northern Company, to said Belt Company, and of the other promises and agreements of the Northern Company herein set forth, the said Belt Company has this day promised, agreed and covenanted, and does hereby undertake, promise, agree and covenant to and with said Northern Company as follows:

First. To furnish and supply to said Northern Company, at the cost of said Belt Company, and without any further liability on the part of said Northern Company, all moneys necessary to procure a right of way for said Northern Company's said line of railroad from a point at or near Kansas City, Missouri, on the north bank of the Missouri River, to Pattonsburg, in the state of Missouri, and such ground as may be necessary for the depots, station houses, side tracks, and yard and terminal tracks.

Second. To build and construct, or cause to be built and constructed, at its own cost and expense, and without an further liability on the part of the said Northern Company, a first class, single track standard gauge railroad over the whole line of said railroad from a point on the north bank of the Missouri River, at or near Kansas City, Missouri, to Pattonsburg, Missouri, together with the necessary side and yard tracks, and to furnish at its own cost and expense, and without any further liability on the part of the said Northern Company all the labor and material necessary to construct and complete the same ready *of* operation, including all tunneling and bridging between the points mentioned.

Third. To build or cause to be built, at its own cost and expense and without any further liability on the part of the said Northern

Company, all depots, bridges, station houses, and round houses, which may be necessary along the line of said Northern Company.

Fourth. To release and fully discharge the said Northern Company from all obligations and liabilities arising from advancements made or obligated to be made by it, the said Northern Company, on account of debts and obligations incurred by said Northern Company, in and since its incorporation.

Fifth. To assume the payment of and pay and discharge all the obligations and liabilities incurred by the said Northern Company in the preparation, issuance and recording of the said first and second mortgage bonds of said Northern Company, and the mortgages given to secure the same.

88 Article III. The work of building the said railroad shall begin and continue in such manner and to such extent from time to time as the said Northern Company may advise and notify said Belt Company, in writing, and the said Belt Company may sublet or assign such portions of said work and this contract as it may see fit.

Article IV. To the end that the said Northern Company may be fully and effectually secured in the performance by said Belt Company, its successors and assigns, of its promises, undertakings and agreements herein set forth, and each and all of them, it is hereby expressly agreed and covenanted that the said Belt Company shall only be entitled to the delivery of said stock and bonds upon the completion of said railroad or portions thereof, as may be properly certified as having been fully completed, by the chief engineer of the said Northern Company, said delivery of stock and bonds to be made in the following manner:

First. The trustee or trustees in the first and second mortgages upon the statement and certificate from time to time of the Northern Company, executed by its president or vice-president, and chief engineer, that said Belt Company has completed the number of miles or fractional parts thereof, of single main or yard track, which may be designated in said statement or certificate, shall certify and deliver to the Belt Company, an amount of bonds equal to twenty first mortgage bonds and fifteen second mortgage bonds for each and every mile of main line and yard track so certified to have been completed. The bonds to be delivered from time to time as aforesaid by said trustee or trustees, shall be in regular and numerical order beginning with the lowest number of said bonds, as aforesaid.

Second. In case said Belt Company, at the request of the Northern Company, shall legally acquire or purchase, (instead of constructing any part or portion of said Northern Company's railroad, which right is hereby given to said Belt Company at the request of the Northern Company), then and in that case, the said trustee or trustees shall deliver such an amount of said bonds to said Belt Company or to such other person or corporation, as may be designated upon the statement and certificate of said Northern Company, executed by its president, or vice-president and chief engineer, as aforesaid, as would be apportioned to the number of miles so acquired and purchased by it, instead of being constructed, subject, however to the

same restrictions and limitations as in said division first of this article as to the number of bonds per mile; or in case said certificate and statement request the delivery of such bonds to persons or corporations, other than the said Belt Company, then the said
89 statement, certificate and request shall be approved by the said Belt Company, in writing, such approval to be executed by the president or vice-president of the said Belt Company.

Third. Whenever, or as often as the said Belt Company shall have completed ten miles of railroad in accordance with its contract with the said Northern Company, it shall be entitled to receive all of the first and second mortgage bonds apportioned to said ten miles, as well as for each and every mile so constructed and so completed and so certified by the chief engineer of the Northern Company, $35,000 par value of the common stock, less the present outstanding and issued stock of said Northern Company.

Article VI. Said Belt Company may assign this contract or any part thereof, to any other person or corporation, and thereafter the assignee of this contract or portion thereof, shall be entitled to the same rights and benefits and to receive said bonds and stock from said Northern Company and any trustee in said mortgage under like circumstances and conditions as herein provided, with respect to said Belt Company, party of the second part.

In witness whereof, the said Northern Company and Belt Company have caused their respective names to be hereunto signed by their respective presidents and their corporate seals to be hereunto affixed, attested by their respective secretaries, or assistant secretaries, the day and year first above written.

KANSAS CITY & NORTHERN CONNECTING RAILROAD COMPANY,

[SEAL.] By A. E. STILWELL, *President.*

Attest:

C. A. BRALEY, *Secretary.*

Attest:

[SEAL.] J. T. NORTHENIUS, *Secretary.*

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY,

By E. L. MARTIN, *President.*

Afterwards, to-wit, on the 5th day of November, 1900, the Answer of Central Improvement Company was filed. Said Answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

90 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Answer of the Defendant, Central Improvement Company, to the Bill of Complaint of the Cambria Steel Company, Complainant.

This defendant, now and at all times hereafter, saving and reserving to itself all benefit and advantage of exceptions which can or may be had or taken to the many errors and uncertainties and other imperfections in the said bill contained, for answer thereto, or to so much and such portions thereof as this defendant is advised it is material or necessary for it to answer unto, answering says:

That this defendant admits that the complainant is a corporation and citizen of the state of Pennsylvania, and that the defendants are all corporations and are all citizens of the State of Missouri, and inhabitants of the Western Division of the Western District of Missouri, as alleged in the bill of complaint, except the defendant, The Union Terminal Railroad Company, which is a citizen of Kansas, and an inhabitant of the First Division of the District of Kansas, as alleged in the bill of complaint.

This defendant admits that the defendant, the Kansas City Suburban Belt Railroad Company, became indebted to the complainant, prior to the institution of this suit in a large sum, for steel rails purchased by said Belt Company from the complainant, but this defendant has not sufficient knowledge or information to enable it to form a belief as to whether or not the amount of said indebtedness was about One Hundred Thousand Dollars, nor as to whether the said steel rails were so purchased by the said Belt Company between the first day of November, 1897, and the first day of March, 1898, as alleged in the bill of complaint.

This defendant admits that a suit was brought in the name of the complainant, upon the obligation given it by the said Belt Company evidencing the balance due upon said indebtedness, and this defendant avers the fact to be that said obligation consisted of a promissory note executed and delivered by the defendant, the Kansas City Suburban Belt Railroad Company to the com-

91 plainant, on January 15th, 1900, for Ninety Eight Thousand, Seven hundred and Forty Four and 23/100 Dollars ($98,744.23) which note was a renewal in whole or in part of

former notes executed by the said Belt Company to the complainant, for the purchase price of steel rails.

This defendant admits that a judgment was recovered in this Honorable Court, on the said note, in the name of the complainant, on the sixth day of September, 1900, against the said Belt Company, for the sum of One Hundred Thousand, Nine Hundred and Sixty Two and 91/100 Dollars ($100,962.91) but this defendant has no knowledge or information sufficient to enable it to form a belief as to whether or not any part of said judgment has been paid, hence demands proof of the complainant's allegation that no part of the same has been paid.

This defendant admits that an execution was issued on said judgment, directed to the Marshal of the Western District of Missouri, and against said Belt Company, and that the said Marshal did make return of said execution, which return, as written, shows upon its face that the execution was wholly unsatisfied for want of property of the said Belt Company upon which to levy the same, but this defendant states and avers the fact to be that suit on said note was instituted in this Honorable Court on the said sixth day of September, 1900; that by a prearrangement the said defendant Belt Company entered its appearance on the same day and consented to said judgments being rendered against it, which was done on the same day and hour, and that counsel appearing as the attorneys for the complainant in that suit, without any purpose, or desire of collecting said judgment, did, on the same day, go through the form of causing an execution to be issued on said judgment, and wrote a pretended return of nulla bona thereon, and placed said execution in the hands of said Marshal, solely for the purpose of having him sign the said pretended return which had been so written for and prepared for him, and the said Marshal, without making any search for property on which to levy said execution, and without making any demand on the said Belt Company for the payment thereof, and without in any way attempting to collect the same, did on the same day, without leaving his office, at the request and direction of those persons who appeared as attorneys for the plaintiff in said execution, through one of his deputies, sign said pretended return of nulla bona which had been previously written and prepared for his signature, as aforesaid.

This defendant denies that the said defendant, Kansas City Suburban Belt Railroad Company was or is insolvent and denies that it had or has no property subject to be reached by legal
92 process to be issued upon the said judgment so secured by the complainant, as aforesaid, as alleged in the bill of complaint; but this defendant states and shows that on the contrary the truth is that the Belt Company then had and still has ample money and means provided and at its command to pay the said debt of the complainant and all its other liabilities, which was fully known to the complainant prior to and at the time of the institution of the said suit on said note, and at all times since.

This defendant further states and shows to the Court that in addition to the fact that the said Belt Company had and has ample

money and means provided and at its command to pay the complainant's said debt, as aforesaid, the complainant, itself, ever since the execution of the said note, has held and still holds in its own hands a large amount of valuable property of the said Belt Company as collateral security to secure the payment of the said note, duly pledged by the said Belt Company to the complainant for that purpose. This defendant does not know the exact amount or description of the said personal property so pledged to and held as collateral security by the complainant, but avers that it was and is of sufficient value upon foreclosure to pay a large part, if not the whole of the complainant's said debt; that a part of said collateral security consists of one hundred and fifty-four (154) First Mortgage, Thirty Year, Five Per cent Gold Bonds of the Kansas City and Northern Connecting Railroad Company, of the denomination of One Thousand Dollars ($1,000) each, which are secured by a first lien on about one hundred miles of first class, standard gauge railroad, between Kansas City and Pattonsburg, Missouri, at the rate of Twenty Thousand Dollars in bonds to each miles of said railroad; that said bonds could have been and can now easily be subjected to the payment of the complainant's debt and to the satisfaction of a large part thereof, but the complainant has made no attempt whatever to collect its debt in any way, but has failed and refused to even appropriate, as it lawfully might and could have done, that part of the Belt Company's property which was and is in its own hands for that express purpose.

This defendant further answering unto that part of the complainant's bill of complaint which refers to the recovery of the said alleged judgment against the said Belt Company, and the alleged issuance and return of execution thereon, states and shows that the said suit was not instituted and the said judgment was not recovered, and the said execution was not issued in good faith for the purpose of collecting the complainant's said debt, but that upon the contrary, the said Belt Company, and its attorneys, agents and officers,
93 and The Kansas City Southern Railway Company, who completely dominates and controls them, and certain other persons having the charge and control of some of its business and financial affairs, hereinafter called the Philadelphia Committee, whose personnel and connection with the Belt Company and its affairs will be more definitely hereinafter stated, unlawfully conceived the fraudulent purpose and design of hindering, delaying and defrauding the creditors of the said Belt Company in the collection of their just debts by procuring the appointment of receivers at the hands of this Honorable Court, to take possession of all of the property of the said Belt Company, and by procuring restraining orders and injunctions from this Honorable Court preventing such creditors, except the complainant from in any way subjecting any of the assets or property of the Belt Company to the payment of their debts, upon the false and fraudulent pretense that the appointment of receivers and the granting of said restraining orders and injunctions against such creditors, were necessary to the protection of the interests of said creditors, and further by seeking to foreclose cer-

tain mortgages on separate parts of the Belt Company's property on the false and fraudulent pretense that there had been a demand for and default in the payment of certain installments of interest thereon, so as to cut out by foreclosure and defeat the unsecured creditors of said Belt Company, in the collection of their debts; that in pursuance of said fraudulent purpose and design, the said Belt Company in connection with and through the said The Kansas City Southern Railway Company and the said Philadelphia Committee, approached the complainant and requested it to allow them to bring a suit in its name on said note and recover a judgment thereon against the Belt Company and afterwards to allow them to bring this suit in its name, so as to make it falsely appear that a bona fide judgment creditor was diligently and in good faith attempting to enforce the collection of its debt through the instrumentality of this creditor's bill and its accompanying receivership or receiverships, whilst in truth and reality it would be and was intended to be in substance and effect the Belt Company suing for and obtaining a judgment and execution against itself, and procuring the appointment of receivers for its own property for the fraudulent purposes aforesaid.

That this defendant is informed and believes, and upon such information and belief avers the fact to be that the said Belt Company, the said The Kansas City Southern Railway Company, and the said Philadelphia Committee promised and agreed with the complainant that if it would allow them to bring the said suit in its name, they would see to it that its debt was fully paid, and would indemnify and save it harmless against any and all
94 costs and expenses on account of said suits so to be conducted in its name; that the complainant, with full knowledge of the said fraudulent purpose and design, and participating therein, for the purpose of carrying the same out, did consent that they might institute, conduct and prosecute in its name the said suits; that the said Belt Company and the said The Kansas City Southern Railway Company and the said Philadelphia Committee then employed counsel, whether in their own name or not or in the name of the complainant, this defendant does not know, and has no present means of ascertaining, to institute and prosecute the said suit on said note to judgment and execution and to present this bill of complaint based thereon; but whatever form may have been used in the employment of said counsel, that the fact is that the said Belt Company, the said The Kansas City Southern Railway Company and the said Philadelphia Committee are the real employers and are by agreement to bear the expense thereof.

That in the further prosecution of their said fraudulent purpose and design of hindering, delaying and defrauding the unsecured creditors of the said Belt Company, they, the said Belt Company, the said The Kansas City Southern Railway Company, and the said Philadelphia Committee, requested and procured the Provident Life & Trust Company of Philedelphia, who, at their instigation was and still is claiming and asserting itself to be the trustee in four certain mortgages which are liens or apparent liens on

separate portions of the property heretofore operated by the Belt Company, but now operated by the said The Kansas City Southern Railway Company, to institute four suits for the foreclosure of the said mortgages in this Honorable Court, on the false pretense that there had been a default in the payment of the interest on the bonds in said mortgages described. That the person who owns and holds all or substantially all of the bonds described in all of the said mortgages, to-wit, The Kansas City Southern Railway Company, is the same person who controls and directs the business and affairs of all the companies that executed said mortgages and who owns and holds all or substantially all, of the capital stock of all of said companies, and is the same person who has the possession and management of the property of all of said companies, and who controls and operates all of the railroads covered by said mortgages, and who collects and receives all of the earnings and income thereof, so that the same person who holds or owns substantially all of said bonds, is the same person who is equitably charged with the duty of paying whatever may be lawfully due on any of said bonds, if anything.

96 That said foreclosure suits were brought at the instance and request of those persons only who are so responsible for the alleged default and were fraudulently and collusively brought to sell said property for the fraudulent purpose aforesaid of cutting out and defeating the unsecured creditors and not for the purpose of enforcing the payment of said bonds.

That the said suit in the name of the complainant to recover judgment on said note, and this bill of complaint in this cause, and each of the said four suits brought in the name of the Provident Life & Trust Company to foreclose said mortgages, were all brought against the Belt Company, and its property, at the solicitation and request of the Belt Company, and of those said persons who dominate and control its action; that they were all drawn and prepared simultaneously by the same counsel and were all instituted at the same time by the same counsel, and the Belt Company, together with all of the other defendants which it controls were present in court at the time of the filing of all of the said suits and voluntarily entered their appearance therein, and fraudulently and collusively consented to the relief sought in each case, but the defendants who were not controlled by the said Belt Company were not present and were not notified. That each and all of the said suits are parts of one and the same transaction, collusively and fraudulently contrived and instituted by the Belt Company and those said persons who control its action, with the fraudulent purpose and intent of hindering, delaying and defrauding all of its unsecured creditors excepting the complainant.

This defendant prays leave to refer to and use upon any hearing of this cause, any and all of the files and records in any and all of said causes as fully as if they were set out herein and made a part of the record in this cause.

This defendant further states and shows that on April 1st, 1899, and prior thereto, the Kansas City, Pittsburg & Gulf Railroad

Company, a Missouri corporation, was operating a railroad from Kansas City, Missouri, to Port Arthur, Texas, and under a rental contract was using the lines, tracks, station houses, yards and depots of the said Belt Company and its associated lines as its Kansas City terminals, and was using the canal of the Port Arthur Channel & Dock Company in Texas as its southern terminals, so as to get its freight to and from the open sea.

That on April 1st, 1899, the said Kansas City, Pittsburg & Gulf Railroad Company defaulted in the payment of the interest on its mortgage bonds and a suit to foreclose its mortgage on
96 account of said default was instituted in this Honorable Court on the 6th day of April, 1899, and receivers were appointed and operated the railroad pending the foreclosure.

That a certain number of persons about that time got together and appointed themselves as a committee herein called the Philadelphia Committee to reorganize the Kansas City, Pittsburg & Gulf Railroad Company and readjust its securities so that it would be thereafter burdened with a less interest charge and one clearly within its ability to earn.

That said Philadelphia Committee, after some resignations, and substitutions was composed of Wm. F. Harrity, A. Heckscher, Herman Sielcken, William Edonborn, Max Pam, Samuel R. Shipley, Silas Pettit and Winthrop Smith.

That the said Philadelphia Committee in pursuance of said purpose, adopted and published a plan and agreement for the reorganization of the said Kansas City, Pittsburg & Gulf Railroad Company and the said Terminal Companies, which provided, among other things, for the formation of a new railroad company which would issue its bonds and stocks in exchange for the bonds and stocks of the said Kansas City, Pittsburg & Gulf Railroad Company and in exchange for the stock and bonds of the Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, the Consolidated Terminal Railway Company of Kansas City, the Kansas City & Independence Air Line and the Port Arthur Channel & Dock Company, in order, as stated in said published plan, "to merge these three corporate managements into one so that the system shall be capable of operation as a whole, under one management, from Kansas City to the ships' side at Port Arthur," so that said new railroad company which would after the reorganization own the main line and property of the said Kansas City, Pittsburg & Gulf Railroad Company, and also own the bonds and capital stock of the Kansas City Suburban Belt Railroad Company and its operated lines at Kansas City, and of the Port Arthur Channel & Dock Company, in Texas, and that thereby "all three properties would be under one corporate ownership, management and control."

That the Provident Life & Trust Company, complainant in said four foreclosure suits filed simultaneously with this suit, was a party to the said plan and agreement of reorganization, and its President, Samuel R. Shipley, was a member of the said Philadelphia Committee.

97 That the said Philadelphia Committee in furtherance of its said plan of reorganization, caused the proposed new railroad company to be incorporated under the laws of the state of Missouri, under the name of The Kansas City Southern Railway Company and placed three of its members on the Board of Directors of said new company, and two others of its members, one of whom is the said Samuel R. Shipley, President of the said Provident Life & Trust Company, as aforesaid, on a Board of Voting Trustees, who were to be and are vested with the absolute and unlimited power of voting all of the stock of The Kansas City Southern Railway Company for the next five years.

That the said Philadelphia Committee, for and on behalf of the said The Kansas City Southern Railway Company, as well as on its own account, did invite and request the owners and holders of the stock and bonds of the Kansas City, Pittsburg & Gulf Railroad Company, the Port Arthur Channel & Dock Company, and the said Kansas City Suburban Belt Railroad Company, and its operated lines at Kansas City, to deposit their said stock and bonds with the said Provident Life & Trust Company and to receive in payment therefor the stock and bonds of said The Kansas City Southern Railway Company at a ratio prescribed in said published plan.

That in response to said invitation and request, the respective owners and holders of the stock and bonds of all of the said companies, and particularly of the Kansas City Suburban Belt Railroad Company and it soperated lines at Kansas City, for the purpose of converting them into the stock and bonds of The Kansas City Southern Railway Company, to the end that the said purposes of said reorganization plan might be carried out, did deposit all or substantially all of their stock and bonds so as to enable the said Philadelphia Committee to consummate its said plan of reorganization, and the same was thereupon declared effective and carried out as proposed.

That after the said plan of reorganization had been declared effective, and the said The Kansas City Southern Railway Company had thereby acquired substantially all of the stocks and bonds of the Kansas City Suburban Belt Railroad Company, and its operated lines at Kansas City, to-wit, on or about the first day of April, 1900, a majority of the then directors and officers of the Kansas City Suburban Belt Railroad Company resigned their respective offices and persons who were then directors, officers and agents of the said The Kansas City Southern Railway Company were chosen in their stead, so that from that time ever since, the said The
98 Kansas City Southern Railway Company, and the said Philadelphia Committee have had and exercised full and unrestrained control, direction and management of all of the corporate affairs of the said defendant, the Kansas City Suburban Belt Railroad Company.

That on or about the said first day of April, 1900, the said The Kansas City Southern Railway Company in furtherance of said plan of reorganization took actual possession of all of the railroad, tracks, shops, depots, station houses, rolling stock and other equipment

and appurtenances of the Kansas City Suburban Belt Railroad Company and its operated lines at Kansas City, and has ever since that time been and still is managing, controlling and operating the same and receiving and collecting all of the earnings and income thereof.

That it was a part of the said plan and agreement of reorganization that the said Philadelphia Committee should cause a syndicate of capitalists to be formed who would buy enough of the stock and bonds of the said The Kansas City Southern Railway Company which would not be needed to retire and convert the stock and bonds of the old companies sought to be unified, to pay off and discharge all of the floating debts and other unsecured obligations of all of the old companies, including those of the Kansas City Suburban Belt Railroad Company. That said syndicate was formed and enough of the securities of The Kansas City Southern Railway Company were sold to said syndicate to provide money to satisfy and discharge all of the floating and unsecured debts and obligations of all of said companies so sought to be united under the ownership and control of The Kansas City Southern Railway Company, including those of the said Kansas City Suburban Belt Railroad Company, and the said Philadelphia Committee and the said The Kansas City Southern Railway Company, which it controls have wrongfully withheld said money and have unlawfully and fraudulently failed and refused to apply the same to the purposes for which it was raised, to-wit, to the payment of the floating and unsecured debts and obligations of the Kansas City Suburban Belt Railroad Company, and the other old companies so [amalaga-ted] as aforesaid under the said plan of reorganization.

This defendant further states and shows that one Max Pam, of Chicago, Illinois, was and is a member of the said Philadelphia Committee, and was and is also a member of the Board of Directors of the said The Kansas City Southern Railway Company, and a member of its Executive Committee; that said Max Pam was and is
99 the General Counsel and legal adviser of the said Philadelphia Committee, and the General Counsel and legal adviser of The Kansas City Southern Railway Company, and the General Counsel and legal adviser of the said Kansas City Suburban Belt Railroad Company, and the General Counsel and legal adviser of The Union Terminal Railroad Company, and the General Counsel and legal adviser of the Kansas City & Independence Air Line, and the General Counsel and legal adviser of the Consolidated Terminal Railway Company, and as such had and has the general supervision, direction and control of the affairs and legal proceedings of the said Philadelphia Committee, and of all of the said last named railroad companies, including the question as to which of their debts, if any, they should pay, and which of their debts they should avoid or escape the payment of, and of the legal proceedings necessary to accomplish the avoidance and escaping of the payment of such debts.

That C. W. Lucas, who entered the appearance of the Kansas City Suburban Belt Railroad Company, The Union Terminal

Railroad Company, the Consolidated Terminal Railroad Company, and the Kansas City & Independence Air Line in this cause, and who on their behalf consented to the appointment of receivers for their properties, is an appointee of the said Max Pam, as an assistant attorney for the said Kansas City Southern Railway Company, and for all of the other said railroad companies, and his salary is fixed by and is dependent upon the wishes and word of the said Pam, and that his said action in appearing for the said defendants and consenting to the appointment of receivers, was in obedience to the direction of the said Pam, and in accordance with his wishes, and for the furtherance of the fraudulent purpose and wrongfully and wickedly conceived by the said Philadelphia Committee and the said The Kansas City Southern Railway Company, and the said Kansas City Suburban Belt Railroad Company which they control, to avoid and escape the payment of the unsecured debts of the said Belt Company by means of the said four foreclosure suits, and by means of this suit so simultaneously and collusively instituted as aforesaid.

This defendant further answering avers the fact to be that the railroads of the Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, and the Kansas City & Independence Air Line extend in and around Kansas City, Missouri, and Kansas City, Kansas, and in and to the city of Independence, Missouri, and are what are known as terminal railroads; that they depend largely for their revenue upon charges received for switching cars from one railroad to another and from and to industries along their lines to and from other railroads which have a connec-
100 tion with the roads of said company. That their business increased from year to year and in order to accomplish the purposes for which they were respectively organized it was necessary that they acquire from time to time additional terminals and lands upon which to place terminal tracks.

That afterwards the said Belt Railroad Company, and The Union Terminal Railroad Company caused to be incorporated this company, the Central Improvement Company, for the purpose of purchasing and holding lands which might be desired for various railroad companies hereinbefore mentioned, and also for the Kansas City, Pittsburg & Gulf Railroad Company, whose property has now been acquired by The Kansas City Southern Railway Company. That in purchasing said lands it was necessary in many instances to give to the sellers, deeds of trust back upon the lands for part of the purchase price for the reason that the Kansas City Suburban Belt Railroad Company did not have funds in its treasury with which to buy all of the additional lands that the Kansas City Suburban Belt Railroad Company, and said The Union Terminal Railroad Company, and the Kansas City & Independence Air Line might desire to carry on their business; that the Central Improvement Company was thereupon organized at the instance of the Kansas City Southern Belt Railroad Company, The Union Terminal Railroad Company and the Kansas City & Independence Air Line, with a capital stock of One Hundred Thousand Dollars; that subsequently,

the capital stock thereof was increased to Two Hundred Thousand Dollars, but all of the capital stock was not paid in on said increase, and the Guardian Trust Company was requested by the Kansas City Suburban Belt Railroad Company to act as Trustee for the stock which had not been taken by the various railroad companies hereinabove mentioned.

That the method of conducting the business of the said Central Improvement Company, was as follows:

Whenever the said railroad companies, or either of them desired to purchase a tract of land, the Kansas City Suburban Belt Railroad Company would advance the money with which to purchase and pay for a sufficient number of shares of stock of this company to enable it to purchase the land, and this company would issue to the said Belt Company, fully paid stock of the Central Improvement Company, or it would furnish the said money for the purchase of said stock and have it issued to The Union Terminal Railroad Company, or the Kansas City & Independence Air Line, whenever the land purchased with the proceeds of the said stock was located
101 along the line of those roads, and that this defendant avers and admits, as stated in the bill of complaint, that all of the money for said stock issued to the Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company and the Kansas City & Independence Air Line was furnished by the Kansas City Suburban Belt Railroad Company and that the stock is actually the stock of Kansas City Suburban Belt Railroad Company.

This defendant in further answering states that in following out the said plan, there has been issued to the Kansas City Suburban Belt Railroad Company 810 shares of the stock of the Central Improvement Company, and to the Kansas City & Independence Air Line 22 shares of the stock of said Company, and to The Union Terminal Railroad Company 334 shares of stock of the said Central Improvement Company, and that it, the said Central Improvement Company holds said lands so purchased for the benefit of the stockholders in said Central Improvement Company.

And the defendant, the Central Improvement Company, in further answering states that among the properties so held by the Central Improvement Company are several tracts of land in Jackson County, Missouri, and Wyandotte County, Kansas, more particularly described and set forth in Exhibit "A" a copy of which is hereto attached and made a part hereof.

This [a] defendant further states that all of the said Two Hundred Thousand Dollars of capital stock has been issued except Fifty Eight Thousand, Six Hundred Dollars, or 586 shares thereof, which is still held by a Trustee and which in accordance with the arrangements and custom of doing the business as hereinabove described will be issued to the several railroad companies as fast as they advance money for stock the proceeds of which is to be used to pay for lands already purchased or to be purchased.

This defendant further answering avers and states that there has been served upon said company a notice by the Guardian Trust Company that it holds 1120 shares of the capital stock of said com-

pany as collateral security for the payment of the indebtedness due the said Guardian Trust Company by the Kansas City Suburban Belt Railroad Company and the said Guardian Trust Company has requested the said Central Improvement Company to at once demand from the said Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, and the Kansas City & Independence Air Line, as well as The Kansas City Southern Railway Company, that they and each of them shall pay into the treasury of the Central Improvement Company large sums of money that are due the said Central Improvement Company for rentals of
102 lands already earned, and that they be requested and compelled to pay rental for the use of land used by said railroad companies and belonging to this defendant.

This defendant further answering states that all of the books of the said Central Improvement Company, and all of its property are now unlawfully in the possession and under the control of the Kansas City Suburban Belt Railroad Company, the Union Terminal Railroad Company, and the Kansas City & Independence Air Line, and their receivers the Honorable S. R. Knott, and E. F. Swinney, and that the said railroad companies and the said receivers have been requested to surrender the books of said company to the proper officers thereof, and have refused, and that they and each of them have so refused to surrender the books and property of the said Central Improvement Company to the officers thereof, and that they, the said railroad companies, and the receivers thereof, have refused to pay into the treasury of the said Central Improvement Company, and to the officers thereof any rent or money for the use of said lands and property so owned by this defendant.

And further answering this defendant state that it is advised that the Kansas City Suburban Belt Railroad Company denies the right of the said Guardian Trust Company, co-defendant herein, to hold said stock as collateral security, and avers that it is necessary for the interests of the stockholders of this defendant and the creditors thereof, that all of the property and the books of this company be taken out of the possession of the said Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, and the Kansas City & Independence Air Line, and the receivers of said companies, and that an impartial receiver who shall have no connection whatever with any of said railroad companies or with any party interested in or connected with said companies, be appointed by this Honorable Court, to take possession of all of the said property and to demand and collect all moneys that may be due this defendant from said railroad companies or any other person, and under and pursuant to the orders of this court, to sell to said railroad companies, or to other persons, the real estate of said company, and to convert all of its property into cash, and pay the same to the stockholders thereof, or to the persons who may be entitled thereto.

This defendant further answering denies that it and its officers are controlled and dominated by the Guardian Trust Company, and denies that it, as a corporation, was a dummy contrived and

provided by the said Guardian Trust Company. And fur-
103 ther answering avers the fact to be that the said Central Improvement Company owes certain amounts of money to various persons from whom it purchased portions of said land, the payment of which is secured by deeds of trust upon said property; that the said Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, and the Kansas City & Independence Air Line, and the receivers thereof, although using said lands and all of the same for their own individual benefit, have refused to pay the taxes due on said lands, or to pay the amounts due on the various tracts of land, although the fair rental value of said property would be much more than sufficient to pay all of the taxes and incumbrances as they fall due, and further answering this defendant avers that the fair rental value of the *of the* said lands is at least the sum of Twenty Thousand Dollars per annum.

This defendant further answering denies any all manner of unlawful combinations, domination or control over its affairs with or by the said Guardian Trust Company, wherewith this defendant is by said bill of complaint charged, without this, that there is any other matter or thing in said complainant's bill of complaint contained relating to this defendant and material or necessary for this defendant to make answer unto and not herein or hereby well and sufficient- answered, confessed, or traversed and avoided, or denied, is true, to the knowledge or belief of this defendant, all of which matters and things this defendant is willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays that a receiver may be appointed for the reasons set forth in this answer and herein contained.

CENTRAL IMPROVEMENT COMPANY,
By TRIMBLE & BRALEY,
WING & CHADBORNE,
Its Solicitors.

C. A. BRALEY,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

C. A. Braley, being first duly sworn, upon his oath deposes and says that he is one of the solicitors and counsel for and also president of the defendant the Central Improvement Company; that he has read the above and foregoing answer of the said defendant, and knows the contents thereof, and that the allegations therein contained are true, except such as are therein alleged to be on information and belief, and as to those matters, he believes them to be true.

C. A. BRALEY.

104 Subscribed and sworn to before me this 20th day of October, 1900.

My Commission expires May 25, 1904.

[SEAL.] FLORENCE APPLEGATE,
Notary Public in and for Jackson County, Missouri.

EXHIBIT "A",

List of Property of Central Improvement Company.

The Union Terminal Railroad Company.

1. Commencing at a point in the South line of Cheyenne Avenue, in Kansas City, Kansas, thirty feet west of North and South one half section line through the center of section twenty-two, township eleven, range twenty five, in Wyandotte County, Kansas; thence west along the south line of Cheyenne Avenue, 37′ feet; thence in a southwest direction on a straight line, forming an angle of 56 deg. 9′ with said South line of Cheyenne Avenue, 680 feet more or less to the northerly boundary of a tract of land owned by the Chicago, Milwaukee & St. Paul Railway Company; thence in a Northeasterly direction along said northerly boundary line (the same being a surved line to the left) 775 feet more or less to a point in the west line of a sixty foot street (the center line of which street is the North and South one half section line through the center of Section 11, Township 11, Range 25) thence along the west line of said street 197 feet to the place of beginning, and containing an area of 1.65 acres.

This tract of land cost $4,400.00 April 23rd, 1895.

2. A certain strip or piece of land situated partly in the Southeast Quarter of Section twenty-one, and partly in the Southwest Quarter of Section twenty two, Township eleven, range twenty five, in Wyandotte County, Kansas, and bounded and described as follows:

Beginning at a point in the south line of the right of way of The Union Terminal Railroad as said right of way is described in a deed from the sellers to the Union Terminal Railroad Company, recorded in Book 204, at page 418 and following, where said south line would be interesected by the prolongation or extension southerly of the east line of Tenth Street, Formerly Twentieth Street, in Kansas City, Kansas; thence in an easterly direction along said line of right of way, 2178 feet; thence south 208.3 feet; thence in a westerly direction on a line parallel to the south line of said right of way
of The Union Terminal Railroad, and at the uniform distance
105 of two hundred feet from *sale* 2178 feet to a point in the east
line, extending southward of the aforesaid Tenth Street in Kansas City, Kansas; thence North along said line two hundred feet to the place of beginning, containing ten acres.

This land was purchased at a cost of $20,000.00.

3. All of a certain lot or piece of land, situated in the Northeast Quarter of section twenty-two, township eleven, range twenty five, in Wyandotte County, Kansas, bounded and described as follows:

Beginning at a point in the east line of Railroad Street in Kansas City, Kansas, 1336.85 feet in a southwesterly direction measured on the line of said street, from the south line of Osage Avenue; thence east along the south line of a tract of land now or formerly owned by the Western Dressed Beef Company, 270 feet more or less; to a

point in the west line of the right of way of The Union Terminal Railroad; thence in a southwesterly direction along said line of right of way to the point where the same interesects or coincides with the east line of Railroad Street; thence in a Northeasterly direction along the line of said street 390 feet more or less to the place of beginning, and containing an area of 48 acres.

This tract of land originally cost $1,008.00.

4. Beginning at a point in the West line of the Northeast Quarter of the Southwest Quarter of section twenty, township eleven, range twenty five, in Wyandotte County, Kansas, 854 feet south of the Northwest corner of same, said point being also the southwest corner of land of John O'Connor; thence north 414 feet to a point in the south line of the right of way of The Union Terminal Railroad Company; thence south 71 deg. 40′ East, along said line 603.5 feet to a point in the west line of land of M. O'Connor; thence south along said 161.4 feet; thence south 63 deg. 37′ west, 139.5 feet to a point in the south line of the land of the said John O'Connor; thence west along said south line, 447.58 feet to the place of beginning, containing 4.1 acres.

This land originally cost $3,275.00.

5. Lots 14, 15, 16, 17, and 18, in Loomis' Riverside Addition: Lots 25, 27, and 28, Clifton Place Addition; Lots 2, 3, 5, 31, and 32 in Block B, F. J. Baird's Addition to Armourdale, now a part of Kansas City, Wyandotte County, Kansas.

Originally cost $8,110.00.

106 *Kansas City Suburban Belt Railroad Company.*

6. All lots numbers 1, 45 and 46 in Block 2 in Modern Mutual Place, an addition to Kansas City, Missouri, as the same appears of record upon the recorded plat thereof, and so much of lots numbered 2 and 44 in Block 2, and so much of lots numbered 6, 7, and 8 in Block 1 in said addition, as lie north and northwest of a line parallel to and 20 feet south of the center line of the most southerly track of the Kansas City Suburban Belt Railroad Company, or the Kansas City and Independence Air Line, as the same is now located across said lots, which said center line is described as follows:

Beginning at a point in the west line of Lot 8 in Block 1 of said addition 65.1 feet south of the northwest corner of said lot; thence in a northwesterly direction upon the line of a curve to the right of 550.8 feet radius, 210 feet more or less to a point in the west line of Lot 44 in Block 2 of said addition, 3.3 feet south of the northwest corner thereof; thence continued on said curve to the right with a radius of 550.8 feet, 198.8 feet to a point in the East line of Lot 1 of Block 2 of said Addition, 2.1 feet south of the Northeast corner of said Lot.

This land cost $1,000.00, in 1895.

7. All interest in and to the following described real estate to-wit:

Lots 31, 47 and 48 in Burck's Subdivision of the Guinnottee Farm, as the same are marked and designated on the recorded plat thereof on file in the office of the recorder of deeds in and for the County of Jackson in the state of Missouri.

Except such parts of said lots as lie in the Missouri River.

This land cost in 1895 $13,551.68.

8. Lot 4 in Block 5 Lykin's Addition to Kansas City, Missouri.

This land cost in 1895, $1,100.00.

9. Lot 7 in Block 4, Lykin's Addition to Kansas City, Missouri.

This land cost in 1895, $1,100.00.

10. Part of the Southeast Quarter of Section 33, Township 50, range 32, beginning 4.30 feet east of the southeast corner of the N. W. ¼ of the S. E. ¼ of Section 33, thence west with the one
107 half quarter section line 417.72 feet; thence north and parallel with the one half quarter section line and east thereof 271.12 feet; thence east 417.72 feet; thence south 271.12 feet to the beginning, containing 2.60 acres.

The east 35 feet of the South 31.6 feet of Lot 7 Block 80, East Kansas Addition.

Part of Lots 7, 8, and 9, Block 80, East Kansas Addition, beginning at the southeast corner of Lot 9, thence westerly along the southern line of lots 9 and 8, 75 feet; thence northerly, at right angles to said southern line of lot 8, 31.6 feet; thence westerly, parallel with the southerly line of lots 8 and 7 60 feet to a point 15 feet easterly from and right angled from the west line of Lot 7. Thence northerly parallel with said west line of lot 7 to the southerly line of the right of way of The Kansas City Suburban Belt Railroad; thence northeasterly on a line forming an angle of 65 deg. 20′ with the last mentioned line, and along the southerly side of the said right of way, 122 feet; thence easterly on the external concave line of a curve 66.7 feet radius 26 feet, to east line of said lot 9; thence southerly along said east line of lot 9, 82.2 feet to beginning.

Parts of Lots 7, 8, and 9 of said Block 80, beginning at the southwest corner of lot 7; thence easterly along the south line of lot 7 fifteen feet; thence northerly parallel with the west line of lot 7 to the south line of the right of way of the Kansas City Suburban Belt Railroad; thence northeasterly along said south line of right of way 122 feet; thence easterly on the external concave line of a curve of a radius 661.7 feet, 26 feet to a point on the east line of lot 9, 82.2 feet northeasterly from the southeast corner of said lot 9; thence northerly along said east line of lot 9 to the northeast corner of said lot; thence westerly along the northerly line of lots 9, 8 and 7, 150 feet to the northwest corner of said lot 7; thence southerly along the west line of said lot 7 to place of beginning.

11. A tract of land in the N. W. Quarter of Section 6 Township 49, Range 33, Kansas City, Jackson County, Missouri, bounded and described as follows: Bounded on the north by a line parallel with and 22 feet north of the center line of the main line of the Kansas City Suburban Belt Railroad as now constructed on trestle north of Jacob Dold's Packing Company's plant in Kansas City, Missouri; on the east by the east line of the Ferrier tract, extended

north to said north line; on the west by the east line of Wyoming Street extended north to the said north line, and on the south by
the north line of the right of way of the Kansas City, Ft.
108 Scott & Memphis Railway, which north line is 12½ feet
north of and parallel with the north line of said right of way, which said center line of said right of way is described as follows: Beginning at a point on the east line of Wyoming Street in said City, 543.2 feet north of the north line of 9th street in said city; thence in a straight line to a point on the east line of the Ferrier tract, 118 feet north of the north line of 8th street, extended.

12. Lot 21 Block 9 of Centropolis, Jackson County, Missouri.

This land cost $100.00 in 1896.

13. Lot 124, in Block 12, Old Town, Kansas City, Jackson County, Missouri.

This land cost $3,000.00 in 1896.

14. A tract of land described by metes and [bo-nds] as follows: Beginning at the northeast corner of lot 16 in Block 16, in that part of Kansas City, Missouri, known as Extension of West Kansas Addition number one, thence west along the north line of said block 16, 72 feet to the northwest corner of lot 14 in said block; thence in a northerly direction on the prolongation or extension of the west line of said lot 1462.1 feet to a point 22 feet measured at right angles north of the center line of the main track of the Kansas City Suburban Belt Railroad as located and constructed upon the ground; thence in an easterly direction on a line parallel to the center line of said main track, and at the uniform distance of 22 feet from said center line 184 feet to a point in the northerly extension or prolongation of a line parallel with and four feet east of the east line of lot 2, Block 15, West Kansas Addition number one; thence South on said line 73.1 feet to a point in the north line of said Block 15, four feet east of the northeast corner of said block 52 feet to the northwest corner of Lot 1 of said Block; thence south along the east line of Mulberry Street, 13 feet more or less to a point 6 feet north of the center line of the most northerly switch track of the Kansas City Ft. Scott & Memphis Railway; thence in a westerly direction on a line parallel with the center line of said switch track and at the uniform distance of 6 feet from the north of said center line 60 feet to a point in the west line of said street; thence north along said line 18 feet more or less to the place of beginning.

This land cost in 1896 $3,000.00.

15. A certain lot or piece of land situated in that part of Kansas City, Missouri north of and adjoining what is known as the Extension of West Kansas Addition Number One, bounded and described as follows:

109 Beginning at the Northwest corner of Lot number 1 in Block number 15 of said Extension of West Kansas Addition No. 1, thence north along the prolongation of the east line of Mulberry Street to the Missouri River, thence easterly along the Missouri River to a point where the prolongation of the east line of lot Number 8 in said block and addition meets the Missouri River; thence southerly along said prolongation to the east line of said lot 8 to

the north line of lot number 15; thence westerly on the north line of said block 15 to the place of beginning.

Also a certain lot or piece of land comprising parts of lots, 1, 2, 3, 4, and 5, of Block No. 15, in said Extension of West Kansas Addition Number One, described as follows:

Beginning at the northwest corner of said block, thence east along the north line of same 99 feet more or less to a point 6 feet measured at right angles north of the center line of the most northerly switch track of the K. C. Ft. S. & M. R'y; thence in a southwesterly direction on a line parallel to said center line and at the uniform distance of six feet from the same one hundred feet more or less to a point in the East line of Mulberry Street; thence north along said line 13 feet more or less to the place of beginning, all in Jackson County, Missouri.

This land cost in 1896 $1,700.00.

A certain piece of land situated in that part of Kansas City just north of and adjoining what is known as Extension of West Kansas Addition number one, and bounded as follows:

Beginning at the Northwest corner of Lot Number 3 in Block number 15 of said West Kansas Addition, thence along the north line of said block twenty feet; thence north on the northerly extension or prolongation of a line parallel to the east line of said lot number 3 73.1 feet to a point 22 feet measured at right angles north of the center line of the main track of the Kansas City Suburban Belt Railroad as located and constructed on the ground; thence in an easterly direction on a line parallel to the center line of the main track of the said Suburban Belt Railroad and at the uniform distance of 22 feet from the said center line 140.2 feet to a point in the northerly extension or prolongation of the east line of lot number 8 in said Block number 15; thence southerly along the said line to the northeast corner of said lot number eight; thence west along the north line of said lot 15 to the place of beginning, and also any and title that the said Charles W. Watson might have in any land adjoining the above described land on the East, West or South thereof.

Also all of a tract of land beginning at the northwest corner of lot number 1 in Block 15 of the Extension of West Kansas Addition number one, an addition to Kansas City, Missouri; thence north along the prolongation of the east line of Mulberry Street about 71 feet to a point 22 feet measured at right angles from the center line of the main track of the Kansas City Suburban Belt Railroad Company as at present constructed; thence easterly on a line parallel to said center line and at the distance measured at right angles, of 22 feet from the said center line 192.2 feet to the prolongation of the east line of lot 8 in said block and addition; thence southerly on said prolongation of said east line of lot 8 to the north line of said block 15; thence westerly on the north line of said block 15 to the place of beginning, in Jackson County, Missouri.

16. A tract of land bought from W. B. Richards in 1897, for $2,100 situated just west of Salmons Mattress factory.

17. Lots 139 and 140, 320 and 319 Old Town, purchased at a cost of $12,000.00 in 1897.

18. A triangular piece of ground in the north west corner of block 3 in Coates & Hopkins' Addition to the City of Kansas City, now Kansas City, Missouri, bounded as follows:

Beginning at a point on the west side of said Block 3 which is 16 feet from the northwest corner thereof, running thence northerly along said west side 16 feet to said corner; thence, easterly along the north side of said block 3, 70 feet; thence southwesterly to the place of beginning, containing about 560 square feet, or .0013 acre.

Also a part of Block 7 in said Coates & Hopkins' Addition, which is bounded as follows:

Beginning at a point on the east side of said Block 7 which is 252.4 feet from the northwest corner of 8th & Henning Streets thence northerly 46 feet along said east side to the northeast corner of said Block 7; thence northwesterly along the northerly side of said block 7, 144.7 feet to the northwest corner thereof; thence south along the west side of said block 7, 84 deg. and 4, included angle, 244.3 feet; thence northeasterly 35 deg. 20′ included angle, 118.1 feet; thence northeasterly 187 deg. 15′ included angle 67.5 feet; thence northerly 188 deg. 26′ included angle 68.7 feet to the point of beginning containing 21,215 square feet, or .487 of an acre.

This land cost $18,000.00 in 1898.

19. All of the Southeast Quarter of the Southeast Quarter of Section 28, Township 50, Range 33, lying south of the Missouri River, except the right of way of the Kansas City Suburban Belt Railroad.

111 20. All of lot 32 Hurck's subdivision of Guinnottee Farm between the right of way of the Kansas City Suburban Belt Railroad and the Missouri River.

This land cost $800.00 in 1898.

21. All that part of lot numbered 41 in Hurck's Subdivision of Guinnotte Farm, sometimes called Lot 41 of the lands of Joseph Guinnotte in Kansas City, as shown upon the recorded plat thereof, and more particularly described as follows:—

Beginning at a point on the west line of said lot 41, 55 feet south of the Northwest corner of said lot; thence south on said west line 88 feet; thence east on a line parallel to the north line of said lot, 150 feet; thence north on a line parallel to the West line of said lot, 88 feet; thence westerly 150 feet to the place of beginning.

This land cost $813.00 in 1898.

Kansas City & Independence Air Line.

22. Beginning at the northwest corner of the S. W. Quarter of the S. E. Quarter of Section 33, Township 50, North Range 32 West thence north along the one half section line, 588 feet; thence east 383.45 feet, thence south 568 feet; thence west 383.45 feet to the point of beginning containing 5 acres.

Also beginning at a point 383.45 feet east of the Northwest corner of the S. W. Quarter of the S. E. Quarter of Section 33, Town-

ship 50, North Range 32, West thence North 568 feet; thence east 230.1 feet thence south 568 feet; thence west 230.1 feet to the place of beginning, containing 3 acres more or less.

This land cost in 1895 $3,434.11.

23. The following tract of land, situated in Jackson County, Missouri:—

Beginning at the Southwest corner of the Southeast Quarter of section 33 Township 50, Range 32, thence north along the west line of said Southeast quarter in section 33, 986.7 feet; thence east and parallel to the south line of said section 33, 750.42 feet; thence south parallel with the West line of said southeast quarter of section 33, 986.7 feet to the south line of said section, thence west along said south line 750.42 feet to beginning, less easement in Independence Avenue, containing 17 acres, more or less.

This land cost $5,500.00 in 1895.

24. The following land in Jackson County, Missouri. All of the N. W. 1/4 of the S. E. 1/4 of Section Thirty three, Township
112 Fifty, Range 32, except 8 acres out of the Southwest corner thereof, and also excepting 2.6 acres out of the southeast corner of said quarter section; said 2.6 acres being described in deed recorded in Book 172, at page 235.

This land cost $11,600.00.

Kansas City and Northern Connecting Railroad Company.

25. The undivided one half of the following described property situated in section 26 Township Fifty, Range 33, Jackson County, Missouri, to-wit:—

Beginning at a point at the intersection of the north line of the right of way of the Kansas City Suburban Belt Railroad Company with the land of the Chicago, Milwaukee & St. Paul Railway; thence in a northwesterly direction along the Chicago, Milwaukee & St. Paul Railway Company's right of way, 82 feet; thence in a southeasterly direction parallel to and 25 feet distant from the center line of the Kansas City and Northern Connecting Railroad Company's connection (being a seven decree 30′ curve) 210 feet on the intersection of the Kansas City Suburban Belt Railroad Company's right of way; thence west along said right of way line 148 feet to the place of beginning, containing .9 acres.

Kansas City, Pittsburg & Gulf Railroad Company.

26. All of lots 1, 2, 3, 4, 5, 6, and 7, in Block 14, West Kansas Addition number 1 of the City of Kansas City, Jackson County, Missouri. Also commencing at the northwest corner of said lot, thence running due north to the Missouri River; thence east following the meanderings of said river to a point due north of the northeast corner of said lot 5 thence due south to the north east corner of said lot 5; thence west to the place of beginning.

Also commencing at the southwest corner of lot 11 in said Block 14, thence west along the east line of Santa Fe Street, 86.67 feet

to the northwest corner of lot 8 in said block 14; thence east along the north line of said lot 8, 98.2 feet; thence southwest making an interior angle with the last described line of 50 deg. 35′ and running 112 feet to the south line of lot 11, being the north line of Eighth Street, at a point on said line 26.2 feet east of the east line of Santa Fe Street; thence west along the south line of lot 11, and the north line of Eighth Street, 26.2 feet to the place of beginning.

This land was purchased in 1895, at a cost of $34,000.00.

Afterwards, to-wit, on the 7th day of November, 1900, an order was filed in words and figures as follows:

113 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN R. R. Co. et al., Defendants.

Order.

Defendants having this day filed herein their answer, which is for the first time seen by complainant's counsel, and both parties desiring to submit evidence in support of their respective pleading;

It is ordered that the complainant have twelve (12) days hereafter within which to file affidavits and take testimony in support of its application for a temporary injunction herein; the defendants shall have five (5) days thereafter in which to file affidavits and take testimony against said application; and complainant have thereafter five (5) days in which to take and file affidavits and testimony in rebuttal.

Shannon C. Douglas is appointed special master, before whom any testimony herein may be taken. Should the complainant in the preparation of its affidavits and testimony desire to examine the books and papers of defendants on material issues, the defendants shall submit the same therefor under the supervision and regulation of the Special Master.

It is further ordered that the temporary restraining order heretofore issued herein shall continue in force until the further hearing before the Court on the application for a temporary injunction.

It is further ordered that upon the completion of said affidavits and testimony, that the respective counsel herein appear before the Court when the Court shall set the hearing down for a day certain.

(Signed) JNO. F. PHILIPS, *Judge.*

Afterwards, to-wit, on the 3rd day of December, 1900, the following Replication to Separate Answer of Guardian Trust Company was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

114 In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Replication to Separate Answer of Guardian Trust Company.

This replicant, Cambria Steel Company, saving and reserving unto itself all and — manner of advantages of exception which may be had and taken to *be* manifold errors, uncertainties and insufficiencies of the answer of the defendant Guardian Trust Company, for replication thereunto sayeth:

That it doth and will aver, maintain and prove that its said bill is true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without *that* that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or evaded, traversed or denied is true; all of which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays, as in and by its said bill it hath already prayed.

L. C. KRAUTHOFF,
FRANK HAGERMAN,
Solicitors for Complainant.

Afterwards, to-wit, on the 3rd day of December, 1900, a Replication to Separate Answer of Central Improvement Company was filed. Said Replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

115 In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Replication to Separate Answer of Central Improvement Company.

This replicant, Cambria Steel Company, saving and reserving unto itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant. Central Improvement Company, for replication thereunto sayeth:

That it doth and will aver, maintain and prove that its said bill is true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without *that*, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or evaded, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it hath already prayed.

L. C. KRAUTHOFF,
FRANK HAGERMAN,
Solicitors for Complainant.

Afterwards, to-wit, on the 20th day of November, 1901, an Ancillary Bill of Complaint was filed wherein Stuart R. Knott et al. are complainants and the Cambria Steel Co., et al., are defendants.

Said Ancillary Bill is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

116 In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,
vs.
CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, and FRANCIS M. Black, its receiver; Missouri Elevator & Terminal Company and Wash Adams, its Receiver; Central Improvement Company and Wash Adams, its Receiver; Second Street Improvement Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Ancillary Bill of Complaint.

To the Judges of the United States Circuit Court for the Western Division of the Western District of Missouri, in the Eighth Circuit, sitting in equity.

Your orators, Stuart R. Knott and Edward F. Swinney, as receivers of the Kansas City Suburban Belt Railroad Company and the Kansas City Suburban Belt Railroad Company, bring this their ancillary bill of complaint against the Guardian Trust Company and Francis M. Black, its receiver, Missouri Elevator and Terminal Company, and Wash Adams, its receiver, Central Improvement Company, and Wash Adams, its receiver, Second Street Improvement Company, and Fairmount Amusement — each and all of which said corporations, both complainant and defendants, are corporations organized under and by virtue of the laws of the State of Missouri, and citizens and residents of said state, and each of them having their principal office and place of business at Kansas City in said state, and each of them being an inhabitant of the Western Division of the Western District thereof except the Cambria Steel Company, which is a corporation duly created and existing under the laws of the state of — and a non-resident of the state of Missouri.

117 Your orators state that on November 30th, 1900, in the suit of W. W. Bierce, et al., complainants, against the Guardian Trust Company, defendant, then pending in the United States Circuit Court for the Western District of Missouri, Francis M. Black was appointed receiver of the defendant Guardian Trust Company; and is now the duly qualified and acting receiver of said Company; that, in this suit, Wash Adams has heretofore been appointed receiver for the Missouri Elevator and Terminal Company, and also receiver for the Central Improvement Company, and he is now the duly qualified and acting receiver of said companies; that said Francis M. Black and Wash Adams are each a citizen and resident of the Western Division of the State of Missouri.

And, thereupon, your orators complain and say that the above-named complainant, the Cambria Steel Company, heretofore exhibited to this Honorable Court its bill of complaint against the Kansas City Suburban Belt Railroad Company, a defendant, and the other corporation defendant above named, in and by which said bill of complaint said Cambria Steel Company, as such complainant, set up the recovery of a judgment by it against the Kansas City Suburban Belt Railroad Company for the sum of One Hundred Thousand Nine Hundred Sixty-two 91-100 Dollars, and the issuance and delivery and return unsatisfied of an execution thereon, and in and by said bill of complaint sought to subject to the payment and satisfaction of said judgment certain rights, properties and assets belonging to the Kansas City Suburban Belt Railroad Company and the other defendants above named.

Your orators further show that prior to the filing of said bill of complaint by said Cambria Steel Company, four certain bills of complaint were duly filed in this court by the Provident Life and Trust Company of Philadelphia, two of said bills being filed against the Kansas City Suburban Belt Railroad Company, as the sole defendant; another of said bills was filed against The Union Terminal Railroad Company, a Kansas corporation, and the said The Kansas City Suburban Belt Railroad Company as defendants, and the other of said bills was filed against the Kansas City and Independence Air Line, a Missouri corporation, and the said Kansas City Suburban Belt Railroad Company. Each of said bills sought the foreclosure of a first mortgage upon the certain railroad property described in the said bills of complaint respectively, and which said several described pieces of railroad property, together for a long time have been operated by the Kansas City Suburban Belt Railroad Company as a continuous and allied system, said Kansas City Suburban Belt

118 Railroad Company being also the beneficial owner of said properties by reason of owning the capital stock of said several companies. Upon the same date upon which the said bills of complaint were filed, an application was made for the appointment of a receiver of all the property of said Kansas City Suburban Belt Railroad Company, and on the same day, to-wit; on the 6th day of September, A. D. 1900, an order was duly entered of record in each of said causes, as well as in the above-entitled cause, appointing your orators, Stuart R. Knott and Edward F. Swinney, as re-

ceivers of the said Kansas City Suburban Belt Railroad Company, and vesting your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, with all the rights, title, estate, property and interests of the said The Kansas City Suburban Belt Railroad Company, and authorizing and directing your orators, Stuart R. Knott and Edward F. Swinney, as such receivers to proceed to take such steps and institute such proceedings, legal or otherwise, as might be necessary or requisite to compel a restoration to said the Kansas City Suburban Belt Railroad Company, and your orators, Stuart R. Knott and Edward F. Swinney, as its receivers, of any property rights belonging to it and to compel an accounting from any and all persons, firms or corporations, from whom the said The Kansas City Suburban Belt Railroad Company might be entitled to such accounting; and that your orators, Stuart R. Knott and Edward F. Swinney as such receivers, were also authorized to appear in any and all suits theretofore or thereafter instituted against the said The Kansas City Suburban Belt Railroad Company, in its name or in the names of your orators, Stuart R. Knott and Edward F. Swinney, as the receivers, to defend any and all such suits. Your orators further show unto the court that under and by virtue of the powers and authorities so vested in them as aforesaid, your orators, for and on behalf of said The Kansas City Suburban Belt Railroad Company which is made a defendant to the bill of complaint in the above entitled cause, have appeared and filed their answer to said bill of complaint as will appear of record herein, and having so filed said answer, your orators bring this, their ancillary bill of complaint against the defendants hereinabove named.

Your orators further show unto the court that immediately upon the appointment of your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, they took and have ever since held possession of each and all the property of the said The Kansas City Suburban Belt Railroad Company, and under and pursuant to the orders of the court so appointing them, have been ever since, and are now, operating the railroad and property of said Kansas City Suburban Belt Railroad Company.

119 And your orators further charge and aver that the matters and things mentioned and set forth in this, your orators' bill of complaint, are ancillary to the said suits so pending in this court wherein your orators, Stuart R. Knott and Edward F. Swinney were appointed as such receivers, and are properly cognizable in this court, which has possession of each and all of the property of said The Kansas City Suburban Belt Railroad Company. For convenience, The Kansas City Suburban Belt Railroad Company will be hereinafter referred to as the Belt Company; the Guardian Trust Company will hereinafter be referred to, for convenience, as the Trust Company, the Missouri Elevator and Terminal Company will be hereafter referred to, for convenience, as the Elevator Company. The Central Improvement Company will hereinafter for convenience be referred to as the Central Company, and Second Street Improvement Company will hereinafter for convenience, be referred to as the Second Street Company; the Fairmount Amusement Company

will hereinafter, for convenience, be referred to as the Amusement Company.

Your orators show unto the court that the Trust Company was incorporated under and by virtue of the laws of the state of Missouri, in or about the year 1883, and that until on or about the month of June, 1899, the name of said Trust Company was Missouri, Kansas and Texas Trust Company; but that at said latter date, such proceedings were taken as are provided by the statutes of the state of Missouri in such case made and provided, so that its name was changed to Guardian Trust Company.

Your orators, upon information and belief, further show unto the court, that, on or about the first day of January A. D. 1887, a corporation was formed under the laws of the state of Missouri, known as Kansas City Suburban Belt Railroad Company, hereinafter for convenience, called the Suburban Company, for the purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas. That, as your orators are informed and believe, and so charge the facts to be, said Suburban Company was organized by the said Trust Company, and the servants and employees of said Trust Company were elected as its officers and directors, so that said Trust Company, at all time dominated and controlled the said Suburban Company. That, as your orators are informed and believe, and so charge the fact to be, the said Trust Company, so dominating and controlling said Suburban Company by virtue of holding possession of the offices of its board of directors and officers, caused the said Suburban
120 Company to issue and deliver to it, said Trust Company, each and all of the capital stock of said Suburban Company and also caused said Suburban Company to execute its bonds, secured by a first mortgage upon all of its corporate property then held and to be hereafter acquired, amounting in the aggregate to the sum of One Million Dollars, and that said bonds in like manner, by virtue of the domination and control of said Trust Company, were delivered to said Trust Company, and that said Trust Company thereupon proceeded to sell and otherwise dispose of said bonds and stock and to apply the proceeds thereof, as claimed by it, for the corporate purposes of said Suburban Company, in the construction and operation of its road; but said Trust Company, although often requested so to do, did not at any time, and never has accounted to said Suburban Company for the proceeds realized by it from said bonds and stock, or the manner in which it so expended the same.

Thereafter, as your orators are informed and believe, and so charge the fact to be, the said Trust Company caused to be formed under the laws of the state of Missouri, a corporation known as the Consolidated Terminal Railway Company, for the purpose of building a line of road to connect with the line of road constructed, or proposed to be constructed, by said Suburban Company, although said Suburban Company had full power under its charter to have constructed the said road itself. Said Consolidated Terminal Railway Company is hereinafter referred to, for convenience, as the

Consolidated Company. That, as your orators are informed and believe, and so charge the fact to be, said Consolidated Company was formed in the same manner as said Suburban Company by said Trust Company electing as its officers and directors, the servants and employees of said Trust Company, so that it at all times dominated and controlled said Consolidated Company, and that said Trust Company thereupon caused said Consolidated Company to issue and deliver to it its entire capital stock, and also bonds secured by a first mortgage upon its corporate property, then and to be thereafter acquired, aggregating the sum of Seven Hundred and Fifty Thousand Dollars, and caused all of said bonds to be delivered to said Trust Company, and that said Trust Company thereupon proceeded to sell and dispose of said bonds and stock of said Consolidated Company, so delivered to it as aforesaid, and to apply the proceeds thereof, as alleged by it, for the corporate purposes of said Consolidated Company, in the construction and operation of its road; but the said Trust Company, although often requested so to do, did not and never has accounted to the said Consolidated Company
121 for the disposition made by it of said bonds and stock so delivered as aforesaid, and the proceeds derived therefrom and the purposes for which said proceeds were applied.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be that thereafter and on or about the 25th day of July A. D. 1892, the said Consolidated Company and the said Suburban Company, as authorized by the statutes of the State of Missouri, entered into articles of consolidation, whereby the said two companies became one consolidated corporation thereafter known as the Kansas City Suburban Belt Railroad Company, of which your orators, Stuart R. Knott and Edward F. Swinney were appointed receivers, as aforesaid, and under and by virtue of said articles of consolidation, as well as the statutes of the state of Missouri in such case made and provided, the said The Kansas City Suburban Belt Railroad Company and your orators, Stuart R. Knott and Edward F. Swinney, as its receivers, have succeeded to each and all of the rights of both said Suburban Company and said Consolidated Company.

Your orators further show unto the court that they are informed and believe, and so charge the facts to be, that at the time of the consolidation of said two companies, as aforesaid, the said Trust Company caused its officers and employes to be elected to the position of officers and directors of said consolidated company, and continued such persons in such positions respectively continuously until about the month of April, 1900, whereby said Trust Company, at all times up to said last mentioned date, completely dominated and controlled the actions of said Belt Company.

Your orators further show unto he court that they are informed and believe, and so charge the facts to be, that some time prior to the said consolidation, and on or about the 30th day of December, 1891, it was found advisable in the course of the construction of the line of road of said Suburban Company to have a corporation formed under the laws of the State of Kansas, for the purpose of

building and holding the title to that portion of the line of road of said Suburban Company, lying within the state of Kansas, and for that purpose, the Union Terminal Railroad Company, hereafter referred to as the Union Company, for the sake of convenience, was by said Trust Company caused to be incorporated under the laws of the state of Kansas, and the said Trust Company, as in the other instances, caused its officers and employes to be elected the officers and directors of said Union Company, and that said Union Company was a
122 corporation organized for the sole purpose of holding the title to the said property of said Suburban Company or Belt Company in the state of Kansas; that the said Trust Company thereupon caused all of the stock of said Union Company to be issued to said Suburban or Belt Company, and also caused said Union Company to execute its first mortgage bonds in the amount of Two Million Dollars, and said bonds were secured by a first mortgage upon all of the property of said Union Company then and to be thereafter acquired: that said bonds were thereupon issued and delivered to said Trust Company for the use and benefit of said Suburban Belt Company; that said Trust Company thereupon immediately proceeded to sell or otherwise dispose of the said bonds and the stock of said Union Company, which had been theretofore delivered to it by said Belt Company, and to apply to the proceeds derived from such sale in part to the construction and operation of the road so built for said Belt Company, but held and operated in the name of said Union Company; that said Trust Company thereupon became liable to account to the said Belt Company for the proceeds and disposition of the same derived from all of the said bonds and stock, but although often requested so to do, it always has failed and refused to account to the said Belt Company for the disposition made by it of said bonds, the proceeds derived from such disposition and the manner in which said proceeds were disposed of.

Your orators further show unto the court that they are informed and believe, and so charge the facts to be, that thereafter, and on or about the 23rd day of January, A. D. 1891, the said Trust Company, caused to be incorporated under the laws of the state of Missouri, a corporation known as the Kansas City and Independence Air Line, hereinafter, for convenience, referred to as the Air Line; said Company being incorporated for the purpose of building a line of road connecting the line of said Suburban Company and the City of Independence, Missouri; that the capital stock of said Company was placed at the sum of Five Hundred Thousand Dollars. The said Trust Company immediately caused its officers and employes to be elected directors and officers of said Air Line, and thereupon caused the said Air Line to issue its first mortgage bonds to the amount of Three Hundred Thousand Dollars, secured by a first mortgage upon all of its corporate property then and to be thereafter acquired; that by virtue of the fact that the officers and directors of said Air Line were officers and employes of said Trust Company, it at all times dominated and controlled the said Air Line, up to and until about the month of April, 1900; that, thereafter, the

said Trust Company caused the said Belt Company to acquire each and all of the bonds and stock of said Air Line, the said
123 Belt Company in fact constructing the railroad property of said Air Line, and acquiring the said bonds and stock in consideration therefor; that the said Trust Company thereupon caused the said Belt Company to deliver the said bonds and stock to it, the said Trust Company, and it proceeded to dispose of the same and to apply the proceeds, as it alleged, for the corporate purposes of said Belt Company; but the said Trust Company, although often requested so to do, has never at any time accounted to said Belt Company for the disposition made by it of the said bonds and the proceeds realized by it therefrom.

Your orators further show that they are informed and believe, and so charge the facts to be, that the said Trust Company at all times up to about the month of April, 1900, absolutely and completely dominated and controlled the affairs of said Belt Company, by reason of the fact that the officers and employes of said Trust Company were elected officers and directors of said Belt Company at the behest of said Trust Company, and were simply "dummies" acting as the agents of said Trust Company, that the said Trust Company itself attended to the disbursement of all the moneys which were realized from the sale of the bonds and stock of the several companies hereinabove named, and itself attended to the disbursement of the moneys which were used in the construction and building of the lines of road of said different companies. That your orators are informed and believe, and on such information and belief, state that the total cost of the lines of all of the said companies did not exceed the sum of about Two Million Dollars, but that there was actually delivered to and disposed of by said Trust Company secured bonds and stock aggregating more than Five Million Dollars, and that said Trust Company, nor its said Receiver, has never at any time, but at all times refused to account to said Belt Company or to your orators for the proceeds derived by it from the sale of the said bonds and the disposition made by it of such proceeds, and fraudulently pretends and claims that it is retaining any and all sums of money above the actual cost of said several railroad properties for the purpose of paying for its commissions and services in the matter of the sale and disposition of said bonds and stock.

Your orators further, upon information and belief, charge and aver that on or about the 30th day of June, 1896, the said Trust Company, either in its own name, or in the name of some of its officers or some corporation controlled by it, had entered into a contract whereby it was obligated to construct a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, for the pur-
124 pose of connecting at that point with the Omaha and St. Louis Railroad Company, and the Omaha, Kansas City and Eastern Railroad Company; that the said Trust Company thereupon caused to be incorporated under the laws of the state of Missouri, a corporation known as the Kansas City and Northern Connecting Railroad Company, hereinafter for convenience called the Connect- Company, and caused certain of its officers and employes to be

elected officers and directors of said Connecting Company and by virtue thereof at all times dominated and controlled the affairs of said Connecting Company; that said Trust Company, being under the obligation to construct said road as aforesaid, set about to discover a way in which it could cause said railroad to be constructed without incurring any liability itself, and without making itself liable for the possibility of a loss in such construction; that it thereupon conceived the idea of having the said Belt Company undertake the construction of said railroad in consideration of the issuance of bonds and stock of said Connecting Company; that thereupon, by virtue of the domination and control which said Trust Company exercised over the affairs of both said Belt Company and said Connecting Company, the said Trust Company caused a contract to be entered into between said Belt Company and said Connecting Company, whereby the said Belt Company agreed to construct and did construct said line of railroad for said Connecting Company in consideration among other things, of the issuance to said Belt Company of certain first and second mortgage bonds and stock of said Connecting Company more fully specified in said contract; that said contract so entered into as aforesaid, is set up in exhibit "A" to the answer of the said Trust Company filed in the above entitled cause, to which reference is hereby made. The said line of railroad so built as aforesaid was constructed for the sole use and benefit of said Trust Company and for the purpose of enabling it to comply with its obligation to so furnish the said railroad; that the said railroad so furnished as aforesaid, was not and never has been of any value whatsoever to the Belt Company, and was not necessary or useful to its corporate purposes; that the construction of such road, as aforesaid, by said Belt Company, was the result of said Trust Company, by reason of its said domination of said Belt Company utilizing the said Belt Company to further and consummate its own purposes and ends, and for its own benefit; and the said contract for the construction of said railroad of said Connecting Company was so entered into by it as aforesaid solely by the domination and control exercised over said Belt Company by said
125 Trust Company, and the said Trust Company, in so constructing the said railroad as aforesaid, simply used the said Belt Company as an unwilling agent in the building of the same, and occupied towards said Belt Company the relation of principal; that each and all of the moneys paid out by said Belt Company for the construction of said connecting road, passed through the hands of said Trust Company, and all the bonds and stock which were to have been delivered to said Belt Company under the terms of said pretended contract, in like manner, passed through the hands of said Trust Company and said Trust Company proceeded to sell or otherwise dispose of the same; that said Trust Company never at any time accounted to the said Belt Company for the amount realized by it from said bonds and stocks, but has pretended that the construction of said road by said Belt Company resulted in a loss to said Belt Company of about Three Hundred Thousand Dollars. Your orators particularly charge and aver that the said Trust Company

in so using the said Belt Company in the construction of said line, is charged in law and equity with the amount of the said loss so claimed to have resulted to said Belt Company, and should be held accountable therefor.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that, during the time said Trust Company so dominated and controlled the affairs of said Belt Company it at various times had said Belt Company advance to it, or take out of the earnings and assets of said Belt Company, large sums of money which it pretended to expend for and on behalf of said Belt Company; that by reason of the fact that said Trust Company at all times dominated and controlled the affairs of said Belt Company, and had its own employees and servants elected as officers and directors of said Belt Company, your orators are unable to state the amount of money so appropriated by said Trust Company, and belonging to said Belt Company; and which said Trust Company alleges it expended for the corporate purposes of said Belt Company; but upon information and belief your orators charge and aver that said amount aggregates upward of Five Thousand Dollars; and that the said Trust Company has never at any time accounted for the said money so received by it, nor the manner in which it was expended, although often requested so to do, and that said Trust Company is in law and equity liable to account to your orators therefor.

Your orator further show unto the court that they are informed and believe, and so charge the fact to be, that during the times hereinbefore mentioned, the said Trust Company took upon itself the business of paying out practically all the moneys which were
126 paid out for the benefit of said Belt Company, and of buying for said Belt Company practically all of the property which said Belt Company needed to acquire in its business of operating said road and used the moneys of said Belt Company for that purpose, but instead of taking the title of the property so purchased in the name of said Belt Company, the said Trust Company caused other corporations to be formed for the purpose of holding the naked legal title to said respective properties, and caused the capital stock of said corporations, so organized as aforesaid, to be issued to said Belt Company and then turned over to said Trust Company, or to be issued to said Trust Company direct, in trust for the use and benefit of the said Belt Company; and that the Trust Company caused its own servants, agents and employes to be elected and continued as the officers of such companies respectively, at all times down to the month of April, 1900, so that said Trust Company in the same manner that it controlled the affairs of said Belt Company, dominated and controlled the actions and affairs of said subsidiary companies, that among the companies so organized by the said Trust Company, in the manner aforesaid, is the Missouri Elevator and Terminal Company, with a capital stock of One Hundred Thousand Dollars, of which forty-two Thousand Dollars has been issued and all of which in truth and in fact belongs to the said Kansas City Suburban Belt railroad Company; that the said company owns two certain elevators in Kansas City along the line of said Belt Company;

and that said Trust Company caused the construction of said elevators, and one other elevator, which has since been destroyed by fire, and in the construction of the same, used the moneys of the said Belt Company; said money being paid out to said Trust Company upon its request; that no accounting has ever been had between the said Trust Company and the said Belt Company as to the amount of money which it actually expended for the construction of said elevators, or of the manner in which it disposed of the funds received by it from the said Belt Company for the alleged purpose of undertaking such construction, although requests for such accounting have frequently been made upon the officers of said Trust Company; that the said Trust Company caused the said Belt Company to assume all the outstanding debts and liabilities of the said Missouri Elevator and Terminal Company and upon said outstanding debts and liabilities the said Belt Company has paid large sums of money, for which said Belt Company has never been reimbursed; that upon the 8th day of November A. D. 1900, one Wash Adams, Esq., was appointed receiver — the Missouri Elevator and Terminal Company;

127 that at all times subsequent thereto the said Wash Adams has held possession of the property of the said Missouri Elevator and Terminal Company, all of which in truth and fact belong to the Kansas City Suburban Belt Railroad Company; that the said Trust Company also caused to be organized the Central Improvement Company, a corporation organized under the laws of the state of Missouri, with a capital stock of Two Hundred Thousand Dollars, of which One Hundred and Forty-one Thousand Five Hundred Dollars, has been issued; that said Company was organized for the purpose of holding the title to various pieces of real estate in Kansas City, Missouri, and elsewhere, purchased for the use and benefit of the said Belt Company, and the Kansas City, Pittsburg and Gulf Railroad Company, another Missouri railroad corporation; that the said Improvement Company elected and continued its own servants and employes as officers and directors of the said Improvement Company, down until about the month of April 1900; that certain pieces of real estate which are of vital importance to said Belt Company are held in the name of the said Improvement Company; and that property upon which is located a portion of the depot buildings belonging to the said Belt Company, is held in the name of the Second Street Improvement Company; that the said Trust Company took upon itself the duty of purchasing the said pieces of property, and using for that purpose funds of the Belt Company; and various sums of money were, during the period above mentioned, paid out by the said Belt Company to the said Trust Company, for the purpose of purchasing such pieces of real estate, but the said Trust Company has never accounted to the said Belt Company, although often requested so to do, for the sums of money so received by it, and the disposition made by it of such sums of money; that certain shares of stock of the said Central Improvement Company were also, although belonging to said Belt Company, issued to said Trust Company, and it has disposed of the same; but although frequently requested so to do, it has never accounted to the said Belt Company

therefor; that a large amount of property was purchased with money advanced by the said Belt Company, the title to which property, however, was taken in the name of the Central Improvement Company; that all of said property in truth and fact belongs to the said Kansas City Suburban Belt Railroad Company; that said Belt Company has never been reimbused for the money so advanced as aforesaid; that upon the 8th day of November A. D. 1900, one Wash Adams, Esq., was appointed receiver of the Central Improvement Company, that at all times subsequent thereto said Wash Adams has held possession of the property of the Central Improvement Company, all of which in truth and fact belongs to the Kansas City Suburban Belt Railroad Company that another subsidiary company organ-
128 ized by the said Trust Company was the Fairmount Amusement Company, with a total capital of Twenty-five Hundred Dollars, all of which belongs to the said Belt Company; that said Company was organized, dominated and controlled in the same manner by the said Trust Company as the other corporations hereinabove set forth; that all of the moneys expended by said Fairmount Amusement Company were moneys supplied by the said Belt Company, or supplied by the said Trust Company and charged to the said Belt Company; and the said Trust Company took upon itself the duty of disbursing all of the said funds; that large sums of money were paid by said Belt Company to said Trust Company for that purpose, but said Trust Company has never at any time accounted to said Belt Company for said money so received by it, or the manner in which it expended the same, although often requested to do so; that said Fairmount Amusement Company was organized for the purpose of operating what is commonly known as Fairmount Park along the line of the Kansas City and Independence Air Line road; that during the time that the said Trust Company so dominated and controlled the said Belt Company, it caused said Belt Company to advance to it large sums of money for the purpose of fitting up said Fairmount Park; that the said Trust Company took upon itself the duty of expending said sums of money for the purpose of fitting up said Fairmount Park; that, as your orators are informed and believe, upwards of Three Hundred and Fifty Thousand Dollars was thus supplied to said Trust Company for the purpose of fitting up said Fairmount Park; that said Trust Company has never at any time accounted to said Belt Company for the manner in which it expended said sums of money, although frequently requested so to [—]; that another company, organized by said Trust Company was the Northern Townsite Company a Missouri corporation with an authorized capital of One Hundred Thousand Dollars, of which, Ninety-two Thousand Eight Hundred has been issued. The said Company was organized by the said Trust Company in connection with the construction of the Kansas City and Northern Connecting Railroad for the purpose of acquiring property at and near townsites along the line of said road; that said Trust Company in the same manner as it dominated the other corporations above named, caused it own servants and employes to be elected and maintained as officers and directors of said townsite company, and at all times dominated

and controlled and still does dominate and control the affairs of the said townsite company, that the said Trust Company caused the said Belt Company to advance to it upwards of Five Thousand Dollars, which it used in the purchase of property which was taken in the name of the said Townsite Company; and your orators are
129 informed and believe, and on such information and belief, state, that substantially all the money with which the property of said Townsite Company was acquired was money advanced by the said Belt Company, and that the said Trust Company, instead of issuing to the said Belt Company all of the capital stock of the said Townsite Company, issued large portions of it to itself or to other persons for its use and benefit, or otherwise disposed of the same; that the said Trust Company has never accounted to the said Belt Company at any time for the money so received by it for the purposes of the said Townsite Company from the said Belt Company, or the manner in which it expended the same, although frequently requested so to do.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that the said Trust Company also, caused to be organized under the laws of the State of Missouri a corporation known as the Kansas City, Pittsburg and Gulf Railroad Company, for the purpose of constructing a line of railroad from Kansas City to Gulf of Mexico; and that the said railroad was so constructed under the direction of the said Trust Company acting through the said railroad corporation, and for the purpose of acquiring funds with which to construct the said railroad, the said Railroad Company issued its first mortgage, to secure the issue of bonds herein specified, and on or about the first day of April, 1899, there were issued and outstanding bonds to the amount of twenty-three million dollars; that at that time a default was made in the payment of an installment of interest due on the said bonds, and a bill was forthwith filed for the foreclosure thereof, and receivers of said railroad were appointed, and thereafter such proceedings were had that the said railroad was sold under the foreclosure decree.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that the said Suburban Belt, Terminal and Air Line Companies, above named, were very largely dependent upon the said Kansas City, Pittsburg & Gulf Railroad Company for their earnings, and an operating contract was in existence between the said Belt Company and the Kansas City Pittsburg & Gulf Railroad Company; so that it was well known to the said Trust Company that if the said Kansas City, Pittsburg and Gulf Railroad Company went into the hands of receivers, it would necessarily and inevitably result in the insolvency of the said Belt and other companies hereinabove named, and would necessitate their ultimately being thrown into the hands of receivers and the
130 mortgages upon the property foreclosed; that the said Trust Company by reason of the domination and control which it exercised over the affairs of the said Kansas City, Pittsburg and Gulf Railroad Company, well knew at and for some time prior to the first day of April, 1889, that said Company would make default in the

payment of the installment of interest due on that date, and that such default would inevitably result in the filing of a bill to foreclose the mortgage and the appointment of a receiver for the said road; and that the said Trust Company thereupon set about to contrive a scheme whereby it might appropriate to itself, before the said Belt Company passed beyond its control, all of the remaining property and assets of the said Belt Company which were in such shape that they could by any possibility be transferred to the said Trust Company; that the said Trust Company thereupon caused to be exhibited to its own officers and employes who were holding the positions of officers and directors of the said Belt Company, various claims and demands which if alleged were due and owing by the said Belt Company to it, and caused such of its own officers and employes who were holding the positions of officers and directors of the said Belt Company to pass upon and approve the said claim and demands; and thereupon caused its own officers and employes so holding the positions of officers and directors in the said Belt Company, between the 31st day of March, 1899, and the 9th day of February, 1900, to execute to said Trust Company various pretended promissory notes and other negotiable instruments, for the alleged purpose of securing to the said Trust Company the payment of the said pretended claims which it held against the said Belt Company, and caused its own officers and employes, so holding the positions of officers and directors of the said Belt Company, to cause to be derived or transferred to it, various stocks, bonds and accounts and other personal property belonging to the said Belt Company as collateral security for the said pretended indebtedness of the said Belt Company [*Company*] to the said Trust Company.

Your orators further charge and aver upon information and belief that the notes so fraudulently caused to be made in form by the said Belt Company to the said Trust Company, are as follows:

Note dated March 31, 1889, payable on July 2nd, 1899, for $50,000, with interest at the rate of 6% per annum.

Note dated July 26, 1899, payable on demand with 6% interest, for $203,900.

Note dated Sept. 21, 1899, payable on demand, with 8% interest, for $23,056.48.

131 Note dated Oct. 23, 1899, payable on demand, with 8% interest for $7162.40.

Note dated November 7, 1899, due January 9, 1900, with 8% interest, for $25,000.

Note dated Jan. 21, 1900, due May 25, 1900, with 8% interest, for $25,000.

Note dated February 8, 1900, due May 12, 1900, with 8% interest, for $109,500.

Note dated Feb. 9, 1900, due June 11, 1900, with 8% interest for $10,400.

The stocks, bonds and other property which the said Trust Company fraudulently caused its own officers and employes as officers and directors of the said Belt Company to turn over to it, for the

purpose of securing the payment of the said pretended notes, as aforesaid, is as follows:

338 First Mortgage, 30 year 5% gold bonds of the Kansas City and Northern Connecting Railroad Company of the denomination of $1000, dated January 1, 1897, being bonds numbered 1467, 1769 to 1733, both inclusive; 1799 to 1818 both inclusive; 1324 to 1331 both inclusive, 1756 to 1768, both inclusive, 1184 to 1216, both inclusive; 1466, 1369 to 1400, both inclusive; 1431 to 1440, both inclusive; 1609 to 1658, both inclusive, 1659 to 1708, both inclusive; 1819 to 1851 both inclusive; 1774 to 1798, both inclusive; 1301 to 1323, both inclusive, and 76 of said bonds, the numbers of which are not known to your orators.

67 and 9-10 second mortgage, 30 year 5% income bonds of the Kansas City and Northern Connecting Railroad Company, of the denomination of $1000 each dated January 1st, 1897, being bonds numbered 1064 to 1098, both inclusive; 1149 to 1157, both inclusive; 1162 to 1173 both inclusive, 1192 to 1202, both inclusive.

Certificate No. 229, entitling the holder to 250-1000 of said mortgage income bonds.

Certificate No. 227, entitling the holder to 250-1000 of said mortgage income bonds.

Certificate No. 220, entitling the holder to 150-1000 of said second mortgage income bonds.

25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100 each, as evidenced by certificates No. 9, 6, 5 and 4.

132 1120 shares of the capital stock of the Central Improvement Company, of the par value of $100, each, as evidenced by certificates No. 148, 149 and 147.

439 shares of the capital stock of the Northern Townsite Company of the par value of $100, each, as evidenced by certificate No. 11.

425 shares of the capital stock of the Missouri Elevator and Terminal Company, of the par of $100, each, as evidenced by certain certificates Nos. 36, 34, 37, 40 and 38.

19,997 shares of the 20,000 shares constituting the capital stock of the Union Terminal Railroad Company.

4994 shares of the capital stock of the Kansas City and Independence Air Line.

15 Kansas City and Northern Connecting Railroad Co.'s second mortgage income bonds.

About 600 tons of new steel rails, theretofore purchased by, and then belonging to said Belt Company, and being stored in its yards.

Your orators further charge that the Trust Company also caused the Belt Company to assign to it an account against the Kansas City, Pittsburg & Gulf Railroad Company, in an amount of about $130,000 to secure said alleged indebtedness.

Your orators further charge and aver, upon information and belief, that the said notes were executed, and said account assigned, and the said property above described given as collateral security solely under and by virtue of the domination and control of the

said Trust Company over the said Belt Company, and at the time the said action was pretended to have been taken by the said Belt Company the officers and directors of the said Belt Company so causing said Belt Company to take such action, were either officers and directors, or servants and employes of the said Trust Company, and as such officers and directors, or servants and employes of the said Trust Company, were personally interested in securing to the said Trust Company, all the available assets of the said Belt Company, and that the execution of said Promissory notes and the delivery of the said collateral security under such circumstances, was fraudulent and void as against the said Belt Company, and in law and equity ought to be set aside.

Your orators further charge and aver upon information and belief that the said Trust Company continued to keep its own officers, servants and employes filling the positions of officers and di-
133 rectors of the said Belt Company down to about the month of April, 1900, when the said Kansas City, Pittsburg and Gulf Railroad Company, having been sold under foreclosure decree, and a reorganization of said property joined with said Belt Company having been undertaken, the control of the said Belt Company passed into other hands, and that during all the time until said month of April, 1900, the said Trust Company continuously kept its own officers and employes in the positions of officers and directors of the said Belt Company, so that at no time were there any persons holding the positions of officers and directors of said Belt Company, who were not personally interested in said Trust Company, and desirous of assisting the said Trust Company in every possible way; and at no time was there ever any accounting had between the said Trust Company and the said Belt Company, for or by reason of any of the matters and things hereinabove set—except such an accounting as the officers and employes of the Trust Company, so holding the positions of officers and directors of the said Belt Company pretended to make in looking over and going through the form of approving the accounts and statements rendered to said Belt Company by said Trust Company.

Your orators further show unto the court that ever since the control of the said Belt Company passed out of the hands of said Trust Company, the said Belt Company prior to the appointment of your orators as receivers, endeavored to procure from the said Trust Company an accounting for and by reason of the matters and things hereinabove set forth, for the purpose of determining the true state of accounts between the said Belt Company and the said Trust Company; but all such demands of the Belt Company have been refused by the said Trust Company.

Your orators further charge and aver that the elevator properties owned by the said Missouri Elevator and Terminal Company, hereinabove described, are situated along the line of the road now being operated by your orators; that the said elevator properties are necessary and essential to the operation of the said road, and that it is indispensible to the operation of the said road that the said elevator properties be retained for the use and benefit of the said road. That

the said property of the said elevator company is in truth and in fact as your orators are informed and believe, the property of the said Belt Company, the said Elevator Company being a mere dummy holding the naked title.

That as your orators are informed and believe there is standing in the name of the said Central Improvement Company much
134 valuable property necessary to the operation of the said road; that the said property belongs in truth and in fact to the said Belt Company, and the naked title is held in the name of the said Central Improvement Company.

In consideration whereof, and for as much as your orators are remediless in the premises, except in a court of equity, your orators therefore pray the aid of this court;

(*a*) That an accounting be taken of the various transactions and dealings between the said Trust Company and its receiver, and the said Belt Company; or by the said Trust Company and its receiver for the use and benefit of and as trustee and agent for said Belt Company, and that the said Trust Company and its receiver be required to pay the balance found to be due by it, if any upon such accounting.

That in taking such accounting all claims and demands alleged to be held by the said Trust Company and its receiver against the said Belt Company in Kansas and Missouri where the said Trust Company used the said Belt Company simply as an instrumentality and agency for its own use and benefit, be charged against the said Trust Company, and it be held liable for all losses incurred or claimed to have been incurred by said Belt Company about the same.

(*b*) That the said notes hereinabove described may be found and decreed by this court to have been executed in the fraudulent manner and for the fraudulent purposes above set forth, and without consideration; and that said notes may be by this court directed to be surrendered up and canceled, and that each and all of the stocks, bonds and other securities, including the assigned account above mentioned, fraudulently delivered to the said Trust Company by its own officers and employes in the manner hereinabove set forth, may be ordered by this court surrendered and delivered up or reassigned to said Belt Company.

(*c*) That each and all the property purchased with the money of the said Belt Company and belonging in equity to it, the legal title to which is held in the name of any of the companies hereinabove set forth, may be required by the decree of this honorable court to be conveyed to the said Belt Company, or to its receivers for it.

Your orators further pray that a writ of injunction may issue herein against the said Guardian Trust Company, its agents, servants and employes, and Francis M. Black, its Receiver, restraining and enjoining them and each of them from selling, transferring or in any wise disposing of the said notes above mentioned, and so
135 executed by the said Belt Company to the said Trust Company, and from selling, transferring or in anywise disposing of the said bonds, stocks, accounts and other property hereinabove

described, delivered to said Trust Company as collateral security for said notes.

And may it please your Honors to grant unto your orators the subpœna of the United States of America issuing out of and under the seal of this Honorable Court, directed to the Guardian Trust Company and to Francis M. Black, its Receiver, the Missouri Elevator and Terminal Company and to Wash Adams, its Receiver, the Fairmont Amusement Company, the Central Improvement Company and Wash Adams, its Receiver, the Second Street Improvement Company, the defendants herein respectively, therein and thereby commanding them on a day certain therein to be made, and under a certain penalty, to be and appear before this Honorable Court then and there to answer (but not under oath, an answer under oath being hereby expressly waived) all and singular, the premises to stand and perform and abide by such orders, directions or decrees as may be made in the premises and as shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray.

THOMAS R. MORROW,
Solicitor for Stuart R. Knott and Edward F. Swinney, Receivers.
C. W. LUCAS,
Solicitor for Kansas City Suburban Belt Railroad Company.

H. B. HURD,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

Stuart R. Knott, being first duly sworn, says that he is one of the Receivers of the Kansas City Suburban Belt Railroad Company, that he makes this affidavit in behalf of himself, his co-receiver, and the Kansas City Suburban Belt Railroad Company, the complainant in the foregoing ancillary bill; that he has read said ancillary bill of complaint and knows the contents thereof; that the allegations therein contained are true so far as they relate to his own acts and the acts of his co-receiver; that so far as they relate to the acts of others, he believes them to be true.

STUART R. KNOTT.

136 Subscribed and sworn to before me this 20th day of November, 1901. My commission will expire Oct. 2nd, 1903.
[SEAL.]
HOWARD F. LEA,
Notary Public, Jackson County, Missouri.

Afterwards, to-wit, on the 2nd day of December, 1901, a Stipulation was filed in cause No. 2616, Stuart R. Knott, et al., vs. Cambria Steel Co., et al. Said stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmont Amusement Company, and Northern Townsite Company.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY and FRANCIS M. Black, Its Receiver; Missouri Elevator & Terminal Company and Wash Adams, Its Receiver; Central Improvement Company and Wash Adams, Its Receiver; Second Street Improvement Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Stipulation.

It is hereby stipulated and agreed by and between Stuart R. Knott and others, complainants in the ancillary bill in the above entitled cause, and the defendants the Guardian Trust Company and Francis M. Black, its Receiver, and the Second Street Improvement Company, that the time for filing answers of each of said defendants just named, shall be and is hereby extended to December 9th, 1901, and that the answers of the said defendants when
137 and if filed on or before December 9th, 1901, shall be treated in all respects as if filed on December 2nd, 1901.

STUART R. KNOTT AND
EDWARD F. SWINNEY,
As Receivers of the Kansas City Suburban Belt Railroad Company, and
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, *Complainants,*
By THOMAS R. MORROW, *For Receiver.*
C. W. LUCAS, *For K. C. Sub. Belt,*
GUARDIAN TRUST COMPANY AND
FRANCIS M. BLACK, *Its Receiver, and*
THE SECOND STREET IMPROVEMENT COMPANY, *Defendants,*
By TRIMBLE & BRALEY, *Their Solicitors.*

Afterwards, to-wit, on the 9th day of December, 1901, there was filed in cause #2616, the answer of the Guardian Trust Company, et al., to the ancillary bill of Stuart R. Knott and Edward F. Swinney, Receivers, et al.

Said answer is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmont Amusement Company, and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY and FRANCIS M. Black, Its Receiver; Missouri Elevator & Terminal Company and Wash Adams, Its Receiver; Central Improvement Company and Wash Adams, Its Receiver; Second Street Improvement Company, and Fairmount Amusement Company, Defendants.

138 Ancillary Bill.

Separate Answer of the Defendants Guardian Trust Company and Francis M. Black, Its Receiver, to the Bill Called "Ancillary Bill of Complaint," Filed by Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, as Complainants.

Now come the defendants, the Guardian Trust Company and Francis M. Black, its Receiver, and now, and at all times hereafter, saving and reserving to themselves all benefit and advantage of exceptions which can or may—had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for their separate answer thereto, or to so much thereof and such portions thereof as these defendants are advised it is necessary or essential for them to answer unto, answering say:

1. That it is true, as alleged in the said ancillary bill, that Francis M. Black was appointed receiver for the Guardian Trust Company,

and that he has qualified and is now acting as such receiver and that the residence and citizenship of the various parties are correctly stated in the said ancillary bill.

2. These defendants admit that the Cambria Steel Company heretofore filed its original bill of complaint in this court against the Kansas City Suburban Belt Railroad Company and the several other defendants named, setting up a judgment which it had on the same day obtained against the Kansas City Suburban Belt Railroad Company, seeking to subject certain alleged rights, properties and assets belonging to the Kansas City Suburban Belt Railroad Company and some of the other defendants, to the payment of its said judgment.

These defendants, further answering, state that it is true that four certain other bills of complaint were duly filed in this court, each by The Provident Life and Trust Company of Philadelphia against the various railroad companies named in the ancillary bill of complaint; the alleged purpose of which said bills of complaint was to foreclose certain mortgages on railroad properties therein described; but this defendant states and shows to the court that the said original bill of complaint of the Cambria Steel Company, and the said four bills of complaint so brought by the said The Provident Life and Trust Company of Philadelphia, were each and all filed at one and the same time by the same counsel, and as separate parts of one and the same transaction, and that all of the said four suits by the Provident Life and Trust Company of Philadelphia, and also the
139 said suit of the Cambria Steel Company, were instituted at the solicitation and request and by collusion with the Kansas City Suburban Belt Railroad Company, for the fraudulent purpose of hindering, delaying and defrauding the creditors of the Kansas City Suburban Belt Railroad Company, and particularly the defendant, the Guardian Trust Company, which was one of said creditors.

It is also true that on the same day on which all of said suits were filed, the said Stuart R. Knott and Edward F. Swinney were appointed in all of said causes, as receivers of the Kansas City Suburban Belt Railroad Company, with the rights, powers and duties alleged in the said ancillary bill.

These defendants deny that the said Kansas City Suburban Belt Railroad Company has ever filed any answer to the said original bill of complaint of the said Cambria Steel Company, and state that if it should file any such answer, the same will be collusive and fraudulent, for the purpose of carrying out the purposes of said suit in hindering, delaying and defrauding the creditors of the said Kansas City Suburban Belt Railroad Company.

3. Further answering these defendants state that the Guardian Trust Company was incorporated under the laws of the State of Missouri, in the year 1889, and not in the year 1883, as alleged in the said ancillary bill; that the said Trust Company was originally incorporated under the name of the "Missouri, Kansas & Texas Trust Company, but afterwards changed its name in the manner provided by statute to "Guardian Trust Company."

4. These defendants state that it is true that in the month of January, 1887, a corporation was formed under the laws of the

State of Missouri, known as The Kansas City Suburban Belt Railroad Company, which is afterwards referred to in the ancillary bill as the "Suburban Company," for the purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas. These defendants say that it is untrue, and hence they deny that the said Suburban Company was organized by the defendant the Trust Company, but aver the fact to be that the said Suburban Company was organized and incorporated some two years before the said defendant Trust Company was created, and the Trust Company had nothing to do with the organization of the said Suburban Company.

It is also untrue that the servants, employes, officers or directors of the Trust Company in any way became or were the officers or directors of the Suburban Company, for several years after the latter company's incorporation, and it is untrue that the Trust
140 Company at all times or at any time dominated and controlled the said Suburban Company.

These defendants deny that the Suburban Company, by reason of the alleged domination, or for any reason whatever, caused the Suburban Company to issue and deliver to the Trust Company all of its Capital Stock, and deny that the Trust Company caused the said Suburban Company to execute its bonds, in the sum of One Million Dollars, or any other amount, and deny that the Trust Company caused said bonds to be delivered to it, and deny that the Trust Company proceeded to sell or otherwise dispose of said bonds and stocks, and to apply the proceeds thereof, except as hereinafter stated. And these defendants deny that the said Trust Company has ever refused or failed to fully account to the said Suburban Company for any property, choses in action, moneys or other things of the said Suburban Company, which may have come into its hands at any time and by any means, but state that the contrary is true, that the Trust Company has frequently, from time to time fully accounted to the Suburban Company for all moneys, property, effects and assets which may, in any way have come into the hands of the said Trust Company, belonging to the said Suburban Company.

These defendants further answering the said ancillary bill concerning the connection of the Trust Company with the said Suburban Company, state and show to the court as follows:

The said Suburban Company was incorporated in January, 1887; that it soon after said date authorized the issuance of $1,500,000.00 of its capital stock; and said Suburban Company for the first two years of its existence had done considerable preliminary work in the way of procuring franchises to use certain streets in Kansas City, along which to build its railroad from a point near Second and Broadway Streets in Kansas City, Missouri, in an easterly direction to a point near Cecil Station on the Missouri Pacific Railway, in what is known as the East Bottoms, being a distance of about four and one half miles; and had also done considerable work in making surveys and locating its said line, and in the way of constructing a portion of its roadbed; but it had been unable to make

any arrangements whereby its could dispose of its securities or otherwise raise money with which to build and complete its road or any considerable portion of it being in that condition it did, about
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April or May 1899, apply to A. E. Stillwell, who was then one of the Vice Presidents of the defendant Trust Company, and who then did not have and never prior thereto had had any connection with or interest whatever in the said Suburban Company, but who had an extended and favorable acquaintance with men of
141 capital, and was recognized as having skill in soliciting and procuring capitalists to subscribe to and invest in such enterprises. And the said Suburban Company at said time requested him, the said Stillwell, to use his efforts to procure the money with which to build and complete the said portion of its road from Second and Broadway Streets to Cecil Station.

That negotiations were then had between the said Stilwell and the said Suburban Company, which resulted in a contract between the said Suburban Company and the said Stillwell, whereby the said Suburban Company agreed to issue and deliver to the said Stilwell $450,000.00 of its first mortgage bonds, out of a total issue, as then contemplated of $500,000.00, and $900,000.00 of its capital stock if the said Stilwell would build or cause to be built the said portion of the said railroad. That said contract was duly authorized by the Board of Directors of the Suburban Company at a meeting lawfully called, and by its stockholders at a meeting duly called and convened on May 31st, 1889. That at the time of the making of said contract, none of the directors or stockholders of the Suburban Company except E. L. Martin, had any connection with or interest in the Trust Company, and none of the Directors, Officers, and stockholders of the Trust Company, except E. L. Martin, had any interest in or connection with said Suburban Company. That said contract was made at arm's length between said parties, free from any domination, direction or control whatever on the part of the Trust Company, and that a large majority of the Board of Directors of the said Suburban Company continued to be composed of persons wholly disconnected with the Trust Company, until the said portion of said railroad was completed and paid for in accordance with the terms of said contract.

That the said Stilwell thereupon procured subscribers to the stock of and the incorporation of a construction company, known as the Kansas City Terminal Construction Company, under the laws of the State of Missouri, which did the work of carrying out the said contract which the said Suburban Company had made with him, the said Stilwell.

That, in order to comply with the said construction contract on its part, and to build additional portions of its road, the said Suburban Company duly authorized the issue of $1,000,000.00 of bonds and authorized the execution of a mortgage upon all of its property then owned or subsequently to be acquired, to secure the payment of said bonds, and appointed the defendant as Trustee under said mortgage.

That upon the completion of the said contract for the con-
142 struction of the said portion of said road between Second and Broadway Streets and Cecil Station, the Suburban Company caused to be issued and certified by the Trust Company as Trustee $500,000. of its said first mortgage bonds, all of which the said Suburban Company used in paying the said construction company for its work in building the said portion of said road, and in compensating some of its officers and directors for services rendered and money advanced and expended by them theretofore; but the said Trust Company had nothing to do with or any connection with the said $500,000.00 of bonds except to certify them as Trustee, at the request of the Suburban Company, and to deliver them on its direction. That at the same time, the said Suburban Company issued and delivered to the said construction company and to its said officers and promoters, for their said labor and services 7,000 shares of its capital stock, which capital stock then had no value; but the defendant Trust Company had nothing to do, either directly or indirectly with the disposition of said $500,000.00 in bonds, or the said 7,000 shares of stock.

That when the said Kansas City Terminal Construction Company received said shares of stock, 6,000 in number, under its said contract, as aforesaid, it then held and owned a majority of the outstanding stock of the Suburban Company, and it, the said construction Company distributed the said stock to its own stockholders by way of dividends or as a distribution of its assets, whereby the stockholders of the said construction company became stockholders, and the holders of a large majority of the outstanding stock of the Suburban Company, and thereafter, as such stockholders, they elected directors of the Suburban Company of their own choice, which choice fell upon persons who were mainly either directors, officers or employes of the Trust Company, but it is untrue, as alleged in the said ancillary bill, that the Trust Company had anything to do with causing its officers, directors or employes to be elected as the officers or directors of the said Suburban Company, but the stockholders of the said Suburban Company chose their own directors, and the Trust Company held but little, if any stock of the Suburban Company, and had but little, if any, voice in the choice of such directors. It was in this way, as above stated that the persons who were directors and officers of the Trust Company came to be directors and officers of the Suburban Company, and not othe-wise.

After the Suburban Company had thus disposed of Five Hundred Thousand Dollars of its bonds and 7,000 shares of its stock, it had remaining in its treasury undisposed of Five Hundred Thousand Dollars in bonds, and 8,000 shares of stock, with which to build
an extension of its road from said Cecil Station to Brush
143 Creek, Jackson County, Missouri. The Suburban Company desired to build and did build this extension itself, without the intervention of a contractor; and the Suburban Company, requested the Trust Company to sell and dispose of the said $500,000.00 of bonds remaining in its treasury and so much of the said stock as might be necessary in order to raise the money for the purpose

of building the said extension. That said stock was wholly without any value, and could not be sold for anything, and that on account of the incomplete condition of the property and the uncertainty of its outcome, the Trust Company was unable at that time to sell and dispose of said bonds without great sacrifice, and, having faith in the enterprise and in its future value, the Trust Company bought the said Five Hundred Thousand Dollars of bonds from the said Suburban Company, at and for a price named at ninety-three per cent, or $930.00 for each $1,000.00 bond, with the understanding and agreement, however that the Trust Company was to have a discount from said price of three per cent on the face of said bonds. The reason of this was that the Suburban Company was perfectly willing to dispose of its bonds at 93 per cent and give to any one who would sell them a commission therefor of 3 per cent, and to give a large amount of stock in addition thereto as a bonus, to any purchaser, because said stock was then without value, and inasmuch as the Trust Company could not find purchasers for the bonds, it was agreed that the Trust Company might itself take the bonds at a price named as 93 per cent, with the said discount of 3 per cent.

That the Trust Company thereupon, for the purpose of enabling the Suburban Company to proceed promptly with its work, did take said bonds at said price, with 2,200 shares of the capital stock of said Suburban Company as a bonus.

That the Trust Company fully paid and accounted to the said Suburban Company for -he total purchase price of said $50,000.00 of bonds and 2,200 shares of stock. That the price paid therefor by the Trust Company was a full and a fair price, and more than could have been obtained from other sources at that time.

The Trust Company carried these bonds for several years, before it was able to sell them, and then sold them at various times and in various amounts and quantities, at about the same price that it had paid for them.

The facts as above stated constitute all of the business transactions by and between the said Suburban Company and the said Trust Company in respect of said stock and bonds prior to and
144 up to the time that the said Suburban Company consolidated with the Consolidated Terminal Railway Company of Kansas City, as stated in the said ancillary bill.

That all of said transactions above referred to occurred more than ten years prior to the filing of this ancillary bill; that all of the facts and transactions above referred to were public, open and were known to, acquiesced in, and ratified and approved by all of the officers, directors and stockholders of the said Suburban Company, more than ten years ago. Wherefore these defendants plead the statutes of limitations, and say that the complainants should not now be allowed to inquire into the transactions closed and approved so long ago.

That about the time or soon after the consolidation above mentioned, the Kansas City Suburban Belt Railroad Company increased its capital stock to $—.

Several years afterwards, and after the consolidation above referred to, and after a large portion of the railroad of said Belt Com-

pany had been completed and was in operation, and had begun to show that it had or soon would have some value as a money earner, the Trust Company bought from the Kansas City Suburban Belt Railroad Company, referred to in the ancillary bill as the "Belt Company," from time to time, certain of its shares of stock, for the purpose of supplying the Belt Company with needed money, and afterwards, from time to time sold, for and on account of the said Belt Company, certain other shares of its capital stock, and the details thereof, are as follows:

On August 29th, 1894, the Trust Company bought from the Belt Company 200 shares of its capital stock, at the price of $18.00 per share, and paid therefor that amount, which the Belt Company received.

On October 10th, 1894, the Trust Company sold to others for and on account of the Belt Company 500 shares of its stock at $19.00 per share, and charged no commission for its services, and the full selling price of said 500 shares of stock was paid to the Belt Company and it received the same.

On December 22nd, 1894, the Trust Company sold to others for and on account of the Belt Company 4000 shares of its capital stock, at $20.00 per share, and charged the Belt Company as a commission therefor $1.00 per share, and paid to the Belt Company the net proceeds of said sale, after deducting said commission, and the Belt Company received the same.

On February 26th, 1895, the Trust Company bought from the Belt Company 221 ad a fraction shares of its stock, at $22.00
145 per share and paid the full amount of the purchase price of the Belt Company, and the Belt Company received the same.

On March 5th, 1895, the Trust Company bought from the Belt Company 529 shares of its stock at $27.00 per share, and paid the full purchase price thereof to the Belt Company, which the Belt Company received.

On April 20th, 1895, the Trust Company bought from the Belt Company 1900 shares of its capital stock at $32.00 per share and paid the full purchase price thereof to the Belt Company, which the Belt Company received.

That the price for which the Trust Company bought said stock of the Belt Company, and the price for which the Trust Company sold said stock for and on account of the Belt Company as above set forth, and enumerated, were fair and reasonable, and all that the stock was worth, and that the commission charged by the Trust Company for its services in selling portions of said stock, as above stated, was a fair and reasonable commission, and all of said transactions were known to, acquiesced in and ratified by the officers, directors and stockholders of the Belt Company from time to time as the same were had and done.

5. These defendants further answering deny that the Trust Company caused a corporation known as the Consolidated Terminal Railway Company of Kansas City, to be formed for the purposes alleged in said ancillary bill, or for any purpose whatever, and deny that the Trust Company had anything to do with the forma-

tion or organization of the said Consolidated Terminal Railway Company of Kansas City.

These defendants deny that the Trust Company had anything to do with electing or causing to be elected its servants and employe as the officers and directors of the said Consolidated Company, and deny that the Trust Company at all times or at any time dominated or controlled the Consolidated Company; deny that the Trust Company caused the Consolidated Company to issue and deliver to it its entire capital stock, or any part of it, or its bonds aggregating the sum of $750,000.00, or any other amount, and deny that the Trust Company at any time proceeded to sell and dispose of the bonds and stock of the said Consolidated Company, and to apply the proceeds thereof in any manner or to any extent, except as hereinafter stated. And the defendants deny that the Trust Company ever failed or refused to fully and fairly account to the Consolidated Company for any of the property, assets or choses
146 in action of the Consolidated Company which came into the hands of the Trust Company, or for the disposition made thereof by the Trust Company, but state the contrary to be true, that the Trust Company at all times when requested, and without request, fully and fairly accounted to the Consolidated Company for everything that the Trust Company received in which the Consolidated Company had any interest.

These defendants further answering state that the facts concerning the affairs of the said Consolidated Company, so far as these defendants or either of them know or had any concern or connection with, are as follows:

After the Kansas City Suburban Belt Railroad Company had caused its said One Million Dollars of bonds to be exhausted in building and equipping its road from Second and Broadway to Brush Creek, it was without means to build any other extensions or additions to its road; whilst it is true that it had the lawful power, under its charter, to build and construct an extension of its road from Second and Broadway westward to the state line between Kansas and Missouri, yet it did not have the financial ability to do so, and inasmuch as its mortgage previously given covered all property which it then had or might afterwards acquire, it could not in its own name issue any new mortgage on any extension which would be a first lien thereon. For these reasons and because the Belt Company saw it was necessary to extend its road to and connect it with the packing houses and other large shipping industries in the West Bottoms, it found it necessary to extend its road from Second and Broadway to the State Line between Missouri and Kansas, and in order to do this, the Belt Company, itself, through its officers and agents, caused the said Consolidated Terminal Railway Company of Kansas City to be formed and incorporated, and caused it to issue $750,000.00 of stock and $750,000.00 of first mortgage bonds, and to give a mortgage which was a first lien upon all of its property then owned or afterwards to be acquired, to secure said bonds, and made the defendant Trust Company its

Trustee under said mortgage, and caused the officers and employes of the Belt Company to be chosen as the Directors and Officers of the Consolidated Company. That the said Consolidated Company was simply an artificial arm of the Belt Company itself, created for its own purposes, and to build extensions and additions to its road. That the Belt Company was wholly without means to defray the expenses of building said extension or any part thereof and that its only means of raising the necessary money therefor was to dispose of the stock and bonds which it had caused the Con-
147 solidated Company to authorize and issue, and at the instance and request of the Belt Company, the Trust Company undertook to act as the agent of the Belt Company in procuring the necessary franchises and rights of way and in placing the said bonds and stock of said Consolidated Terminal Railway Company, and in advancing money to defray the expenses of the said extension of said road to the State Line.

That the stock which the Consolidated Company was authorized to issue was, of course, without any value at that time, and the said Company authorized the Trust Company to give the said stock to purchasers of the bonds as a bonus, at the ratio of 8 shares of stock with each bond, and the Belt Company promised to pay to the Trust Company in consideration of its services in selling and disposing of the said bonds and stocks and acting as such financial agent for the Belt Company in respect to such bonds and stocks, a sum equal to twelve per cent of such of said $750,000.00 of bonds as the Trust Company might sell, three-fifths of which amount was to be paid in cash out of the proceeds of such sales, and the other two-fifths was to be paid in stocks and bonds of the said company at the same price at which others of said bonds and stock could be disposed of by the Trust Company to other people; which was a fair and reasonable commission and one which the said company could well afford to pay, under the circumstances, in order to raise the money it needed.

That the Trust Company then proceeded to sell said bonds, with said stock as a bonus, and from time to time was able to find purchasers for some of said bonds at that price, but, being unable to sell them fast enough to supply the money necessary to defray the costs and expenses of procuring the right of way and constructing the road, as the same was from time to time needed, it was agreed by and between the said Consolidated Company, and the Suburban Company and the Trust Company, that the Trust Company should itself buy such of said bonds as it was willing to buy, at the same price, namely, at 80 per cent of their face value, with 8 shares of stock with each bond as a bonus, and should in paying and settling therefor, be entitled to deduct twelve per cent of the face of said bonds from the purchase price, and in this way should account to the railroad company for the bonds which the Trust Company might buy in the same way and on the same terms that it was to account for bonds sold by it to others.

That the Trust Company from time to time sold to others 504

of said bonds, at $800.00 each, with which went 3932 shares of said stock as a bonus, which was 8 shares of stock for each of said bonds, the details of which sales are as follows:

148 (The dates given below are the dates when the first payment was made on each sale of bonds. The Trust Company kept no record of the exact date when the sale was made. The Trust Company is unable to give the date of the first sale named below, but the bond record of the Consolidated Company, in the possession of the complainants in this ancillary bill, will show.)

	50 bonds at 80 with	400 shares of stock as bonus.
Aug. 6th, 1891.	10 bonds at 80 with	80 shares of stock as bonus.
Aug. 14th, 1891.	1 bond at 80 with	8 shares of stock as bonus.
Aug. 19th, 1891.	11 bonds at 80 with	88 shares of stock as bonus.
Sep. 17th, 1891.	6 bonds at 80 with	48 shares of stock as bonus.
Sep. 25th, 1891.	1 bond at 80 with	8 shares of stock as bonus.
Oct. 8th, 1891.	1 bond at 80 with	8 shares of stock as bonus.
Oct. 10th, 1891.	5 bonds at 80 with	40 shares of stock as bonus.
Oct. 15th, 1891.	5 bonds at 80 with	40 shares of stock as bonus.
Oct. 16th, 1891.	1 bond at 80 with	8 shares of stock as bonus.
Oct. 19th, 1891.	2 bonds at 80 with	16 shares of stock as bonus.
Oct. 21st, 1891.	2 bonds at 80 with	16 shares of stock as bonus.
Oct. 22nd, 1891.	55½ bonds at 80 with	444 shares of stock as bonus.
Oct. 23rd, 1891.	11 bonds at 80 with	88 shares of stock as bonus.
Oct. 24th, 1891.	31½ bonds at 80 with	252 shares of stock as bonus.
Oct. 26th, 1891.	23 bonds at 80 with	184 shares of stock as bonus.
Oct. 28th, 1891.	40½ bonds at 80 with	324 shares of stock as bonus.
Oct. 29th, 1891.	25 bonds at 80 with	200 shares of stock as bonus.
Oct. 30th, 1891.	2 bonds at 80 with	16 shares of stock as bonus.
Nov. 2nd, 1891.	18 bonds at 80 with	144 shares of stock as bonus.
Nov. 4th, 1891.	9 bonds at 80 with	72 shares of stock as bonus.
Nov. 5th, 1891.	2 bonds at 80 with	16 shares of stock as bonus.
Nov. 11th, 1891.	1 bond at 80 with	8 shares of stock as bonus.
Nov. 13th, 1891.	5 bonds at 80 with	40 shares of stock as bonus.
Nov. 17th, 1891.	2 bonds at 80 with	16 shares of stock as bonus.
Nov. 19th, 1891.	13½ bonds at 80 with	108 shares of stock as bonus.
Dec. 7th, 1891.	1 bond at 80 with	8 shares of stock as bonus.
Dec. 18th, 1891.	10 bonds at 80 with	80 shares of stock as bonus.
Jan. 2nd, 1892.	10 bonds at 80 with	80 shares of stock as bonus.
Jan. 7th, 1892.	5 bonds at 80 with	40 shares of stock as bonus.
Jan. 8th, 1892.	1 bond at 80 with	8 shares of stock as bonus.
Jan. 9th, 1892.	6 bonds at 80 with	48 shares of stock as bonus.
Jan. 11th, 1892.	7 bonds at 80 with	56 shares of stock as bonus.
Jan. 13th, 1892.	5 bonds at 80 with	40 shares of stock as bonus.
Jan. 18th, 1892.	2 bonds at 80 with	16 shares of stock as bonus.
Jan. 25th, 1892.	1 bond at 80 with	8 shares of stock as bonus.
Jan. 30th, 1892.	11 bonds at 80 with	88 shares of stock as bonus.
Feb. 11th, 1892.	3 bonds at 80 with	24 shares of stock as bonus.
Feb. 26th, 1892.	2 bonds at 80 with	16 shares of stock as bonus.
Feb. 29th, 1892.	5 bonds at 80 with	40 shares of stock as bonus.
Mch. 11th, 1892.	6 bonds at 80 with	48 shares of stock as bonus.

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Mch. 14th, 1892.	25 bonds at 80 with	200 shares of stock as bonus.
Apl. 8th, 1892.	45 bonds at 80 with	360 shares of stock as bonus.
Apl. 10th, 1892.	10 bonds at 80 with	80 shares of stock as bonus.
Aug. 1st, 1892.	15 bonds at 80 with	120 shares of stock as bonus.
Total,	504 bonds	3932 shares of stock.

The Trust Company from time to time under the agreement and upon the terms above stated bought 213 of said bonds, with 756 shares of said stock as a bonus; the price paid in one instance being higher than eighty per cent, and the number of shares in one instance which went as a bonus, being less than 8 shares to the bond.

The details of which transactions are as follows:—

Dec. 17th, 1891. The Trust Company bought 31 bonds, at 80 with 248 shares of stock as a bonus.

Nov. 7th, 1892. The Trust Company bought 15 bonds at 85 with 120 shares of stock as a bonus.

Dec. 8th, 1892. The Trust Company bought 167 bonds at 80 with 238 shares of stock as a bonus.

Total 213 Bonds. 756 shares.

The Trust Company in November 1891, took in part payment on its said commission and services 33 of said bonds at 80 with 240 shares of said stock as a bonus.

The above accounts for all of the 750 bonds and 4928 shares of the stock of the said Consolidated Terminal Railway Company of Kansas City. The Trust Company never received or had anything to do with the remaining 2572 shares of the stock of said company, but is informed and believes that the same were converted into stock of the Kansas City Suburban Belt Railroad Company after its amalgamatron with the said Consolidated Terminal Railway Company.

In addition to taking the said 33 bonds as aforesaid, in part payment for its said commissions, services and advancements, the Trust Company charged to the account of the said Consolidated Terminal Railway Company therefor, further sums, at divers times, as follows:

October 27th, 1891	$30,000.00
December 17th, 1891	6,000.00
April 4th, 1892	6,000.00
April 25th, 1892	7,000.00

That after deducting from the commissions so charged for its said services, by the Trust Company, the amount of advance-
150 ments made by it, the remainder was much less than 12 per cent of the face value of the bonds so disposed of by and purchased by the Trust Company.

That the Trust Company from time to time paid to and paid out for the Consolidated Terminal Railway Company of Kansas City, all of the proceeds of the sale of said bonds and stock, less

such charges for services, commissions and expenditures and the said Consolidated Company accepted and received the benefit thereof, as these defendants have frequently shown, and are now ready and willing to again show to this Honorable Court, in so far as the same may be required.

That all of the charges made by said Trust Company were fair and reasonable, and all of the transactions had between the Trust Company and the said Consolidated Company and the Suburban Company, in relation to the said bonds and stock of said Consolidated Company, as well as in connection with any and all other business between them were fully known to, approved by, acquiesced in and ratified by all of the officers, directors and stockholders of the said Consolidated Company, and of its successor the said Belt Company more than five years prior to the institution of this suit, and these defendants plead the statute of limitations of the state of Missouri in bar of the complainant's suit.

6. These defendants further answering state that it is true that as alleged in said ancillary bill, on or about the 25th day of July, 1892, the said Consolidated Company and the said Suburban Company, entered into Articles of Consolidation under the statutes of the state of Missouri, whereby the said two companies became one consolidated corporation and was thereafter known as the Kansas City Suburban Belt Railroad Company, and called in the ancillary bill the "Belt Company."

These defendants deny that at the time of the consolidation of said two companies, or at any other time, the said Trust Company caused its officers and employes to be elected to the positions of officers and directors of the said consolidated company, but state that the stockholders of the said two companies after their consolidation elected their own officers and directors, without any interference or influence on the part of the Trust Company. It is true, however, that certain persons who were connected with the Trust Company were chosen as some of the directors and officers of the said consolidated company; but these defendants deny that the Trust Company at any time, as alleged in the ancillary bill, dominated or controlled the actions of the Belt Company.

7. These defendants, further answering, admit, as stated in the ancillary bill of complaint, that it was found advisable about
151 the 30th day of December, 1891, to have a corporation formed under the laws of the State of Kansas, for the purpose of building and holding the title to a further extension of the said belt railroad system from the state line westward to Argentine, in the State of Kansas; but these defendants deny that the Trust Company caused the said The Union Terminal Railroad Company to be organized for that purpose or any other purpose, but state the fact to be that the said The Union Terminal Railroad Company was organized for that purpose by the Belt Company.

And these defendants deny that the Trust Company cause its officers and employes to be elected as the officers and directors of the said Union Company, but state that the Belt Company caused the

officers and directors of the said Union Company to be elected, without any interference or domination whatever on the part of the Trust Company.

These defendants deny that the Trust Company caused all of the stock, or any of the stock of the said Union Company to be issued to the said Suburban Company or Belt Company, and deny that the Trust Company caused the said Union Company to execute its first mortgage bonds in the amount of $2,000,000.00 or any other amount; but they admit that the said Union Company did authorized the issuance of $2,000,000.00 of bonds, and executed its first mortgage to secure the same, and made the said Trust Company its Trustee in said mortgage. The said Union Company though being in fact an independent corporate entity, was really organized by the Belt Company for its use and benefit and for the purpose of building the said extension to said belt railroad.

These defendants deny that the said bonds were issued and delivered to the Trust Company for the use and benefit of the Suburban or Belt Company, except as hereinafter stated.

These defendants deny that the Trust Company ever failed or refused, when requested, to fully and fairly account to the said Union Company and the Belt Company for any and all disposition made by it of any of the bonds, stocks or property of either of said companies; but state that upon the contrary, the Trust Company has frequently accounted to both the Union Company and the Belt Company for all property, choses in action, money or assets of whatever nature which came into its hands in which either of said companies had any interest.

That the said Union Company and the said Belt Company were obliged to dispose of the said bonds and stock of the said Union Company for the purpose of raising the money with which
152 to acquire and construct the said extension into the state of Kansas, as they had no other means of raising the money for that purpose. That at the special instance and request of the said Union Company and said Belt Company, the Trust Company undertook and agreed to act as the Trustee and financial agent for them in and about the matter of disposing of said stocks and bonds of the Union Company, and financing said enterprise, and to render such services and advance such moneys as might be necessary to procure the necessary franchises therefor, and to establish, and put in operation warehouses, factories and other like industries along the line of the said Belt Railroad; and the said Suburban Company and the said Union Company agreed to pay the Trust Company a reasonable compensation for its services, advances and responsibilities in that behalf.

That it was impossible to find purchasers for said bonds at a greater price that 82 per cent of their face value, and only then provided considerable quantities of the stock of the said Union Company should go with the bonds as a bonus; but said stock, as a matter of fact, at that time, and for several years after, was without any value. That the Trust Company immediately after the organization of the said Union Company, in pursuance of the request and

agreement above stated, proceeded to finance the said Union Company, and to sell its said bonds and stock, or to buy them when other purchasers could not be found in time to supply the needed money, and to render important and valuable services in connection with the securing of franchises for the building of the road, and advance, from time to time, such moneys as might be needed therefor; and the Trust Company continued to act as such financial agent and to render such services until the said extension of such road of the Union Company was completed, which extended over a period of several years.

That it was understood and agreed between the Trust Company and the said Union Company and the Belt Company, that in case the Trust Company could not find purchasers for said bonds fast enough to supply money needed for the construction of said road, that the Trust Company might itself buy such of said bonds as it was willing to buy, at the same price that like bonds were being sold to other persons, and to deduct from the price thereof a sum equal to what would be a fair commission for selling the bonds to others; that is to say, the Trust Company in case it bought any of said bonds, was to account to the Union Company or the Belt Company for the price of said bonds, in the same manner and upon the same terms as it was to account to them for bonds sold to other people.

153 That the Trust Company from time to time, for and on behalf of the said Union Company and Belt Company, sold to other persons 444 of the bonds of said Union Company, and 3096 shares of its stock, at the times, and upon the terms as shown in the following detailed statement; that is to say the Trust Company sold to others.

In August,	1892,	50 bonds at a bonus.	82	with 400 shares of stock as
In September,	1892,	132 bonds at a bonus.	82	with 1056 shares of stock as
In October,	1892,	36 bonds at a bonus.	82	with 288 shares of stock as
In November,	1892,	12 bonds at a bonus.	82	with 96 shares of stock as
In December,	1892,	22 bonds at a bonus.	82	with 176 shares of stock as
In January,	1893,	10 bonds at	82	with 80 shares of stock as
In October,	1897,	82 bonds at	100	with no shares as a bonus.
In August,	1898,	10 bonds at	95	with no shares as bonus.
In September,	1898,	10 bonds at	95	with no shares as bonus.
In October,	1898,	30 bonds at	92½	with no shares as bonus.
In December,	1898,	1 bond at	92½	with no shares as bonus.
In January,	1899,	11 bonds at	92½	with no shares as bonus.
In February,	1899,	10 bonds at	92½	with no shares as bonus.
In February,	1899,	28 bonds at	90	with no shares as bonus.
July,	23rd, 1894,		1000	shares at $17.50 per share.
Total,		444 bonds	3096	shares of stock.

That being unable to sell and dispose of said bonds to others fast enough to provide the money as it was needed, the Trust Company, under the agreement and arrangement before stated, from time to time, purchased 1496 of said bonds, and 4554 shares of stock of the said Union Company, the dates, prices and details of which appear from the following itemized statement; that is to say the Trust Company bought

Jan. 7th, 1893.	300 bonds at	82	with 2400 shares of stock as bonus.
Jan. 23rd, 1893,	128 bonds at	82	with 504 shares of stock as bonus.
Apl. 5th, 1893,	250 bonds at	95	with 1000 shares of stock as bonus.
Nov. 27th, 1893,	31 bonds at	80	with 300 shares of stock as bonus.
Jan. 20th, 1894,	37 bonds at	70	with 350 shares of stock as bonus.
July 6, 1894,	108 bonds at	75	with no stock as bonus.
July 16, 1894,	39 bonds at	70	with no stock as bonus.
Aug. 3rd, 1894,	1 bond at	70	with no stock as bonus.
Nov. 23rd, 1894,	84 bonds at	75	with no stock as bonus.
July 22, 1896,	50 bonds at	90	with no stock as bonus.
June 3, 1897,	18 bonds at	66	with no stock as bonus.
Nov. 3rd, 1898,	350 bonds at	100	with no stock as bonus.
Feb. 17th, 1899,	100 bonds at	95	with no stock as bonus.
Total,	1496 bonds		4554 shares of stock.

On October 21st, 1892, the Trust Company took 60 of said bonds at 82, and 1500 shares of said stock in part payment for its commissions and services rendered in and about the matters aforesaid.

154 On September 25th, 1893, the Trust Company purchased from the Belt Company 200 first mortgage bonds of the Kansas City & Independence Air Line, hereinafter referred to, and in order to induce the Trust Company to purchase said bonds, the Belt Company gave to the Trust Company as a bonus to said bonds 2500 shares of the stock of the said Union Company.

On February 13th, 1894, the Trust Company held promissory notes aggregating $5,000.00, with some accumulated interest, for money expended by it in the establishment of what was known as the Kansas City Fruit Auction Company, on the line of the said Belt Company, all of which was done at the request of the Belt Company and for its use and benefit, and on that day, to-wit, February 13th, 1894, the Belt Company delivered to the Trust Company in satisfaction of said indebtedness and in payment for the services of the Trust Company in establishing said fruit auction plant, 286 shares of the said Union Company.

The transactions above referred to account for all of the bonds of the said Union Company, and 11,936 shares of its stock. That the

Trust Company never had anything to do or any connection with the remaining 8064 shares of stock of said Union Company, but it is informed and believes that 1,000 shares thereof were, early in the history of the company distributed among a number of persons for the benefit of the Union and Belt companies in the promotion of the said enterprise, and that the remaining 7064 shares were converted into stock of the Belt Company.

That in addition to the taking of the said 60 bonds and the said 1,500 shares of stock in part payment for its said commission and services and advances, the Trust Company from time to time charged to the account of the said Union Company and Belt Company therefor, divers amounts as follows:

January 13th, 1893	$30,000.00
January 26th, 1893	15,000.00
February 16th, 1893	12,800.00
April 5th, 1893	25,000.00
September 16th, 1898	50,00
October 6th, 1898	100,00
October 18th, 1898	50.00
January 17th, 1899	231.25
January 17th, 1899	277.50

That the Trust Company, from time to time, paid to and paid out for the said Union Company and Belt Company all of the proceeds of the sale or purchase price of said bonds and stock, less
155 said charges for commissions, services and expenditures, and the said Union Company and Belt Company received the benefit thereof, as these defendants have frequently shown and are now ready and willing to again show to this Honorable Court in so far as the same may be required.

That all of the charges made by the said Trust Company for its said services and commissions were fair and reasonable, and all of the transactions had between the Trust Company and the said Union Company and Belt Company with relation to the said bonds and stock of said Union Company, as well as in connection with any and all other business between them, were fully known to, approved by, acquiesced in and ratified by all of the officers, directors and stockholders of the said Union Company and said Belt Company.

8. These defendants further answering deny that the Trust Company on the 23rd day of January, 1891, or at any other time caused a corporation known as the Kansas City & Independence Air Line to be incorporated or formed. Said Air Line was incorporated, however, for the purpose of building a line of railroad connecting with the line of the said Suburban Company and running to the City of Independence, Missouri, the capital stock of said company was after being increased, fixed at $500,000.00. These defendants deny that the Trust Company at any time caused its officers and employes to be elected as the directors and officers of the said Air Line, and deny that the Trust Company caused said Air Line to issue its first mortgage bonds to the amount of $300,000.00, or another amount, but state that the Air Line did issue its first mort-

gage bonds to that amount, and secured [bye] same by a first mortgage upon all of its corporate property, and made the Trust Company its Trustee under said mortgage. These defendants deny that the Trust Company, at any time dominated or controlled the said Air Line; deny that the said Trust Company caused the said Belt Company to acquire all, or any, of the bonds and stocks of the Air Line, and deny that the Trust Company caused the Belt Company to deliver the said bonds and stock to it, the said Trust Company, and deny that the Trust Company proceeded to dispose of the same and to apply the proceeds thereof, for the corporate purposes of the Belt Company, or for any other purpose except as hereinafter stated; deny that the Trust Company has ever refused upon request to account to said Belt Company for the disposition made by it of any of said bonds or the proceeds realized therefrom, but upon contrary, states the fact to be that the Trust Company has frequently fully and truly accounted to the Belt Company and to the Air
156 Line company for the disposition of all of the properties, assets or chooses in action of either of said companies which in any way came into the hands or under the control of the Trust Company.

These defendants, further answering, state that the facts concerning the Air Line Company and its connection with the Belt Company and the Trust Company are as follows:

That on the 23rd day of January, 1901, at the suggestion and by the procurement of the Suburban Belt Company, the Air Line Company was incorporated with a capital stock of $150,000.00, and with eleven directors, a majority of whom were directors of the said Suburban Company, for the purpose of building a railroad from a point on the line of the Suburban Company's road, to the city of Independence, Missouri, a distance of some six or eight miles, for the use and benefit of the said Suburban Company. That the said Air Line Company soon after increasted its capital stock to $500,000.00 and issued its bonds, as aforesaid, to the amount of $300,000.00.

That the said Air Line afterwards entered into a contract with the construction company known as the Kansas City Terminal Construction Company, for the building and completion of its said road, whereby it promised to pay to the said construction company, in consideration of the construction of said road, $250,000.00 of its first mortgage bonds, and 2,000 shares of its capital stock. That said road was built and completed by said construction company under said contract.

That at the request of the Air Line, and said Suburban Company, the Trust Company rendered valuable services in procuring franchises for using public highways for said railroad, and acting as the financial agent and Trustee for said Air Line, and in from time to time advancing it money and selling certain of its bonds and stocks, and in purchasing certain other of its bonds and stocks, in order to furnish the money with which to do the work of building the said railroad. That said bonds were not reasonably worth more than

80 per cent of their face value, and the said stock had no market or other value at all.

That when the said Air Line Company came to settle with the said Kansas City Terminal Construction Company, the said construction company accepted in full payment for its work under said contract, a less amount of stock and bonds than was specified in the contract as drawn, that is to say, the construction company accepted $227,375.00 of said first mortgage bonds, and 1,819 shares of stock, which said bonds and stock were delivered to the said con-
157 struction company. This left still in the treasury of the Air Line Company $72,625.00 of its first mortgage bonds, and 3,181 shares of its said stock. That at the special instance and request of the said Air Line and the said Suburban Company, the Trust Company sold them and for their account $13,000.00 of said bonds, and 104 shares of said stock of said Air Line, at the times and for the prices as follows, to-wit:

Mch. 16th, 1892.	1¾	bonds at	80 with	14 shares of stock as bonus.
Mch. 21st, 1892.	6¼	bonds at	80 with	50 shares of stock as bonus.
Apr. 5th, 1892.	4	bonds at	80 with	32 shares of stock as bonus.
May 27th, 1892.	1	bond at	80 with	8 shares of stock as bonus.
Total,	13	bonds,		104 shares of stock.

That the Trust Company, at the special instance and request of said Air Line and said Suburban Company, from time to time, by reason of the fact that it was unable to sell said bonds and stock to others fast enough to supply money that the said Air Line and the Belt Company needed in connection with the building of said road, bought certain of said bonds and stock for the purpose of furnishing said money, to-wit: $46,625 of said bonds, and 77 shares of said stock, at the times and for the prices as follows:

June 25th, 1892.	9.625	bonds at 80 with	77 shares of stock as bonus.
July 6th, 1892.	15	bonds at 80 with	no shares of stock as bonus.
Dec. 8th, 1892.	22	bonds at 80 with	no stock as bonus.
Total,	46.625	bonds and	77 shares of stock.

That the said Air Line Company and the Suburban Company delivered to the Trust Company in full for its services as financial agent in connection with said matter, and in procuring franchises and for commissions in the sale of said bonds and stocks, 13 of said bonds at 80, with 500 shares of said stock, which said stock, as aforesaid, was worthless, and of no value.

The facts stated above account for all of the said $300,000.00 of bonds of the said Air Line Company, and 2,500 shares of its stock. The Trust Company never had anything whatever to do with any of the remaining 2,500 shares of stock, and never received the same, nor acquired any interest in or control over the same, or any part

thereof; but these defendants are informed and believe that 500 of said shares were used for the purposes of promotion by being distributed where it was supposed they would do the most good, and that the remaining 2,000 shares of said stock were issued to the Suburban Company and converted into the stock of the Belt Company.

That the Trust Company from time to time paid to and paid out for and on account of the said Air Line and Suburban Com-
158 pany, all of the proceeds of all of the said bonds and stock so sold by it, and also all of the purchase price of all of said bonds and stock so purchased by it, and the said Air Line and Suburban Company accepted and received the benefit thereof, as these defendants have frequently shown, and are now ready and willing to again show to this Honorable Court, in so far as the same may be required.

That the compensation paid to the Trust Company for its said services in connection with said Air Line Company matter, was fair and reasonable, and that, together with all of the transactions had between the Trust Company and the said Air Line and Suburban Company in relation to the stock and bonds any moneys of the said Air Line, as well as any connection with all other business between them, were fully known to, approved by, acquiesced in and ratified by all of the officers, directors and stockholders of the said Air Line Company and of the said Suburban Company, and its successor the said Belt Company, more than five years prior to the institution of this suit, and these defendants plead the statute of limitations of the state of Missouri in bar of the complainants' suit.

9. These defendants, further answering, deny that the Trust Company at all times up to and about the month of April, 1900, or at any other time, in any way dominated and controlled the affairs of the Belt Company by reason of the alleged facts in said ancillary bill, or by any other reason or means whatever; deny that the Trust Company caused its officers, directors and employes to be elected as the officers and directors of the Belt Company, or in any way induced or influenced the stockholders of said Belt Company to choose such persons as its officers or directors; deny that the officers and directors of the Belt Company were mere dummies acting as the agents of the Trust Company, but state that they were chosen by the stockholders of the Belt Company and were acting independently for and on behalf of the Belt Company at all times.

These defendants admit that the Trust Company attended to the disbursement of a large amount of the moneys which were realized from the sale of the bonds and stocks of the said several companies hereinabove mentioned, but deny that they attended to the disbursement of all of said moneys, and state that whatever disbursements of such moneys were made by the Trust Company, were made at the special instance and request of the Belt Company, and for its use and benefit, and were fairly done and fairly and fully accounted for.

These defendants do not know what the total cost of the lines of all of the said railway companies hereinabove named amounted to,

and have no means now of ascertaining the same, as all of
159 the books and papers connected therewith are in the possession of the complainants in the said ancillary bill, and have been for nearly two years.

These defendants deny that there was actually delivered to and disposed of by the Trust Company secured stocks and bonds of said companies aggregating in value more than $5,000,000.00 as alleged in the ancillary bill, (or to any other amount or of any other value than as hereinbefore stated); deny that the Trust Company or its receiver have ever at any time refused to account to the said Belt Company or to its receivers for the proceeds derived by said Trust Company from the sale of any of the said bonds and stocks, or for the disposition made by it of any of the proceeds thereof; but, upon the contrary, state that they have frequently, and at all times duly and fully accounted for all of said stocks and bonds, and for all of the proceeds thereof which came into the hands of the Trust Company, or over which it had any control. The defendants deny that they or either of them pretend or claim that they are retaining any money above the actual cost of the said several railroad properties for the purpose of paying for the commissions and services of the Trust Company in the matter of the sale and disposition of said bonds or stock, or any of them, except as hereinbefore particularly stated, and these defendants again state that each and every of said transactions, and each and all of said charges for commissions and services were fair, reasonable, fully accounted for and satisfactory to the Belt Company and acquiesced in and approved by all of its officers, directors and stockholders, many years prior to the institution of this suit.

10. These defendants further answering, deny that on or about the 30th day of June, 1896, or at any other time prior or subsequent thereto, the Trust Company, either in its own name, or in the name of any of its officers, or in the name of any corporation controlled by it, or in any other manner whatever, had entered into any contract whereby it was obligated to construct a line of railroad from Kansas City, Missouri to Pattonsburg, Missouri, for the purposes alleged in the ancillary bill, or for any other purpose; but state that the Trust Company was never in any way obligated or bound to build the said railroad from Kansas City to Pattonsburg, or any part thereof, and never assumed any obligation in connection therewith.

These defendants deny that the Trust Company at any time ever caused the Kansas City and Northern Connecting Railroad Company to be incorporated, and deny that it caused certain of its officers and employes to be elected as officers and directors of the said Connecting Company, and deny that the Trust Com-
160 pany at all times, or at any time, dominated and controlled the affairs of the said Connecting Company; deny that the Trust Company set about to discover a way in which it could cause the said railroad to be constructed without incurring any liability itself; deny that it had anything to do with the construction of the said railroad except as the Trustee and financial agent of the Belt Company, as hereinafter stated. They deny that the Trust Com-

pany conceived the idea or purpose of having the Belt Company undertake the construction of the said railroad; deny that the Trust Company by any means whatever caused or attempted to cause a contract to be entered into between the said Belt Company and the said Connecting Company, whereby the Belt Company agreed to construct the said railroad for the Connecting Company.

These defendants admit that the Belt Company did enter into a contract with the Connecting Company whereby the Belt Company agreed to build said railroad for said Connecting Company from Kansas City, Missouri to Pattonsburg, Missouri, and that the Exhibit A, heretofore filed by the Trust Company in its answer to the original bill of the Cambria Steel Company in this cause, is a true copy of the said contract between said Belt Company and the said Connecting Company.

These defendants deny that the Trust Company had anything whatever to do with the making of the said contract, or that it in any way controlled or dominated or in any way influenced either of the parties thereto to enter into the same. These defendants deny that the said connecting railroad was constructed in any way for the use and benefit of the Trust Company; deny that said Trust Company had any interest whatever in the building of the same; deny that the said connecting railroad has been of any benefit or value to the Trust Company; deny that the said connecting railroad has been of no benefit or advantage to the Belt Company, but, upon the contrary, state that it has been of large benefit to said Belt Company, and that it was necessary and useful for the corporate uses and purposes of the said Belt Company, and deny that the said railroad was built for the purposes and ends of the Trust Company, or that it had any interest whatever in the same.

These defendants deny that all of the money paid out by the Belt Company for the construction of the said connecting railroad passed through the hands of the Trust Company, but state, however, that much of said money did pass through the hands of the Trust Company, for the reasons and to the extent hereinafter stated, but not otherwise; they deny that all of the bonds and stock which
161 were to have been delivered to the said Belt Company under the terms of the said contract, passed through the hands of the said Trust Company, but state that some of said bonds and stock did pass through the hands of the Trust Company, for the purposes and to the amount hereinafter stated, and not otherwise.

The defendants admit that the Trust Company proceeded to sell and dispose of some of the said bonds and stock as hereinafter stated but the same was at the special instance and request of the Belt Company and as the financial agent of the said Belt Company, and not otherwise.

These defendants deny that the said Trust Company ever at any time when requested, failed to account to the said Belt Company for the amount realized by it from the sale of any of said bonds and stock; deny that the Trust Company has stated or pretended that the construction of the said road by said Belt Company resulted in a loss to that company of about $300,000.00 or any other sum;

but these defendants state that the Trust Company, frequently, at all times when requested, fully accounted to the said Belt Company for the proceeds of all of said bonds and stock which passed through the hands of the Trust Company and for any and all moneys which came into the hands of the Trust Company or under its control belonging to the said Belt Company, or in which the Belt Company had any interest.

These defendants deny that the Trust Company is, or ought to be in any way chargeable with the amount of any loss which may have resulted to the Belt Company, if any did result, on account of its contract in building the said connecting railroad; deny that the Trust Company is in any way responsible therefor, or should be held accountable therefor.

These defendants further answering, state that the facts connected with the building of the said connecting road are as follows:

The business of the Belt Company was not that of a trunk line, but consists in switching for trunk lines and for industries situated along its line, and in furnishing terminal facilities for other railroads that might want to enter Kansas City, and had no terminal facilities of their own; hence it was to the advantage and interest of the Belt Company to encourage and assist as many industries as possible to locate along its line; and also to assist and encourage other trunk lines of railroad to enter Kansas City, and to use
162 the terminals of the said Belt Company for the purpose of entering, either by aiding said trunk lines to build in to Kansas City or by building out to meet them.

That in 1896, although all of the several portions of the said Belt Company's railroad system had been constructed and operated for several years, yet the Belt Company found that it had been and still was unable to earn enough from its business to pay its operating expenses and the interest on its bonds; hence it conceived the idea of building a railroad from Kansas City to Pattonsburg, there to meet the Omaha, Kansas City & Eastern Railroad, and the Omaha & St. Louis Railroad, and at an intervening point to meet the Chicago, Rock Island & Pacific Railroad, and thereby to furnish to those three railroad companies an entrance into Kansas City, which railroads would use the tracks and other terminal facilities of the Belt Company and pay a large and profitable switching business to the Belt Company. It was also thought by the Belt Company that it could make a large profit in constructing the Northern Connecting Railroad on its own account, so it was that the Belt Company caused the Kansas City and Northern Connecting Railroad Company to be organized, without any suggestion or domination by the Trust Company whatever, and the Connecting Company was organized for the purpose of building a railroad from Kansas City to Pattonsburg, for the use and benefit of the Belt Company, for the reasons above stated. The Belt Company caused some of its directors, officers, employes and stockholders to be chosen as the directors and officers of the Connecting Company, and the Connecting Company afterwards authorized the issuance of first mortgage bonds to the extent of $20,000.00 per mile of the road to be built, and second mortgage

income bonds to the amount of $15,000.00 per mile for each mile of road to be built, and made the Trust Company its Trustee under both of the mortgages securing such bonds, and authorized the issuance — shares of capital stock.

The eBlt Company had no means whatever with which to carry out its contract for constructing the said railroad, except such as it might be able to realize from the sale of the bonds and stock of the Connecting Company, and at the special instance and request of the Belt Company and the Connecting Company, the Trust Company undertook to act as their financial agent in the sale and disposition of such of the bonds and stock of the said Connecting Company as it could find purchasers for, and at such price as it might be able to obtain. That the said second mortgage income bonds had
163 no market value, and only in one or two exceptional cases was the Trust Company able to sell any of the said second mortgage income bonds for any money, but found it necessary in selling the first mortgage bonds to deliver to the purchaser some of the second mortgage bonds as a bonus. The capital stock of the connecting company had no market or other value.

The Connecting Company issued in all 1851.8 of its first mortgage bonds, 1388 of its second mortgage income bonds, and 30,000 shares of its Capital Stock. That the Trust Company, for and on account of the said Belt Company and Connecting Company, and at their special instance and request, from time to time sold 882 of the said first mortgage bonds, and 791.7 of the said second mortgage bonds, and 19,180 shares of said stock, at the times and at the prices as follows, which were the highest and best prices which could be obtained therefor, and which was all they were worth:

July,	1896.	12 bonds at 80	with
		4.2 seconds and	60 shares of stock as bonus.
August,	1896.	154 bonds at 80	with
		53.9 seconds and	770 shares of stock as bonus.
Sept.	1896.	1 bond at 80	with
		.350 seconds and	5 shares of stock as bonus.
Sept.	1897.	18 bonds at 80	with
		6.3 seconds and	90 shares of stock as bonus.
Oct.	1897.	500 bonds at 75	with
		175. seconds and	2500 shares of stock as bonus.
Oct.	1897.	1 bond at 80	with
		.350 seconds and	5 shares of stock as bonus.
Dec.	1897.	3 bonds at 85	with
		1.050 seconds and	15 shares of stock as bonus.
Dec.	1897.	10 bonds at 75	with
		3.5 seconds and	50 shares of stock as bonus.
Feb.	1898.	65 bonds at 75	with
		22.750 seconds and	350 shares of stock as bonus.
March,	1898.	6 bonds at 75	with
		2.1 seconds and	30 shares of stock as bonus.
June,	1898.	50 bonds at 74½	with
		17.5 seconds and	250 shares of stock as bonus.

Aug.	1898.	2 bonds at 82	with
		.7 seconds and	10 shares of stock as bonus.
Aug.	1898.	18 bonds at 85	with
		6.3 seconds and	90 shares of stock as bonus.
Sept.	1898.	7 bonds at 85	with
		2.450 seconds and	35 shares of stock as bonus.
Oct.	1898.	5 bonds at 74½	with
		1.750 seconds and	25 shares of stock as bonus.
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Nov.	1898.	25 bonds at 72	with
		8.750 seconds and	125 shares of stock as bonus.
Dec.	1898.	5 bonds at 75	with
		1.750 seconds and	25 shares of stock as bonus.
Oct.	1897.	483. seconds at 45.	
July,	1896.		850 shares of stock at $1.00 per share.
October,	1899,		13920 shares of stock at $1.42-6/7 per share.
	Totals,	882 bonds.	791.00 seconds, and 19180 shares of stock.

That the Trust Company was unable to find purchasers for said stock and bonds as fast as the money was needed by the Belt Company and Connecting Company to meet their demands in the construction of said Northern Connecting Railroad, and it was understood and agreed between them and the Trust Company, that the Trust Company might purchase as many of said bonds as it was willing to buy at the prices hereinafter named, and might deduct from the purchase price thereof in settlement an amount equal to what would be a fair commission in case such bonds had been sold by the Trust Company to other persons.

That in pursuance of said understanding, and for the purpose of furnishing and supplying money to the Connecting Company and the Belt Company for the building of the said Northern Connecting Road, the Trust Company did, from time to time, buy 414 of said first mortgage bonds, 277.9 of said second mortgage bonds, and 10.370 shares of said stock, at the times and for the prices as follows, which prices were fair and reasonable and fully as much as the said bonds and stock were worth:

July,	1896.	400 bonds at 75	with
		140. seconds and	2000 shares of stock *and* bonus.
Sept.	1896.	14 bonds at 75	with
		4.9 seconds and	70 shares of stock as bonus.
Dec.	1896.	16. seconds at 45.	
Oct.	1897.	117. seconds at 45.	
July,	1896.		2000 shares of stock at $1.00 per share.
July,	1896.		6250 shares of stock at $6.00 per share.

March, 1897. 50 shares of stock at $1.00 per share.

Totals, 414 First Mtg. Bonds.
277.9 Second Mortgage Bonds, and
10370 shares of stock.

The above purchases and sales account for the disposition of 1296 of the said first mortgage bonds, and 1069.6 of the second mortgage bonds, and 29,550 shares of said stock.

165 The remainder of said bonds and stock were delivered to and disposed of by the Belt Company, as these defendants are informed and believe, as follows:

Delivered by the Belt Company to the A. & P. Roberts Company, in part payment of indebtedness due from the Belt Company to said A. & P. Roberts Company.

10 first mtg. bonds, 3.5 second mortgage bonds.

Deposited with the Trust Company as collateral security for indebtedness of the Belt Company held by the Trust Company,

414 first mtg. bonds, 82.9 second mortgage bonds.

Deposited with Cambria Steel Company by the Belt Company, as collateral security to secure indebtedness from the Belt Company to the Cambria Steel Company,

131 first mtg. bonds.

That the remaining .8 of a first mortgage bond, and the remaining 232. of the second mortgage bonds still remain, as these defendants are informed and believe in the treasury of the Belt Company, and are still owned and held by it.

Of the remaining 450 shares of stock of said Connecting Company, 350 shares thereof were distributed to the directors of the said Connecting Company to qualify them and in compensation for their services, and 100 shares of said stock were issued to A. S. Potter on account of promotion.

That the Trust Company from time to time paid to and paid out for and on account of the said Connecting Company and the said Belt Company all of the proceeds of all of the said bonds and stock so sold by it, and also all of the purchase price of all of the said bonds and stock so purchased by it, except the charges hereinafter referred to for its commissions and services, and the said Connecting Company and the said Belt Company accepted and received the benefit thereof, as these defendants have frequently shown, and are now ready and willing to show again to this Honorable Court in so far as the same may be required.

That the Trust Company from time to time charged the account of the Belt Company and the Connecting Company for its services in acting as such financial agent, and in and about the matter of the said Connecting Company, and for its commissions in selling and disposing of the said bonds and stock, and for its serv-

166 ices in advancing money to the Belt Company for the purpose of building the said connecting road, the following amounts:

December 10th, 1896	$11,262.00
October 4th, 1897	50.00
December 23rd, 1897	65,791.55
February 10th, 1898	250.00
February 25th, 1898	300.00
September 8th, 1898	950.00
December 27th, 1898	250.00
Total	$78,853.55

all of which were fair and reasonable charges for the said services and commissions, and which is less than three per cent of the face value of such of the said bonds and stocks as were sold by the Trust Company or bought by it for cash, saying nothing about the bonds and stocks that were given as bonus.

That about the first of April, 1900, there was an entire change in the officers and management of the Belt Company, and the persons who were at that time chosen as its officers and directors were in no way connected with or interested in the Trust Company, but were hostile to it.

That the said Belt Company received and accepted the proceeds of the contract for the building of the said Northern Connecting Railroad and that since the change in the management of the Belt Company, as well as prior thereto, the Belt Company had claimed the stocks and bonds payable under the said construction contract as its property and they and the Belt Company, both prior to and since the said change in its management have continued and still continue to exercise acts of ownership and control over such of said bonds and stock as remain in the treasury of the said Belt Company, as aforesaid.

Wherefore these defendants say that the Belt Company is estopped now to claim that the said contract for the construction of the Northern Connecting Railroad, was in fact the contract of the Trust Company, and not of the Belt Company, and are estopped to claim that the Trust Company should in any way be held responsible for any loss that arose, if any, on account of the carrying out of the said contract by the Belt Company.

11. These defendants, further answering, deny that the Belt Company at any time advanced any money to the Trust Company, or that the Trust Company took out of the earnings or assets
167 of the Belt Company any sums of money whatever, which it pretended to expend for and on behalf of the Belt Company, or otherwise; they deny that the Belt Company ever advanced or delivered to the Trust Company any money, at any time, or times, except such as it was able, from time to time, to deliver to the Trust Company, in part payment of the indebtedness which the Belt Company from time to time owed to the Trust Company. The fact is that the Belt Company never had any money to advance to anybody; it needed all the money it had and more, too, to pay its current indebtedness, and instead of the Belt Company's advance any money to the Trust Company for any purpose whatever, the

contrary is true, that the Trust Company from time to time, advanced to the Belt Company to keep said Belt Company from bankruptcy and to keep it as a going concern.

These defendants deny that the Trust Company was ever requested by the Belt Company, or by anyone else, to account for any money alleged to have been so advanced or so taken out of the treasury of the Belt Company by the Trust Company; that, as a matter of fact, there never was any ground or basis for supposing that the Trust Company had ever gotten any of the Belt Company's money.

12. These defendants *in* further answering, deny that during the times hereinbefore mentioned, or at any time or times the Trust Company took upon itself the business of paying out practically all of the moneys which were paid out for the benefit of the said Belt Company, but state that the Trust Company did, from its own funds, frequently, and at various times advance large sums of money to and for the use and benefit of the Belt Company, because the said Belt Company had no money itself with which to meet demands that from time to time were pressing, and to make improvements and betterments that were absolutely necessary for its success as a money earning institution.

These defendants deny that the Trust Company took upon itself the duty of buying for the Belt Company practically all or any of the property which the said Belt Company needed to acquire in its business of operating said railroad, and deny that it used any money of the Belt Company for any such purpose; deny that the Trust Company caused other corporations to be formed for the purpose of holding the legal title to any properties purchased for the use and benefit of the Belt Company; deny that the Trust Company caused the capital stock of any such corporations to be issued to the Belt Company and then turned over to the said Trust Company, or to be issued to the said Trust Company direct, or otherwise, for any purpose whatever; deny that the Trust Com-
168 pany caused its own servants, agents and employes to be elected and continued as the officers and directors of any such companies, at any time; deny that the Trust Company, in the manner alleged in the ancillary bill, or in any other manner, controlled the affairs of the Belt Company, or controlled the actions and affairs of any of the said subsidiary companies; deny that the Trust Company caused the Missouri Elevator & Terminal Company to be incorporated for the purpose alleged in the ancillary bill or for any other purpose.

These defendants state that the Missouri Elevator & Terminal Company was organized by the procurement of the Belt Company for the purpose of acquiring and erecting grain elevators along the line of the Belt Company, so as to furnish such facilities as would increase the business and earnings of the Belt Company. That said Missouri Elevator & Terminal Company acquired certain lands in what is known as the East Bottoms of Kansas City, Missouri, and caused to be erected thereon three elevators, one of which has since been destroyed by fire. That the Trust Company advanced to

the said Missouri Elevator & Terminal Company, large sums of money for the erection of said elevators, and received from the said Missouri Elevator & Terminal Company three mortgages or deeds of trust, one on each of said elevators, one for $12,000.00, one for $12,000.00 and one for $8,000.00. That one of the said elevators was consumed by fire, and the amount of the insurance thereon, was collected by Wash Adams, the receiver of the Missouri Elevator & Terminal Company and was paid by him to the Trust Company and its receiver, and was duly credited upon the note which was secured by the mortgage on that elevator, leaving a balance still due on account of that mortgage of $4,251.50; that on the remaining two mortgages, one for $12,000.00 and the other for $8,000.00 nothing has been paid, and the interest on all of them has been long in default, and the Trust Company still holds said mortgages on said property.

The said Belt Company, from time to time, advanced some money to the Missouri Elevator & Terminal Company, which went into the construction of the said elevators, and received therefor 425 shares of the capital stock of the said Missouri Elevator & Terminal Company of the par value of $100.00 each, which is all or practically all of the stock which the said Missouri Elevator & Terminal Company has issued. It is true that the said elevator property was purchased and the said elevators built for the use and benefit of the Belt Company, but it is untrue that it was done by the Trust Company, and inasmuch as the Belt Company
169 is the owner of all or substantially all of the outstanding stock of the Missouri Elevator & Terminal Company, it is in this sense true that all of the property of the Missouri Elevator & Terminal Company belongs to the Belt Company, subject, however, to the lien of the mortgages thereon to the Trust Company, as before stated.

The Trust Company has not and never had any interest in any of the property standing in the name of the said Missouri Elevator & Terminal Company, except as the holder of the said mortgages.

These defendants deny that the Trust Company ever failed or refused to account to the Belt Company for all of the transactions of the Trust Company in connection with the said Missouri Elevator & Terminal Company's property, and these defendants deny again that the Trust Company ever received any funds from the Belt Company, for the purpose of constructing said elevators; deny that the Trust Company caused the Belt Company to assume all of the outstanding debts and liabilities of the said Missouri Elevator & Terminal Company, but state that if the Belt Company did assume such outstanding debts and liabilities, it was a proper thing for it to do, as it is, by reason of its being the sole stockholder in the said company, the beneficial owner of all of the property subject to the said debts and liabilities, and there is no reason, in law or equity, why the Belt Company should be reimbursed for paying its own debts, or discharging obligations upon its own property, if it did discharge any such obligations. These defendants admit

that Wash Adams, Esquire, was appointed receiver of the Missouri Elevator & Terminal Company, as alleged in the ancillary bill, and still had and holds possession of its property.

These defendants deny that the Trust Company caused the Central Improvement Company to be organized for the purpose of holding the legal title to various pieces of real estate in Kansas City, Missouri, or elsewhere, purchased for the use and benefit of the said Belt Company, and the Kansas City, Pittsburg & Gulf Railroad Company, or either of them, or for any other purpose; they deny that the Trust Company caused its servants and employes to be elected as the officers and directors of the said Central Improvement Company; they deny that any money whatever was at any time paid out by the Belt Company to the Trust Company, for the purpose of purchasing any pieces of real estate to be held by the said Central Improvement Company; deny that any shares of stock of the Central Improvement Company were ever at any time issued to the said Trust Company; deny that the Trust
170 Company ever had any interest in or owned any of the stock of the Central Improvement Company; deny that any request or demand has ever been made by the Belt Company or anyone else, on the Trust Company for an accounting for any funds alleged to have been advanced to the Trust Company by the Belt Company for the purpose of buying land for the Central Improvement Company, or for an accounting for the alleged disposition of any of the stock of the said Central Improvement Company.

It is true that a corporation known as the Central Improvement Company was organized, but it was done at the instance and by the procurement of the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company, for the purpose of securing and acquiring title to various tracts of land in and about Kansas City, which were needed for the use of the said railroad companies. It is true that the Suburban Belt Railroad Company furnished some of the money to be paid upon the purchase price of the lands bought by the Central Improvement Company; it is also true that the Kansas City, Pittsburg & Gulf Railroad Company advanced some money for the same purpose; upon such money being furnished by the said railroad companies, the said Central Improvement Company issued to the Belt Company 1,120 shares of its capital stock, and also issued certain shares of its stock to the Kansas City, Pittsburg & Gulf Railroad Company, on account of the money furnished by it; all or practically all outstanding stock of the Central Improvement Company has been issued to and is held by the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company, or their assigns. That by reason of the fact that the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company, or their assigns, hold all of the stock of the Central Improvement Company, they are in equity the beneficial owners of all of the property of the Central Improvement Company, subject, however to any liens thereon for unpaid portions of the purchase price thereof. That the Trust Company has not now and never has had any interest in the property

of the Central Improvement Company except that it holds a mortgage on a certain piece of the property owned by the said Central Improvement Company, to secure certain promissory notes aggregating the principal sum of $5,000.00, which mortgage was a subsisting lien upon the property at the time the Central Improvement Company bought it, and which mortgage was subsequently purchased and is now held by the Trust Company.

These defendants deny that any part of the lands upon which the depot of the Belt Company is situated, which stands in the name of the Second Street Improvement Company, belongs to
171 the Belt Company; deny that the said Belt Company has any interest whatever in any of the property standing in the name of the Second Street Improvement Company, except as lessee; deny that the Belt Company ever advanced or furnished any of the money which went into the purchase or improvement of the property now standing in the name of the Second Street Improvement Company.

These defendants admit that Wash Adams, Esquire, was appointed as receiver of the said Central Improvement Company, and that he now has possession and control of its property, as alleged in the said ancillary bill.

These defendants deny that the Trust Company caused the Fairmount Amusement Company to be organized, or to be dominated or controlled by it, as alleged in the ancillary bill; deny that the Belt Company ever advanced any money to the Trust Company for the purpose of purchasing or improving the property of the Fairmount Amusement Company. The defendants admit that all of the capital stock of the Fairmount Amusement Company belongs to the Belt Company, subject, however to the lien of the Trust Company upon it as a pledge for the security of certain indebtedness of the Belt Company to the Trust Company, as hereinafter shown. These defendants state that they do not know what moneys, if any, the Fairmount Amusement Company ever expended, if any, and do not know who furnished the money; but they deny that the Belt Company ever supplied the Trust Company with any money to be used in furthering the ends or purposes of the Fairmount Amusement Company; deny that the Trust Company ever took upon itself the duty of disposing of or disbursing any money for the Belt Company for any such purpose; deny that large sums of money, or any sums of money were ever paid by the Belt Company to the Trust Company for that purpose; deny that the Belt Company or anyone else has ever asked the Trust Company for an accounting on account of any such money alleged to have been furnished to the Trust Company for any such purpose.

It is true that the Fairmount Amusement Company was organized for the purpose of operating what is commonly known as Fairmount Park, along the line of the Kansas City & Independence Air Line, but it is untrue that the Trust Company at any time caused said Belt Company to advance to it large sums of money for the purpose of fitting up Fairmount Park; it is true, however, that the Trust Company itself did advance at the special instance and re-

quest of the Air Line and the Belt Company, from time to time, large sums of money in the fitting up of Fairmount Park, and that it charged the same to the Kansas City & Independence Air
172 Line, and afterwards to the Belt Company when the account of the Air Line was merged in that of the Belt Company; but the defendants deny that the Belt Company ever supplied the Trust Company with any money for that purpose; deny that the Belt Company or any one else ever requested the Trust Company to account for any money alleged to have been advanced to it by the Belt Company in fitting up said Fairmount Park, but state that no such money was furnished; all of the money which the Trust Company advanced towards fitting up Fairmount Park, was charged, as aforesaid to the Air Line or to the Belt Company, and due and proper accounts were rendered thereof from month to month as the work progressed, and were duly audited and approved; the originals of such bills and accounts so rendered are now in the possession of the Belt Company and its receivers.

That all of the transactions of whatever nature between the Trust Company and the Air Line or the Belt Company in reference to Fairmount Park were fully accounted for, known to and ratified and approved by all of the officers, directors and stockholders of the Air Line Company and the Belt Company, more than five years ago, and these defendants plead the statutes of limitations of the State of Missouri, in bar of this suit in reference thereto.

These defendants deny that the Trust Company caused to be organized what is known as the Northern Townsite Company; deny that the Trust Company dominated or controlled the affairs of the said Northern Townsite Company; deny that the Trust Company caused the Belt Company to advance to the Trust Company upwards of $5,000.00, or any other sum which was used by the Trust Company in the purchase of property which was taken in the name of the said Northern Townsite Company; deny that all or substantially all of the money that was used for the purpose of acquiring the property of the Northern Townsite Company was money advanced by the Belt Company; and deny that the said Trust Company, instead of issuing to the said Belt Company all of the capital stock of the said Northern Townsite Company, issued large portions thereof to itself, or to other persons for its use and benefit; or that it otherwise disposed of the same, except as hereinafter stated. The defendants deny that the Belt Company, or any one else has ever requested the Trust Company to account for any money alleged to have been received by the Trust Company from the Belt Company for the purposes of the Northern Townsite Company.

It is true that the Northern Townsite Company was organized for the purpose of acquiring real estate along the line of the
173 Northern Connecting Railroad; the facts are that the Trust Company and the Belt Company supplied all of the money that was used in purchasing lands by the Northern Townsite Company. The Belt Company paid into the treasury of the Northern Townsite Company $6,286.57, and received therefor 439 shares of the capital stock of the said Northern Townsite Company of the

par value of $100.00 each, and the Trust Company paid into the treasury of the Northern Townsite Company $6,720.07, and received 489 shares of the capital stock of said Northern Townsite Company, of the par value of $100.00 each; that said shares so issued to the Belt Company and to the Trust Company, were issued in proper proportion to the amount of money paid in by each, and that the amount of money paid into the treasury of the said Northern Townsite Company by the Trust Company and the Belt Company was equivalent to about $14.32 on each share of stock so issued to them respectively. That 24 shares of said stock were issued to each of the following named parties, A. E. Stilwell, C. A. Braley and J. T. Nolthenius, in compensation for their services as directors and officers of the Northern Townsite Company, and that no other stock of the said Northern Townsite Company has been issued to anyone.

That the Trust Company owes the Belt Company nothing on account of the Northern Townsite Company's affairs, and there is nothing to call for any accounting by the Trust Company to the Belt Company in connection therewith.

13. These defendants deny that the Trust Company caused the Kansas City, Pittsburg & Gulf Railroad Company to be formed, and these defendants admit, however, that the said Kansas City, Pittsburg & Gulf Railroad Company was formed for the purposes stated in the said ancillary bill, and that it issued the bonds to the amount therein stated; that the default therein stated was made, and that the foreclosure proceedings stated therein were had.

These defendants deny that either the Belt Company, the Terminal or Air Line Companies were largely dependent upon the Kansas City, Pittsburg & Gulf Railroad Company for their earnings; they admit that an operating contract was in existence between the Belt Company and the said Kansas City, Pittsburg & Gulf Railroad Company, but they deny that it was well known to the Trust Company that if the Kansas City, Pittsburg & Gulf Railroad Company went into the hands of receivers, it would result in the insolvency of the Belt and other companies before named or that it would necessitate their ultimately being thrown into the hands of receivers, and the mortgages upon their respective properties foreclosed.

174 These defendants deny that the Trust Company at any time set about to contrive a scheme whereby it might appropriate to itself before the Belt Company should pass beyond its control, any of the property or assets of the Belt Company; deny that the Trust Company caused to be exhibited to its own officers and directors who were holding the positions of officers or directors of the Belt Company, various claims and demands which it alleged were due and owing by the Belt Company to it; deny that the Trust Company caused such of its own officers and employes who were holding the positions of officers and directors of the Belt Company to pass upon and approve such claims and demands; deny that the Trust Company caused its own officers and employes who were holding the positions of officers and directors of the Belt Com-

pany to execute to the said Trust Company various pretended promissory notes and other negotiable instruments for the alleged purpose of securing to the Trust Company the payment of such pretended claims, as alleged in the ancillary bill; deny that the Trust Company caused to be delivered and transferred to its various stocks, bonds and accounts and other personal property belonging to the Belt Company as collateral security for the said pretended indebtedness by the means or for the purposes alleged in the ancillary bill.

These defendants state, however, that the said Belt Company did duly execute and deliver to the Trust Company the certain negotiable promissory notes named in the ancillary bill of complaint, except that the note appearing in the ancillary bill as of date November 7th, 1899 was for $50,000.00, instead of $25,000.00 as alleged in the said ancillary bill, and that the belt company assigned and pledged to the Trust Company as collateral security for the payment of the said promissory notes and other indebtedness held by the Trust Company against the Belt Company, the stocks, bonds and property stated in the ancillary bill of complaint, except that the item of property stated in the said ancillary bill as being 600 tons of new steel rails, was in fact about 344 tons of steel rails and about 17 tons of fastenings.

These defendants deny that the said notes were executed or that the said stocks, bonds and property were given as collateral security by reason of or through any domination or control of the said Trust Company over the Belt Company. It is true that at the time the said notes were given and the said property assigned as collateral security that a majority of the officers and directors of the Belt Company were connected with the Trust Company, either as its officers, directors or employes, but these defendants deny that any of the officers or directors of the Belt Company were personally interested in securing to the said Trust Company any of
175 the assets of the Belt Company which in equity or good conscience ought not to have been secured and deny that the execution of said promissory notes, or either of them or the delivery of the said collateral security or any part thereof was fraudulent or void for any reason whatever.

On the contrary these defendants state and show to the court that the Belt Company was justly indebted to this defendant the Trust Company at and prior to the time of the execution and delivery of the said promissory notes respectively for moneys from time to time loaned to the said Belt Company, or advanced by the Trust Company and paid out to and for the use and benefit of the Belt Company, all subsequent to the first day of January, 1898; that each and all of said notes were given for the purpose of evidencing a bona fide indebtedness to the amount specified in said notes. That said notes were executed and delivered and the said collateral security assigned and pledged in good faith for the purpose of evidencing and securing the payment of debts justly and equitably due and not otherwise. That all of said notes were given for so much money loaned and advanced by the Trust Company

to the Belt Company, subsequent to the first day of January, 1898, as aforesaid.

These defendants deny that the Trust Company kept its officers and directors; or caused its officers and directors to be continued as the officers and directors of the Belt Company during the time stated in the ancillary bill, or at any time. It is true, however, that many of the officers and directors of the Belt Company were also officers and directors of the Trust Company, but that condition was occasioned by the fact that the stockholders of the Belt Company, who were persons other than the Trust Company elected certain officers, directors and employes of the Trust Company as officers and directors of the Belt Company, and it was not occasioned by any domination or control of the Trust Company, or by any influence whatever exerted by or on behalf of the Trust Company, and there never was, at any time, any officer, director or employe of the Trust Company, who was also an officer or employe of the Belt Company who desired or wished the Trust Company in any way to have or acquire any undue advantage whatever of the Belt Company, and there was at all times open and careful accounting had between the Belt Company and the Trust Company of all transactions in which they had any mutual connection; and although the Trust Company has at all times made full and accurate accountings for all of its business transactions with the Belt Company, all of which have been fully ratified and approved by
176 all of the officers, directors and stockholders of the Belt Company, as before stated, yet the Trust Company has at all times stood ready and is still ready and willing to make any such further accounting thereof, as may by the court be required.

These defendants deny that since the Belt Company passed into the control of other hands, it has ever been refused any accounting or information of any character concerning the past relations between the Trust Company and the Belt Company at any and all times when requested, but state, upon the contrary that the Trust Company has frequently rendered full, true and accurate accounts to the Belt Company, and to other persons, at its instance and request, of all of the transactions between the Trust Company and the Belt Company. That it has at all times offered every opportunity for the examination of its books and accounts; that at its invitation the Belt Company has had its own experts examine the books and accounts of the Trust Company. The Trust Company has always been anxious to have its accounts examined, and the balance due it settled and paid, and has insisted upon this from time to time.

14. These defendants further state and show that from and after the first day of January, 1898, continuously up until the first of April 1900, at divers and frequent times the Trust Company loaned and advanced to the said Belt Company, at its instance and request, large sums of money, aggregating more than half a million of dollars, for the purpose of making necessary improvements in the said Belt Company's road and paying its operating expenses and meeting its interest charges, and also for the purpose of encourag-

ing and securing the location of industries along its line, to the end that its earnings and income might be increased. That the said Belt Company from time to time repaid to said Trust Company parts of the money so loaned and advanced by it as aforesaid, but left unpaid a very large portion thereof, for a part of which balance the said promissory notes were duly executed and delivered by the Belt Company to the Trust Company, and to secure which the said stocks, bonds and property were pledged as collateral security as aforesaid. That the said Belt Company since it passed into the hands of its present management, has frequently recognized the said indebtedness of the Trust Company as valid and just and has frequently promised to pay the same. That on the Month of June, 1900, the Belt Company, then being in the hands of its present management, paid, on account of some of the said promissory notes, large sums of money, which were duly credited thereon, as hereinafter shown, and promised to pay the remainder of said notes and other indebtedness.

177 15. That the Trust Company and its receiver now own and hold the following promissory notes duly executed and delivered, as aforesaid, by the said Belt Company, all of which are long past due and remain unpaid, to-wit:

One note dated March 31st, 1899, due July 2nd, 1899, for $50,000.00 with interest from date at the rate of 6 per cent per annum, on which there has been paid and credited on June 14th, 1900, $12,500.00.

One note dated July 26th, 1899, due on demand for $203,900.00 with interest at 6 per cent per annum from date, upon which there was paid and credited on June 11th, 1900, $9,996.65.

One note dated September 21st, 1899, due on demand for $23,056.48 with interest at 8 per cent per annum from date.

One note dated October 23rd, 1899, due on demand, for $7,162.40 with interest at 8 per cent per annum from date.

One note dated November 7th, 1899, due January 9th, 1900, for $50,000.00 with interest after maturity at 8 per cent per annum upon which there was paid and credited June 14th, 1900 $12,500.00.

One note dated January 25th, 1900, due May 25th, 1900 for $25,000.00, with interest after maturity at 6 per cent per annum.

One note dated February 8th, 1900, due May 12th, 1900, for $109,500.00 with interest from maturity at 8 per cent per annum, on which there was paid and credited October 23rd, 1900 as proceeds of sale of collateral made by the National Bank of Commerce $110,250.00, leaving a balance due on October 23rd, 1900 of $3,240.66.

One note dated February 9th, 1900, due June 11th, 1900, for $10,400.00, with interest from maturity at 6 per cent — annum.

In addition to the above stated promissory notes, the Belt Company is justly indebted to the said Trust Company and its receiver, on an open book account for so much money at various times and in divers sums advanced to and paid out for the use and benefit of the Belt Company, at its special instance and request, parts of which

were by the said Belt Company from time to time repaid and truly credited, all of which sums of money so advanced and paid out to and for the use and benefit of the said Belt Company, together with the payments and credits thereon, are fully and truly set out and appear from the itemized statement of account, which, ac-
178 count shows the balance due to the Trust Company on said account on September 26th, 1900, of $43,713.32, and which account is in words and figures as follows, to-wit:

Kansas City Suburban Belt Railroad Company in Account with Guardian Trust Company.

1899.		Debit.	Credit.
Sept. 25,	To payment of draft of Wm. S. Taylor, dated Sept. 23, 1899, for payment of 20 coupons Union Terminal R. R. Co., due Aug. 1, 1899	$500.00	
26,	To payment draft of Wm. S. Taylor, dated Sept. 26, 1899, for payment of 40 coupons Union Terminal R. R. Co., due August 1, 1899	1,000.00	
	To expressage on 65 coupons Union Terminal R. R. Co. from New York to Philadelphia	.50	
	To pro. of Philadelphia office expenses for month of August, 1899.....	4.50	
27,	To interest on note for $25,000, dated Sept. 25, 1899, from that date to Jan. 25th, 1900, 122 days at 6%	508.33	
	To revenue stamps on note of $23,056.48 given by them to Trust Co., dated Sept. 21, 1899.....	4.62	
	To telegrams.....	2.38	
	To telegrams.....	.59	
29,	To revenue stamps on note of $25,000, given to Trust Co. dated 9/25/99,	5.00	
	To revenue stamps on note for $25,000 given 1st Nat'l Bank, K. C.....	5.00	

		To payments of semi-annual interest due Oct. 4, 1899, to Provident Life & Trust Co., on 2 notes of $5,000 each at 6% held by them, dated April 4, 1890	300.00	
	30,	To payment to Nat'l Bank of Commerce for draft on New York Remitted for coupon interest.....	40,000.00	
		By proceeds of sale of draft by K. C. Suburban Belt R. R. Co., at 30 days on J. de Goeijen, Jr., for florins 100,000 draft endorsed by Trust Co. amount to apply as credit on above charge of $40,000.00	....	$39,437.50
179				
Oct.	3,	To revenue stamps on draft on J. de Goeijen, Jr., and telegrams regarding draft	19.58	
Oct.	3,	By collection from J. de Goeijen, Jr., account interest on $89,333.33 for the month of Sept.....	....	521.10
	4,	To payment of 20 coupons Union Terminal R. R. Co. due August 1, 1899,	500.00	
	10,	To revenue stamps on 13,920 shares stock K. C. & N. C. R. R. Co. transferred account sale.....	279.40	
	11,	To clerical service Oct. 1899	17.00	
		To funds deposited with Drexel & Co., for payment of coupons of Union Terminal & Consolidated Terminal R. R. Companies	1,000.00	
	14,	To telegrams.....	5.76	
	19,	To expressage N. Y. to Philadelphia on 20 coupons Union Terminal R. R. Co.....	.13	

Nov.	7,	To interest on note of $50,000, dated M'ch 31, 1899, renewed by note maturing Jan'y 9, 1900, Interest Mch. 31, 1899, to Jany. 9, 1900, at 6%...	2,366.67	
	8,	By collection from J. de Goeijen, Jr., of interest on $89,333.33 month of Oct. 1899.....	....	538.48
	29,	To interest on daily balances, September, 1899,	37.22	
		To interest on daily balances, October, 1899....	22.74	
Dec.	1,	To interest on daily balances, November, 1899..	33.55	
Dec.	6,	By collection from J. de Goeijen, Jr., of interest on $89,333.33 for month of November, 1899.....	....	521.10
1900.				
Jan.	2,	By proceeds of sal of draft by K. C. S. B. R. R. Co. on J. de Goeijen, Jr., bearing endorsement of Trust Co., Draft for florins 37,735.64, sold at 39-3/4.....	....	15,000.00
		To drafts of Kuhn & Co. of London, dated Dec. 20, 1899, on Trust Co. as endorser, to take up drafts on J. de Goeijen, Jr., Sept. 30, 1899, for $39,437.50 not paid by him $41,000.00		
		Less allowances by Kuhn & Co. acc't excess in exchange 667.40		
			40,332.60	
180				
Jan.	4,	By collection of interest from J. de Goeijen, Jr., on $89,333.33 month of December, 1899.....	....	538.48

25,	To draft of Kuhn & Co., London, dated Jan. 12, 1900, on Trust Co. as endorser, to take up draft on J. de Goeijen, Jr., Jan. 2, 1900, not paid by him.....		1,500.00	.....
Feb. 2,	By cash on account.....		....	3,245.13
May 17,	To clerical services, months of November and December, 1899, January, February and March,, 1900, 5 months at $17.00.....		85.00	
June 4,	To interest on daily balances:			
	Month of Dec. 1899,	34.95		
	Month of Jan. 1900,	200.65		
	Month of Feb. 1900,	224.36		
	Month of Mar. 1900,	254.01		
			713.97	
			$102,744.34	$59,031.02

Balance due Trust Company.....$43,713.32

That the Trust Company, and its receiver now hold certain stocks, bonds, accounts and property, which are the property of the Belt Company, and which have heretofore been duly transferred and pledged to the Trust Company as collateral security for the payment of the said indebtedness of the Belt Company to the Trust Company, including all of the said promissory notes and the said open book account, and the said Trust Company and its receiver now hold the said stocks, bonds, accounts and property as such collateral security; the said stocks, bonds, accounts and property so held by the Trust Company and its receiver as such collateral security, are as follows:

82.9 Second Mortgage Income Bonds of the Kansas City and Northern Connecting Railroad Company.

25 shares of the capital stock of the Fairmount Amusement Company.

439 shares of the capital stock of the Northern Townsite Company.

1120 shares of the capital stock of the Central Improvement Company.

425 shares of the capital stock of the Missouri Elevator & Terminal Company.

A certain account and claim of the Belt Company against the

Kansas City, Pittsburg & Gulf Railroad Company, consisting
181 of charges for material furnished, labor performed, switching charges and terminal rentals due from Kansas City, Pittsburg & Gulf Railroad Company to the said Belt Company, which account on its face amounts to $133,805.44.

343-1940-2240 tons of steel rails.

16-1712/2000 tons of fastenings.

That the Trust Company has heretofore been temporarily enjoined at the suit of the Cambria Steel Company in the above entitled original cause from selling or otherwise subjecting the above named stocks and bonds, so held as collateral security, toward the payment of the indebtedness of the Belt Company to the Trust Company; and the said claim and account of the Belt Company against the Kansas City, Pittsburg & Gulf Railroad Company, so assigned to and held by the Trust Company, as collateral security for said indebtedness, has heretofore been by the Trust Company made the matter of an intervening petition in the suit of the State Trust Company complainant against the Kansas City, Pittsburg & Gulf Railroad Company, et al., defendants in the United States Circuit Court for the Western Division of the Western District of Missouri, and the said intervening petition is still there pending and undetermined.

That notwithstanding the Belt Company had assigned the said steel rails and fastenings to the Trust Company as collateral security, it afterwards refused to actually deliver the same to the Trust Company, and the Trust Company was therefore compelled to bring a suit in replevin therefor, which suit was brought in the State Court of Jackson County, Missouri, where the same is still pending and undetermined.

That whilst it is true as these defendants have hereinbefore stated, that the Trust Company had and has no interest in the property standing in the name of the Central Improvement Company, or of the Missouri Elevator & Terminal Company, or of the Fairmount Amusement Company except that it holds liens upon certain portions thereof, as hereinbefore stated, and that the Trust Company had and has no interest in the property of the Northern Townsite Company, except that it is a stockholder therein, as hereinbefore stated, yet it is also true as these defendants state and show to the court, that the Trust Company has and holds

25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100.00 each.

1120 shares of the capital stock of the Central Improvement Company of the par value of $100.00 each, and

182 425 shares of the capital stock of the Missouri Elevator & Terminal Company of the par value of $100.00 each, and also

439 other shares of the capital stock of the Northern Townsite Company of the par value of $100.00 each, as collateral security duly deposited and pledged with the Trust Company by the Belt Company to secure the payment of the said indebtedness hereinbefore stated due and owing by the Belt Company to the said Trust Company.

These defendants further state and show that they are ready and willing, if in the judgment of this court, they ought and should do so, to render a fuller accounting of any and all of the transactions of the Trust Company with any and all of said companies, in such manner and at such times as the Court may direct.

These defendants further state and show that the Trust Company has heretofore frequently made demand upon the Belt Company for the payment of each and all of said promissory notes and said book account, and that the said Trust Company, on the first day of April, 1900, in due manner made special demand upon the said Belt Company for the payment of each of said promissory notes which are payable on demand, and also on that date made due demand on the said Belt Company for the payment of the said open book account. That the Belt Company has failed and refused to pay the said notes or account, or any part thereof.

All of which matters and things hereinbefore stated these defendants are ready to aver, maintain and prove as this Honorable Court may direct, and hereby pray that judgment may be rendered by this Court against the Kansas City Suburban Belt Railroad Company and its said receivers, in favor of the Guardian Trust Company and its receiver, for the amount of each and all of the said promissory notes, together with interest thereon, and for the amount of the said book account, with interest thereon from the 1st day of April, 1900, and that the said Trust Company and its receiver may have judgment against the said Belt Company, and its receivers, for any all further sums or amounts that may be found due the said Trust Company or its receiver, upon the accounting which may be had in this cause; that the court may by proper orders protect and enforce the interest of the Trust Company and its receiver in and to the stocks, bonds, accounts and property so deposited with and held by it as collateral security, as aforesaid, and that the said Kansas City Suburban Belt Railroad Company, and its receivers may be ordered and directed to pay to the Guardian Trust Company and its receiver, whatever sums of money the Trust Company or its receiver may be found entitled to upon such accounting, and that these de-
183 fendants also have judgment for their reasonable costs and charges in this behalf most wrongfully expended and sustained.

GUARDIAN TRUST COMPANY,
By TRIMBLE & BRALEY, *Its Solicitors.*
FRANCIS M. BLACK,
Receiver of the Guardian Trust Company.
By TRIMBLE & BRALEY, *His Solicitors.*

Afterwards, to-wit, on the 16th day of December, 1901, an answer of Cambria Steel Company was filed in cause No. 2616. Said Answer is in words and figures as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY et al., Defendants.

VS.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants.

Original Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

VS.

CAMBRIA STEEL COMPANY et al., Defendants.

Ancillary Bill.

The Answer of the Cambria Steel Company to the Ancillary Bill of Complaint of Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Co.

This defendant saving and reserving to itself, now and at all times hereafter, all and all manner of benefit and advantage of exception which can or may be had or taken to the said complainants' said ancillary bill of complaint, for answer thereto, and to so much thereof as this defendant is advised is in any wise material or necessary for it to make answer unto, answers and says:

Upon information and belief it avers that all the matters and things stated in said bill up to the prayer thereof are true; that heretofore, on September 6th, 1900, this defendant recovered a judgment against the Kansas City Suburban Belt Railroad Company hereinafter called the Belt Company, for $100,962.91, no part of which has been paid but all of which is still due. Having recovered such judgment, this defendant caused a writ of execution to be issued thereon directed to the marshal of this district, who
184 upon the same day, returned the said execution wholly unsatisfied for want of property upon which to levy the same. That said Belt Company was wholly insolvent and had no property subject to be reached by legal process which might be issued against it upon the judgment so recovered by this defendant; whereupon defendant filed in this court case number 2468, which was a bill in equity upon its behalf against said Belt Company, the Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, the purpose and object of which was to have an accounting as between the said Belt Company and

the Guardian Trust Company and to subject to the payment of its judgment all the property which the said Belt Company owned excepting that covered by its railroad mortgages, and particularly all the collateral pledged to secure the notes mentioned in the said ancillary bill of complaint. Said cause is pending and still undetermined. This defendant begs leave to refer to said bill of complaint and all the proceedings in said cause the same as if copied herein, and respectfully shows that when an account is taken of the various transactions between the Guardian Trust Company and its receiver and the Belt Company or its receivers, as in and by said ancillary bill claimed, the sums found due the receivers of the Belt Company should be subjected to the payment of the judgment of this defendant, which is the first, prior and paramount lien thereon, and no action should be taken in this cause in any manner interfering with the rights of this defendant in said bill for an accounting. And this defendant denies all and all manner of unlawful combination and confederacy, wherewith it is by the said bill charged; without this, that there is any other matter, cause or thing in the said bill of complaint contained (material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied) which is true, to the belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

L. C. KRAUTHOFF,
FRANK HAGERMAN,
Solicitors for Cambria Steel Company.

Afterwards, towit, on the 31st day of December, 1901, Complainants' exceptions to the answer of Guardian Trust Company
185 and Francis M. Black its receiver was filed in case #2616, Knott & Swinney Recors. et al., vs. Cambria Steel Company et al.

Said exceptions are in words & figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY and FRANCIS M. BLACK, Its Receiver; Missouri Elevator & Terminal Company and Wash Adams, Its Receiver; Central Improvement Company and Wash Adams, Its Receiver; Second Street Improvement Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Exceptions Taken by the Complainants Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company to the Separate Answer of the Defendants Guardian Trust Company and Francis M. Black, Its Receiver.

1. For that the following allegation contained in paragraph No. 2 of said Answer is impertinent, irrelevant and immaterial and contains no defense to the complainants' allegation and is insufficient: "But this defendant states and shows to the Court that the said original bill of complaint of the Cambria Steel Company and the said four bills of complaint so brought by the said The Provident Life and Trust Company of Philadelphia were each and all filed at one and the same time by the same counsel and as separate parts of one and the same transaction, and that all of the said four suits by the Provident Life and Trust Company of Philadelphia and also the said suit of the Cambria Steel Company were instituted at the solicitation and request and by collusion with the said Kansas City Suburban Belt Railroad Company for the fraudulent purpose
186 of hindering, delaying and defrauding the creditors of the Kansas City Suburban Belt Railroad Company and partic-

ularly the defendant the Guardian Trust Company, which was one of said creditors."

2. For that the following allegation contained in paragraph No. 2 of said Answer is impertinent, irrelevant and immaterial and contains no defense to the complainants' allegations and is insufficient: "These defendants deny that the said The Kansas City Suburban Belt Railroad Company has ever filed any answer to the said original bill of complaint of the said Cambria Steel Company and state that if it should file any such answer the same will be collusive and fraudulent for the purpose of carrying out the purposes of said suit in hindering, delaying and defrauding the creditors to the said Kansas City Suburban Belt Company."

Wherefore, the complainants come and in all particulars aforesaid except to the answer of the said defendants Guardian Trust Company and Francis M. Black, its Receiver, on the ground alleged that the same is irrelevant, impertinent and insufficient; and humbly pray that the said defendants may be compelled to put a full, complete and sufficient answer thereto and have such other relief in the premises as to the Court may seem proper.

LATHROP, MORROW, FOX & MOORE,
Solicitors for Complainants.

Service of a copy hereof is hereby acknowledged, this 31st day of Dec. 1901.

TRIMBLE & BRALEY &
FRANCIS M. BLACK,
Solicitors for Defendants Guardian Trust Co. & Francis M. Black, Its Receiver.

Afterwards, to-wit, on the 9th day of April, 1902, a Replication was filed in cause #2616 to Answer of Guardian Trust Company et al. Said Replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

187 STUART R. KNOTT and EDWARD F. SWINNEY, Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY and FRANCIS M. Black, Its Receiver; Missouri Elevator & Terminal Company and Wash Adams, Its Receiver; Central Improvement Company and Wash Adams, Its Receiver; Second Street Improvement Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Replication to Answer of Guardian Trust Company and Francis M. Black, Its Receiver.

These replicants Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of Guardian Trust Company and Francis M. Black, its receiver, for replication thereunto say, that they do and will aver, maintain and prove their said ancillary bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray as in and by their said ancillary bill they have already prayed.

LATHROP, MORROW, FOX & MOORE,
Solicitors for Complainants in Ancillary Bill.

Afterwards, to-wit, on the 1st day of April, 1902, an Order was filed and entered of record in Ancillary Cause #2616 wherein Stuart R. Knott, and Edward F. Swinney, Receivers, et al., are Complainants and the Cambria Steel Company, et al., are defendants. Said Order is in words and figures as follows:

188 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants.

STUART R. KNOTT et al., Receivers, Complainants,
vs.
CAMBRIA STEEL COMPANY et al., Defendants.

(Ancillary Bill.)

Order.

The exceptions filed by complainants in the ancillary bill to the answer of the Guardian Trust Company and F. M. Black, its receiver, having been heard by the court and submitted by the respective counsel, and the court being fully advised in the premises:

It is ordered that the first exception thereto be, and the same is hereby, sustained; and the second exception thereto is sustained as to the following portions of the answer, to-wit: "And stated that if it should file any such answer, the same will be collusive and fraudulent, for the purpose of carrying out the purposes of said suit in hindering, delaying and defrauding the creditors of the said Kansas City Suburban Belt Railroad Company."

It is further ordered by the court that the complainants in the ancillary bill have leave to file replication to the answer of the respective defendants thereto on or before the 9th day of April, 1902; and that thereupon the cause shall stand referred to Shannon C. Douglas as Special Master to take the proofs and report the same, with his conclusions thereon to this court, in connection with the issues in the original cause herein and matters heretofore referred to him in the original suit herein, at the earliest practical date.

(Signed) JOHN F. PHILIPS, *Judge.*

Afterwards, to-wit, on the 29th day of May, 1902, the Resignation of Wash Adams, Receiver of the Central Improvement Company and Missouri Elevator & Terminal Company was filed. Said Resignation is in words and figures as follows:

189 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

CAMBRIA STEEL CO.
VS.
KANAS CITY SUBURBAN RAILROAD Co et al.

To the Hon. Judges of the said Circuit Court:

I hereby resign the office of Receiver of the Central Improvement Co. & the Missouri, Elevator & Terminal Co. appointed in the above entitled cause.

WASH ADAMS.

The order accepting resignation of Wash Adams, Receiver of the Central Improvement Company & Missouri Elevator & Terminal Co. filed May 29, 1902, is in the words & figures following:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

CAMBRIA STEEL COMPANY, Complainant,
VS.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants.

Order.

The resignation of Wash Adams, Esq., Receiver of the Central Improvement Company and the Missouri Elevator & Terminal Company, heretofore appointed, in the above entitled cause, having been this day tendered to this court, it is by the court accepted.

It is further ordered by the court that said Wash Adams, as such receiver, upon the appointment of his successor in office, turn over and deliver to him all property and assets of whatsoever kind and description which came into his possession as such receiver, not otherwise disposed of by him in the execution of his said office, and take said successor's receipt therefor, and file the same with the clerk of this court.

It is further ordered by the court that said Wash Adams, at the earliest date practicable, make and file with the clerk of this court his report giving an account of his administration as such receiver with such other facts as to him may seem pertinent.

(Signed) JNO. F. PHILIPS,
U. S. Dist. Judge.

Afterwards, to-wit, on the 27th day of June, 1902, the following Order was filed and entered of record:

190 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants.

Order.

The receiver heretofore appointed in this cause, to-wit, on November 8th, 1900, of the Central Improvement Company having resigned his position as such on the 29th day of May, 1902, it is ordered and adjudged by the Court,

1st. That Thomas T. Crittenden, Sr., be and he is hereby appointed to fill said receivership vacancy of all and singular the property, assets, rights and franchises of said Central Improvement Company wheresoever situate.

2nd. That said receiver is hereby authorized and directed to take immediate possession of said property and all the proceeds thereof, if any, and under and subject to the direction of this court, to conduct the business of said company and manage the properties thereof; and under and subject to the direction of this court, to collect and receive the income from said properties and to institute and prosecute such suits as may be necessary for the proper protection of the property and trust hereby vested in said receiver, and likewise to defend all actions instituted against him as such receiver or such as may now be pending, if any, against said company affecting said property.

3rd. That said receiver shall pay out, of any moneys or funds which may come into his hands, any and all taxes, lawfully charged against said property, as the same shall become due, and the necessary current expenses for conducting said business.

4th. That the said receiver within five days from the date of this order, make and file with the clerk of this court a bond in the sum of one thousand dollars ($1,000.00) with sufficient surety or sureties, to be approved by the judge of this court, conditioned that said receiver shall well and truly perform the duties of said office, and account for all moneys and property that shall come into his hands and abide by and perform all things which in this decree he is directed to, or shall hereafter be directed to perform by this court.

5th. The court reserves the right and power to make any and all further decrees in this case that it may deem necessary to carry out the intent and purposes of this receivership.

191 & 192 6th. The said receiver shall file report in this court at least once in every sixty days of his administration of said property, which report, if not accepted to within thirty days after the filing thereof, shall stand confirmed, otherwise the exceptions,

which same are filed, shall stand referred to S. C. Douglass as special master.

(Signed) JNO. F. PHILIPS, *Judge.*

Afterwards, to-wit, on the 7th day of February, 1905, a Stipulation making Kansas City Southern Railway Company, a party to this cause was filed.

Said stipulation is in words and figures as follows:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Missouri.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Cross-complainants,
vs.
GUARDIAN TRUST COMPANY et al., Cross-defendants.

Stipulation.

It is agreed by the parties to the above entitled cause, by their respective counsel, that The Kansas City Southern Railway Company shall become a party to the action, either as a joint complainant, or by a bill of intervention, as it may elect; that it may file its bill of intervention, or otherwise assert its claim by becoming a party complainant on or before February 25, 1905, and the adverse party shall have ten (10) days hereafter in which to plead; that the testimony heretofore or hereafter taken in this cause, so far as applicable, may be considered as evidence in support of the claim or bill of The Kansas City Southern Railway Company and in support of the claim of the adversary parties; that such
193 orders of court as may be necessary for the purpose may be entered, carrying into effect this stipulation.

H. S. MECARTNEY,
J. C. ROSENBERGER,
For Guardian Trust Co.
S. W. MOORE,
For The Kansas City Southern Ry. Co.
FRANK HAGERMAN,
For Cambria Co.

Afterwards, to-wit, on the 27th day of February, 1905, the following Stipulation was filed:

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Cross-complainants,
vs.
GUARDIAN TRUST COMPANY et al., Cross-defendants.

Stipulation.

It is agreed by the parties to the above entitled cause, by their respective counsel, that The Kansas City Southern Railway Company shall become a party to the action, either as a joint complainant, or by a bill of intervention, as it may elect; that it may file its bill of intervention, or otherwise assert its claim by becoming a party complainant on or before February 25, 1905, and the adverse party shall have ten (10) days thereafter in which to plead; that the testimony heretofore or hereafter taken in this cause, so far as applicable, may be considered as evidence in support of the claim or bill of The Kansas City Southern Railway Company and in support of the claim of the adversary parties; that such orders of court as may be necessary for the purpose may be entered, carrying into effect this stipulation.

H. S. MECARTNEY &
J. C. ROSENBERGER,
For Guardian Trust Co.

Time for filing pleading or bill of the Kansas City Southern Railway Company extended to on or before Feb. 27th, 1905.

____ ____,
Attys. for Guardian Trust Co.

194 Time for Kansas City Southern Railway Co. to file its bill of intervention to otherwise assert its claim in this cause is hereby extended from Feby. 25, 1905, to Feby. 27, 1905. Dated this Feby. 24, 1905.

H. S. MECARTNEY,
J. C. ROSENBERGER,
Solicitors for Guardian Trust Co.

Afterwards, to-wit, on the 27th day of February, 1905, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City & Independent Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Order.

In accordance with the stipulation herein filed it is ordered that The Kansas City Southern Railway Company shall become a party to the action and that leave to it is hereby granted to file its intervening petition, and that the adverse party shall have ten days in which to plead to the same; and that the issues so made shall stand referred to Honorable Shannon C. Douglass, Special Master, to take the testimony thereon and make report with all convenient speed.

(Signed) CHARLES F. AMIDON, *Judge.*

Afterwards, to-wit, on the 27th day of February A. D. 1905, the Kansas City Southern Railway Company filed its intervening petition herein.

Said intervening petition is in words and figures, as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

195 *Intervening Petition of the Kansas City Southern Railway Company.*

To the Judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

The Intervenor, the Kansas City Southern Railway Company, respectfully shows:

1. The intervenor is a corporation duly organized and existing under the laws of the State of Missouri as a railway corporation, having been duly incorporated according to law in March, 1900.

2. That the Kansas City Suburban Belt Railroad Company, one of the defendants herein, being a railroad corporation duly organized and existing under the laws of the State of Missouri, and being about to construct and equip a line of railroad in Jackson County, Missouri, did, on or about May 1, 1890, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein) as Trustee, in which said mortgage or deed of trust it is recited that the said mortgage or deed of trust shall be a first mortgage and paramount lien upon said railroad and upon all the property and rights of property of the railroad company of every name, nature and description then held or that might be thereafter acquired including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to said trustee to secure an issue of the first mortgage bonds of said railroad company in the principal sum of One Million Dollars ($1,000,000.00) all and singular the double track standard gauge railroad of the company (meaning thereby the Kansas City Suburban Belt Railroad Company) constructed and to be constructed from a point at the intersection of Second and Broadway Streets in Kansas City in Jackson County, Missouri; thence in an easterly direction on and along said Second Street to its point of intersection with Harrison Street in said city; thence in a north-easterly direction to a point near Randolph Avenue in said city; thence east for a distance of about one and one-half miles; thence in a southeasterly and southerly direction to the southern limits of said city; thence in a general southwesterly direction to a point at or near the mouth of Brush Creek in said county of Jackson, being about twelve (12) miles of double track railroad, about ten (10) miles of which are within the corporate limits of Kansas City; also all the lands, tenements, easements and hereditaments acquired or appropriated or which shall be thereafter acquired or
196 appropriated for the purpose of a right of way for said railroad or for its tracks or switches; also all railroad tracks, railways and rights of way, depot grounds, station grounds and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shops and other shops, water tanks, turn tables, superstructures, erections, fixtures, rolling stock, furniture, fuel, tools, implements, machinery, *machinery* and appliances and other facilities for maintaining and operating said railroad, as well such as are then owned and held by the company as also such as the company might thereafter construct or acquire for use in connection with its said railroad; also all the terminals, terminal rights, privileges, contracts, leases, connections and appliances which the company then owned and held and which it might thereafter own and hold for use in connection with its said railroad; also all of certain described lots, tracts and parcels of land situated in Kansas City in the County of Jackson, State of Missouri, more specifically

described in said mortgage or deed of trust; also all and singular the rents, tolls, income, issues and profits of the said railroad, premises and property; and also all the estate, right, title and interest, legal and equitable and present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties and franchises of the company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof as well *as* those thereafter to be acquired as those then held.

That default was made in the payments required by the terms of said mortgage or deed of trust and, on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage or deed of trust in the circuit court of the United States for the western division of the western district of Missouri; that the defendant Guardian Trust Company was a party to said proceedings.

The intervenor further states that the Kansas City & Independence Air Line, one of the defendants herein, being a railroad corporation duly organized and existing under the laws of the State of Missouri and being about to construct and equip a line of railroad in Jackson County, Missouri, did, on or about March 1, 1892, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein) as Trustee, in which said mortgage or deed of trust it is recited that the mortgage or deed of trust shall be a first mortgage and paramount lien upon
197 the railroad of said company and upon all its property and rights of property of every name, nature and description then held or that might thereafter be acquired, including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to said trustee to secure an issue of the first mortgage bonds of said railroad company in the principal sum of Three Hundred Thousand Dollars ($300,000.00), all and singular the standard gauge railroad of the company (meaning the Kansas City & Independence Air Line) constructed and to be constructed from a point on the line of the Kansas City Suburban Belt railroad at or near the southeast corner of section twenty-five (25) township fifty (50), Range Thirty — (33) west, in Jackson, County, Missouri; thence in a general easterly direction to the city of Independence in said County of Jackson, in the State of Missouri, being about six (6) miles of standard gauge railroad and lying wholly within the said county of Jackson and State of Missouri; also all the lands, tenements, easements and hereditaments acquired or appropriated, for the purpose of a right of way for said railroad or for its side tracks or switches; also all railroad tracks, railways, ways and rights of way, depot ground, station grounds and other grounds, bridges, viaducts, culverts and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shops and other shops, water tanks, turn-tables, superstructures, erections, fixtures, rolling stock, furniture, fuel, tools, implements, machinery and appliances and other facilities for maintaining and operating said railroad, as well such as the company

then owned or held as also such as the company thereafter may construct or acquire and own for use in connection with its said railroad; also all the terminals, terminal rights, privileges, contracts, leases, connections and appliances which the company then owned and held and which it might thereafter hold and own for use in connection with its said railroad; also all and singular the rents, tolls, income, issues and profits—the said railroad, premises and property; and also all the estate, right, title and interest, legal and equitable and present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties and franchises of the company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof as well those thereafter to be acquired as those then held; that default was made in the payments required by said mortgage or deed of trust and on September 6, 1900, proceedings were instituted for the foreclosure of the said mortgage or deed of trust in the Circuit Court of the United States within and for the western division of the western district
198 of Missouri; that the defendant Guardian Trust Company was a party to said proceedings.

That such proceedings were held in the two foreclosure suits above mentioned that the said causes were consolidated, and upon the 6th day of November, 1901, there was entered by said court a final decree of foreclosure and sale adjudging and decreeing that default had been made in the payment of the principal and interest upon the bonds secured by the mortgages aforesaid and that the railroads, properties and franchises embraced in each of said mortgages should be sold as in and by the said decree provided, reference being hereby made thereto and to the record in said causes; that pursuant to said decree a commissioner was appointed to make said sale and the said commissioner did on December 31, 1901, at the place in the said decree specified duly sell at public a-ction to the intervenor. The Kansas City Southern Railway Company, it being the highest and best bidder at said sale, all and singular the railroads, property and franchises in said decree mentioned and directed to be sold and in said mortgages described as heretofore set forth, due notice of the time and place of said sales having been published pursuant to said decree, and the said decree was complied with in all things relating to said sales; that said commissioner did duly make and file his report of said sales on December 31, 1901, in the above entitled causes and court which said report and sales were, after notice given, duly confirmed and made absolute, and the said commissioner did thereafter as directed by said court and on or about January 4, 1902, duly convey by commissioner's deed all and singular the railroads, franchises and property of every kind and description theretofore belonging to the said railroad companies and set forth and described in said mortgages including the property held by the said companies respectively at the date of said mortgages and also the property thereafter acquired by them and each of them, to your intervenor, The Kansas City Southern Railway Company, which is now the lawful owner thereof.

3. Your Intervenor further shows that the Union Terminal Railroad Company, one of the defendants herein, being a railroad corporation duly organized and existing under the laws of the State of Kansas, and being about to construct and equip a line of railroad in Wyandotte County, in the State of Kansas, did, on or about February 1, 1893, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company, (now by change of name called the Guardian Trust Company, one of the defendants herein) and the Provident Life & Trust Company of Philadelphia, as
199 Trustees, in which said mortgage or deed of trust it was recited that said mortgage or deed of trust should be a lien upon the railroad of said company and upon all the property and rights of property of the said company of every name, nature and description then held or that might thereafter be acquired including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to the said trustees all and singular the standard gauge railroad of the said Union Terminal Company constructed and to be constructed from a point in the City of Argentine, in the County of Wyandotte, in the State of Kansas, to a point on the north side of the Kansas River opposite the said city of Argentine; thence in a northwesterly direction by the most convenient and practical route, to a point at or near the Missouri River; thence along and down the valley of the Missouri and up the valley of the Kansas river to the place of beginning, so as to substantially encircle the city of Kansas City, Kansas, in said County of Wyandotte; also such branch or branches and spur or spurs as may be necessary to enable it to connect with the Kansas City Suburban Belt Railroad Company's railway at the state line between Missouri and Kansas where the said railway intersects said state line on or near the south bank of the Missouri river; the main line of the railway of the Union Terminal Railroad Company being about twenty-two miles in length and lying wholly within the said County of Wyandotte and State of Kansas; also all the lands, tenements, easements and hereditaments acquired or appropriated, for the purpose of a right of way for said railroad, or for its side tracks or switches; also all railroad tracks, railways, ways and rights of way, depot grounds, station grounds, and other grounds, bridges, viaducts, culverts, and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shops and other shops, water tanks, ties, rails, furniture, fuel, tools, implements, machinery supplies and appliances, and other facilities for maintaining and operating said railroad, as well such as were then owned or held by the company as also such as the company might thereafter construct or acquire and own for use in connection with its said railroad, and also the terminal, terminal rights, privileges, contracts, leases and connections and appliances which the company then owned and held and which it should thereafter own and hold for use in connection with its said railroad; also all and singular the rents, tolls, income, issues and profits of the said railroad, premises and property; and also all the estate, legal and equitable and present and future of the company in and to the same and every part

thereof; and also all the corporate and other rights, privileges,
200 liberties and franchises of the company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof. as well those thereafter to be acquired as those then held; that default was made in the payments required by the terms of said mortgage or deed of trust and on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage and deed of trust in the circuit court of the United States for the district of Kansas, first division; that such proceedings were had in said foreclosure suit; that upon the 6th day of November, 1901, there was entered by the said court a decree of foreclosure and sale, adjudging and decreeing that default had been made in the payment of the principal and interest upon the bonds secured by the mortgage aforesaid and that the railroad properties and franchises embraced in said mortgage should be sold as in and by the said decree provided, reference being hereby made thereto and to the record in said cause; that pursuant to said decree a commissioner was appointed by the court to make said sale, and the said commissioner did, on December 31, 1901, at the place in the said decree specified, duly sell at public auction to the intervenor, The Kansas City Southern Railway Company, it being the highest and best bidder at such sale, all and singular the railroad property and franchises in said decree mentioned and directed to be sold, including all property held by the said railroad company at the time of the execution of said mortgage, as well as property thereafter acquired and held as provided in said mortgage or deed of trust, due notice of the time and place of said sale having been published pursuant to said decree, and the said decree was complied with in all things relating to said sale; that said commissioner did duly make and file his report of said sale on December 31, 1901, in the above entitled cause and court, which said report and sale were, after notice given, duly confirmed and made absolute; and the said commissioner did thereupon and on the 4th day of January, 1902, as directed by said court, duly convey by commissioner's deed all and singular the railroad, franchises and property of every kind and description theretofore belonging to said company at the time of the execution of said mortgage or deed of trust, and also all property therein described thereafter acquired by said company, to your intervenor, The Kansas City Southern Railway Company, which is now the lawful owner thereof.

4. Your intervenor further states that the Kansas City, Pittsburg & Gulf Railroad Company, being a railroad corporation duly organized and existing under the laws of the State of Missouri, and being
engaged in the construction of a line of railroad from a point
201 near Kansas City, Missouri, southwardly to the Gulf of Mexico, did on or about April 1, 1893, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein) and the State Trust Company of the City of New York, as Trustees, in and by which said mortgage or deed of trust there is conveyed to the trustees therein named all and singular the line of railroad constructed or thereafter constructed or acquired

from Kansas City in the State of Missouri, southerly through the counties of Jackson, Cass, Bates and Vernon, and the northwest corner of Barton County, in said State of Missouri to the western line of Barton County in said State of Missouri, and so on to the city of Mena in the State of Arkansas; and all and singular the railroad, ways and rights of way, roadbeds, depot grounds and other lands and all tracks, bridges, viaducts, culverts, fences, depots, stations, station houses, engine houses, car houses, freight houses, wood houses, locomotive shops and other shops, and all other structures and buildings whatsoever then held or owned or which should be thereafter in anywise acquired, held or owned by the said railroad company for use in the construction, maintenance or operation of its line of railroad or any extension, continuation, branch railroad or lines of railroad which it might thereafter purchase, construct or acquire in connection with its main line of railroad; also all locomotives, tenders and passenger, baggage, freight, cattle and other cars, and all other rolling stock and equipment whatsoever, and all machinery, tools and implements and all fuel, supplies and materials then or thereafter held, owned or acquired by said railroad company for constructing, maintaining, operating and repairing its said railroad or any extension or branch thereof; also all rights, privileges, powers, immunities and exemptions and all corporate and other franchises then owned, held and enjoyed by the said railroad company with respect to said main line or any part thereof or which should be thereafter owned, acquired, held or enjoyed by or conferred upon said railroad company connected with or relating to the said main line of railroad, its extensions, continuations and branches; also all leases, traffic contracts and arrangements of every kind and character whatsoever which said railroad company had or might thereafter enter into with any other railroad company forming part of the said line; also all and singular any tenements, hereditaments and appurtenances to said railroad or lines of railroad and each and every part thereof acquired and to be acquired, constructed, and to be constructed, then or thereafter belonging or in any wise appertaining; and all the reversion and reversions remainder and remainders, estate, right, title, interest, prop-
202 erty, possession, claim and demand whatsoever, as well in law as in equity which the said railroad company then had or was entitled to or which the said railroad company, its successors or assigns should thereafter acquire or become entitled to concerning the said railroad or any extension, continuation or branch thereof or their rights, franchises and each and every part and parcel thereof with the appurtenances. Said mortgage or deed of trust was executed and delivered to said trustees to secure an issue of the first mortgage bonds of said railroad company in the principal sum of Twenty-three Million Dollars ($23,000,000.00); that default was made in the payments required by the terms of said mortgage or deed of trust, and on April 28, 1899, proceedings were instituted in the Circuit Court of the United States for the western division of the western district of Missouri for the foreclosure of the said mortgage or deed of trust; that such proceedings were had in

said action that on the 5th day of January, 1900, there was entered by said court a decree of foreclosure and sale adjudging and decreeing that default had been made in the payments of the principal and interest upon the bonds secured by the mortgage or deed of trust aforesaid; and that the railroads, properties and franchises embraced in said mortgage should be sold as in and by the said decree provided, reference being hereby made thereto and the record in said cause; that pursuant to said decree a special master was appointed to make said sale and the said special master did, on March 19, 1900, at the place in said decree specified duly sell to a committee acting for your intervenor, the said committee being the highest and best bidder at said sale, all and singular the railroads, property and franchises in said decree mentioned, including the properties owned and acquired at the time of the execution of said mortgage or deed of trust as well as those thereafter acquired for use in connection with its said railroad, and directed to be sold, due notice of the time and place of said sale having been published pursuant to said decree and sale, and said decree was complied with in all things relating to said sale; that your intervenor by leave and order of court became the substitute bidder in the place of said committee; that said special master did duly make and file his report of said sale on March 20, 1900, in the above entitled cause, which said report and sale were, after notice given, duly confirmed and made absolute, and the said special master did thereupon, as directed by said court, duly convey by master's deed all and singular the railroad, franchises and property of every kind and description belonging to the said railroad company, including not only the properties described in said mortgage or deed of trust as then owned and held by the said railroad company but also the properties thereafter acquired for use in connection with the operation of
203 said railroad, to your intervenor, The Kansas City Southern Railway Company, which is now the lawful owner thereof.

The mortgages or deeds of trust mentioned in the foregoing paragraphs are all duly and properly acknowledged and duly and properly recorded in the various counties in which the properties mentioned therein were respectively located at or about the dates of said mortgages or deeds of trust respectively.

5. The intervenor further shows that, about the year 1887, the defendant Guardian Trust Company, hereinafter called the Trust Company, conceived and entered upon the plan and purpose to cause to be constructed a number of railroads in and about Kansas City in the State of Missouri, and Kansas City in the State of Kansas, and leading from or to said city; it was a part of the said plan and purpose of the Trust Company to cause said railroads to be built, constructed and operated by various corporations to be organized by the Trust Company and to elect certain of the officers, agents and representatives of the said Trust Company as the officers and directors of the said several railroad companies so as to at all times to absolutely dominate and control the corporate action of the said railroad companies through their common directors and officers; it was a further part of the plans and purposes of the Trust

Company to utilize and employ some one or more of the said railroad companies to act for and on behalf of the Trust Company in building and operating railroads and in the issue of bonds and stocks so as to gather unto the Trust Company all the profits and other advantages accruing in the premises to foist upon the said railroad companies so utilized any and all losses, burdens or other liabilities which might result in the course of their operation; in carrying out its said plans and purposes the Trust Company assumed the position of trustee and agent in constructing and operating said railroad and in managing and disposing of the bonds, stocks, funds and other assets of the said railroad companies and is held to the liability of trustee or agent for the use and benefit of the parties who might and did become concerned or interested therein; and that consequently the relation of the Trust Company to each and all of the said railroad companies and especially those hereafter named so far as the said Trust Company might employ the same, or either of them, as agents and instrumentalities to further its own plans and purposes, was that of a principal bound and charged with the duty to indemnify and protect such railroad company so employed and utilized in any particular transaction against any and all losses, burdens and liability arising in the prem-
204 ises; moreover the Trust Company was either the sole trustee in the mortgages above mentioned, or when joined as co-trustee with the Provident Life & Trust Company was the active trustee in the charge and management of the trust created by the several mortgages or deeds of trust above described, and as such trustee owed an active duty at all times during the continuance of such relation, to care for and in every way protect the interest of the bondholders secured by said mortgages, as well as to care and protect the interests of the mortgagors themselves; the Trust Company in pursuance of the plans and purposes so conceived and entered upon by it, did acquire the control of the Kansas City Suburban Railroad Company, hereinafter called the Suburban Company, in the year 1899, and caused it to issue the bonds secured by the mortgage aforesaid and to issue capital stock in a large amount and to cause said company to construct and thereafter to operate a railroad in Jackson County, Missouri, as described in the mortgage or deed of trust of said company heretofore set forth; the Trust Company, in pursuance of the same plan, did, in 1891, cause to be incorporated the Consolidated Terminal Railroad Company (hereinafter called the Consolidated Company) and did cause said Consolidated Company to issue bonds and a mortgage or deed of trust to secure the same, and to issue its capital stock in a large amount, and to construct a railroad in Kansas City, Jackson County, Missouri, connecting with the railroad of the Suburban Company, the two roads forming a continuous line of railroad from the state line between the states of Kansas and Missouri at a point in the eastern portion of Jackson County known as Belt Junction; that in December, 1891, the Trust Company caused to be incorporated under the laws of the State of Kansas the Union Terminal Railroad Company (hereinafter called the Terminal Company) and did cause it to issue and execute the bonds

and mortgage or deed of trust above referred to and issue capital stock in a large amount and did further cause it to construct a railroad beginning at the state line between the states of Kansas and Missouri and extending southwesterly along the left bank of the Kaw, or Kansas, river to a point at or near the town of Argentine, Wyandotte County, Kansas; in January, 1891, the Trust Company caused to be incorporated under the laws of the State of Missouri, the Kansas City & Independence Air Line (hereinafter referred to as the Air Line) and did cause the Air Line to issue and execute the bonds and mortgage above referred to and issue stock in a large amount and to construct and operate a railroad in Jackson County, Missouri, extending from a point on the line of the Suburban Company known as Air Line Junction to the City of Independence
205 in the State of Missouri. Shortly after the issue of the bonds and stocks of the Consolidated Company the Trust Company caused it to Consolidate with the Suburban Company forming a new company called the Kansas City Suburban Belt Railroad Company (hereinafter referred to as the Belt Company); that the Trust Company caused the Terminal Company to execute a lease of all its property, rights and franchises to the Belt Company and thereunder the Belt Company operated the line of the Terminal Company and its own line and continued so to operate the same until the institution of the foreclosure proceedings above referred to; the Trust Company, by virtue of its ownership and control of the capital stock of the Belt Company, Air Line and Terminal Company, did, at all times, cause its officers and directors to be elected as the officers and directors of said lines, and did thereby dominate and control all the affairs and business of said lines and caused them and each of them to do and perform all such corporate acts and things as the Trust Company from time to time deemed to be beneficial to its own interests; that the Trust Company in the year 1893 caused to be incorporated the Kansas City, Pittsburg & Gulf Railroad Company, hereinafter called the Gulf Company, and caused it to issue and execute the bonds and mortgage or deed of trust above referred to and issue stock in a large amount. The Trust Company also caused the Gulf Company to construct and operate a railroad extending generally from a point near Kansas City, Jackson County, Missouri, to the Gulf of Mexico and did cause the Gulf Company to enter into contracts with the Belt Company for the use of the latter's terminals at Kansas City; the Trust Company also caused its officers and directors to be elected officers and directors of the Gulf Company and at all times by that means did dominate and control the affairs of the Gulf Company and did cause it to perform such corporate acts and things as the Trust Company deemed to be for its benefit and advantage; that by reason of such domination and control *of* the Trust Company at all times had a complete and intimate knowledge of all the affairs and transactions of all the companies above referred to in all their details, including the transactions hereinafter specifically mentioned.

6. Your intervenor further shows that in the year 1895, the Trust Company caused to be incorporated under the laws of the

State of Missouri the Central Improvement Company (hereinafter called the Central Company) the directors and officers of which were at all times made up from the directors and officers of the Trust Company, and the Central Company was at all times in all of its transactions dominated and controlled by the Trust Company;

206 the purposes of the incorporation of the said Central Company were to hold the legal title to real estate that might be needed and acquired for right of way or other purposes necessary for and in connection with the operation of the various railroad companies so dominated and controlled by the Trust Company, in some instances the purpose being that upon the purchase of property by one of the said railway companies the title should be taken in the name of the Central Company in order that it might be enabled to give back a mortgage or deed of trust to secure a portion of the purchase money, which said mortgage or deed of trust would be a first lien and not subject to the first mortgage or deed of trust lien upon the property of the railway companies respectively. In pursuance of this plan large amounts of money were furnished to the Central Company by the Belt Company, by the Air Line and by the Gulf Company for the purchase of right of way and terminal properties necessary for the use and operation of the said railways respectively, and purchases were accordingly made of properties for the use and operation of said companies, a list of which properties so purchased is hereto attached, marked "Exhibit A"; this statement shows the price paid for each particular piece of property and for which particular railroad company the said property was acquired, and by which company the purchase price was paid; that the titles to said property so acquired were, for convenience merely, placed in the name of the said Central Company; in some instances the money so furnished to pay for such properties was furnished directly by the Belt Company or other companies for whose benefit the purchase was made to the vendors and in other instances the money was furnished direct to the Central Company, which issued to the company so furnishing such funds its capital stock representing approximately the amount of moneys so furnished. That in this way there were issued by the Central Improvement Company fourteen hundred and seven (1407) shares, of which eight hundred and seventeen shares (817) are now held by the Belt Company, three hundred and thirty four (334) shares are now held by the Union Terminal Company, twenty-two (22) shares are now held by the Air Line and two hundred and thirty four (234) shares are now held by the Gulf Company, such companies having furnished from time to time for the purchase of property for the use and benefit of such companies the following amounts:

Belt Company	$129,673.96
Air Line	16,104.41
Gulf Company	23,673.89

that no money was ever received by the Central Company except the money so furnished as aforesaid, and it did not have at any time any assets or property except property so purchased as aforesaid;

that the said fourteen hundred and seven (1407) shares of
207 stock were the only shares of stock ever lawfully issued by the Central Company; and by reason of the premises the said Central Company is, and was at all times, a mere trustee holding the legal title to the various properties, in trust, for the said railways, for whose use and benefit said lands were purchased as aforesaid; immediately upon the making of such purchases and the vesting of title in the Central Company the particular railroad company for which such purchase was made became the equitable owner and entitled to a conveyance thereof; the said properties so purchased for the said railroad companies and to which the said railroad companies respectively were entitled to a conveyance were necessary for the use of such railroad company in connection with and in the operation of its railroad and came within the after acquired property clause of the mortgage placed upon said road, so that the equitable liens of said mortgages respectively attached to and became a charge upon the said properties in favor of their bondholders respectively; that sales of some of said properties have been made by the Central Company and by its receiver acting under order of this court and the proceeds thereof are now in the possession of said receiver. By the foreclosure proceedings above mentioned and decrees of sale had thereunder the intervenor acquired the equitable title to all of said properties so held by the Central Company, as aforesaid, and became and is now entitled to a conveyance of the same and to the proceeds of sales thereof now held by the said receiver, but the Trust Company denies the right of the intervenor to said property or to the stock of the Central Company, and pretends to hold the said stock of the Central Company as collateral security to an alleged indebtedness from the Belt Company to it, as hereinafter more specifically set forth.

7. Your intervenor further shows that, prior to February 1, 1900, the Belt Company purchased and owned a large quantity of steel rails for use in the construction and repair of its railroad and in connection therewith; there were in the possession of the Belt Company on February 1, 1900, and prior thereto, approximately six hundred (600) tons more or less of said steel rails so owned by the Belt Company and approximately twenty tons of fastenings for use in connection therewith; by virtue of the after acquired property clause above referred to in the mortgage of the Belt Company, the said steel rails and fastenings became charged with a lien to secure the payment of the bonds so issued by the Belt Company, as aforesaid, upon the foreclosure of the said mortgage of the Belt Company and the sale had thereunder the equitable title to said rails passed
to and vested in the intervenor, The Kansas City Southern
208 Railway Company, and it became and is now the equitable owner thereof; the Trust Company claims to have acquired said steel rails and fastenings on or about February 1, 1900, as collateral security to an alleged indebtedness from the Belt Company to it and the Trust Company denies the right and claim of your intervenor to said steel rails and fastenings, although it received the same with actual notice of the mortgage lien thereon, the value

of said steel rails and fastenings was and is thirty five dollars ($35.-00) per ton and the Trust Company should be required in equity to deliver said property to your intervenor, or if the said property has been sold by the Trust Company then it should be required to account for and pay to your intervenor the proceeds or full value thereof.

8. Your intervenor further states that the railroad of the Terminal Company was a connecting railroad with the line of the Belt Company the two railroads forming a continuous line of railroad and the Belt Company was, therefore, authorized by law to aid the Terminal Company in the construction of its road and to acquire the stock of the Terminal Company in the lawful execution of the corporate purposes of the Belt Company did acquire five thousand (5,000) shares of the capital stock of the Terminal Company and held said stock for the uses and purposes of its railroad as by law duly authorized to do; by virtue of the after acquired property clause in the mortgage executed by the Belt Company as above set forth, the lien of said mortgage in equity attached to said five thousand (5,000) shares of Terminal stock when so acquired by the Belt Company and inured to the benefit of the stockholders of the Belt Company as the Trust Company well knew. The Trust Company acquired possession of said Five Thousand (5,000) shares of Union Terminal stock so covered by said mortgage lien as aforesaid, and claims to hold the same as collateral security for an alleged indebtedness from the Belt Company to it, and denies the right of your intervenor to said stock or to the proceeds thereof. On or about June 14, 1900, the Trust Company claims to have sold said five thousand (5,000) shares of Terminal stock at and for the sum of twenty-five thousand ($25,000.00) dollars which sum was the fair value thereof at that time. By virtue of the said mortgage of the Belt Company and the foreclosure proceedings and sale thereunder your intervenor became entitled in equity to said five thousand (5,000) shares of Terminal stock, or twenty-five thousand dollars ($25,000.00), the value or proceeds thereof, together with interest thereon at six per cent per annum from said June 14th, 1900, which the Trust Company unlawfully withholds from the intervenor.

209 The Air Line owned and operated a railroad connecting with the railroad from the Belt Line, as hereinbefore stated, and the two formed a continuous line of railroad, and the Belt Company thereby, by virtue of the Statutes of the State of Missouri, became entitled to aid the Air Line in the construction of its road and to purchase and hold the capital stock of the Air Line; prior to June 11, 1900, the Belt Line had acquired and owned 4,994 shares of the capital stock of the Air Line; the Belt Line also at the same time had acquired as aforesaid and held 14,997 shares of the Terminal stock in addition to the five thousand shares above mentioned; that the said Terminal stock and the said Air Line stock were acquired by the Trust Company claiming to hold the same as collateral security to an alleged indebtedness from the Belt Line to it but the said stocks had been acquired by the Belt Company prior thereto and were covered by the after acquired property clause in

the mortgage of the Belt Company, as the Trust Company well knew, to secure the bonds of the Belt Company; and upon the foreclosure of said mortgage of the Belt Company and the sale thereunder to your intervenor the latter acquired the equitable title to said stock or to the value or proceeds thereof; the Trust Company claims that it did, on or about June 11, 1900, sell said 14,997 shares of Terminal stock and 4,994 shares of the Air Line stock at the sum or price of $9,996.65; and it holds the said stocks or the proceeds thereof and denies the right of your intervenor thereto; that your intervenor in equity is entitled to said stock or, if the same has been sold by the Trust Company, to have the Trust Company account to it for the value or the proceeds thereof together with interest thereon from June 11, 1900, at six per cent.

9. Your intervenor states that in the year 1896, the Trust Company caused to be incorporated a railroad corporation under the laws of the State of Missouri, called the Kansas City Northern Connecting Railroad Company (hereinafter called the Connecting Company) for the purpose of constructing a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with the railroads at that point running eastwardly to Quincy, Illinois, and northwardly to Council Bluffs, Iowa. The Trust Company, after the incorporation of said railway company, caused it to execute its bonds, secured by mortgage or deed of trust, in a large amount and to issue its capital stock in a large amount, and thereupon caused the Connecting Company and the Belt Company to enter into a contract, by the terms of which the Belt Company undertook to acquire the right of way and to construct the railroad of the Connecting Company, and as a consideration thereof, the
210 Connecting Company agreed to execute, issue and deliver to the Belt Company the bonds and stocks of the Connecting Company; that the proposed line of the Connecting Company formed a direct connection with the line of the Belt Company and the two lines formed a continuous line of railroad; in pursuance of said contract the Belt Company began the construction of the railroad of the Connecting Company and the acquisition of its right of way, and received as a consideration for so doing, a large amount of the first mortgage bonds and of the capital stock of the Connecting Company and held and owned a large amount in value of said stock and bonds, for use in connection with the operation of its railroad on and prior to July 20, 1899; that at various dates the Trust Company took and converted to its own use eleven hundred and thirty (1130) of the first mortgage bonds of the Connecting Company which at that time belonged to the Belt Company and were of the value of eight hundred forty five thousand four hundred and fifteen dollars ($845,415.00); that at the same time the Trust Company took and converted to its own use sixteen (16) of the second mortgage bonds of the Connecting line which were at that time owned by the Belt Company, of the value of seven thousand two hundred dollars ($7,200.00); that at the same time the Trust Company took and converted to its own use six thousand two hundred and fifty (6250) shares of the capital stock of the Con-

necting Company, which were the property of the Belt Company of the value of thirty-seven thousand five hundred dollars ($37,500.00). On or about July 20, 1899, the Trust Company took from the Belt Company four hundred and fourteen (414) mortgage bonds of the Connecting Company and three thousand nine hundred and twenty (3920) shares of the stock of the Connecting Company, which were at that time the property of the Belt Company, and claimed to hold the same as collateral security for an alleged indebtedness from the Belt Company to it. All of said bonds and stocks came under the after acquired property clause of the mortgage or deed of trust executed by the Belt Company and were charged with an equitable lien to secure the bonds of the Belt Company, as the Trust Company at all times well knew. By the foreclosure proceedings and sale to your intervenor as above referred to the equitable title to said stocks and bonds or to the proceeds thereof, when they had been sold by the Trust Company, vested in your intervenor, which is now in equity the owner thereof. On or about September 30, 1899, the Trust Company claims to have sold said 3920 shares of Northern Connecting stock and to have received therefor the sum of Nineteen thousand eight hundred and eighty-five and 71/100 Dollars ($19,885.71); the Trust Company denies the right
211 of your intervenor to said bonds and stocks, or the value or proceeds thereof, but claims that it has since the acquisition thereof sold all of said first mortgage bonds, including those above referred to as collateral and to have received therefrom the proceeds thereof in the sum of Nine Hundred Ninety-five Thousand four hundred fifteen dollars ($995,415.00) and your intervenor is entitled in equity and good conscience to have the proceeds of all of said stocks and bonds above mentioned accounted for and paid to it.

10. Your intervenor further shows that in the month of —— 1896, the Trust Company caused the Belt Company to enter into a terminal contract with the Gulf Company, by the terms of which the Belt Company gave to the Gulf Company an entrance into Kansas City and certain valuable terminal rights and facilities; and the Gulf Company on its part undertook and agreed to pay to the Belt Company certain sums of money as rental for the rights and privileges granted to it in said contract; both parties entered upon the performance of said contract and continued so to do until April 1, 1899, when receivers for the Gulf Company were appointed by the Circuit Court of Jackson County, Missouri. At the time of the appointment of said receivers there was due to the Belt Company from the Gulf Company under and by virtue of the terms of said terminal contract a large sum claimed by the Trust Company to be in excess of One Hundred Thirty Three Thousand Dollars ($133,000.00). That said terminal contract, by virtue of the provisions of the after acquired property clause in the mortgage of the Belt Company heretofore set forth became charged in equity with the mortgage lien to secure the bonds issued by said company, and the rents, issues and profits at that time due the Belt Company under said contract also became

charged in equity with the mortgage lien of the Belt Company to secure said bonds; that by virtue of the said foreclosure proceedings and sale thereunder to your intervenor the latter acquired all equitable right and title to said contract and to the rentals due thereon as the Trust Company at all times well knew. The Belt Company, on or about February 1, 1900, undertook to transfer and assign said account to the Trust Company as collateral security to secure an alleged indebtedness from the Belt Company to it and the Trust Company claims to be the assignee of said account, and refuses to cancel or re-assign said account to your intervenor as in equity and good conscience it should be required to do.

11. Your intervenor further states, that in connection with the contract between the Belt Company and the Connecting Company aforesaid, and as a part of the obligation of the Belt Company under said contract to procure the right of way for the
212 railroad of the Connecting Company, the Belt Company purchased and acquired certain lands along the line of said railroad in addition to the right of way and took the title thereto in a corporation organized under the laws of the State of Missouri called the Northern Townsite Company (hereinafter referred to as the Townsite Company) which corporation was organized by the Trust Company and officered by the officers of the Trust Company. In purchasing land for said right of way it became frequently necessary, in the economical handling of the matter, to purchase larger tracts out of which the right of way would be carved, and also to purchase lands for townsites, and the title to the lands of this character that were purchased was taken in the name of the Townsite Company. All of the money used in purchasing said lands, amounting to the sum of Forty Six Thousand Four Hundred Sixty Three and 75/100 Dollars ($46,463.75) was furnished and provided by the Belt Company, except the sum of $6,288.57, which was furnished and provided by the Trust Company. That the capital stock of the Townsite Company, to the extent of 439 shares, was by it issued to the Belt Company to represent the moneys contributed by it in the purchase of said lands; that the purchase of said lands was incidental to the construction of the railroad of the connecting line; and the title to said lands (except such as may be held to have been purchased with moneys furnished by the Trust Company) in equity belonged to the Belt Company and were covered by the after acquired property clause in the mortgage of the Belt Company as aforesaid; that by virtue of the said foreclosure proceedings and sale thereunder to your intervenor, the latter became vested with the title to said lands so owned in equity by the Belt Company and became entitled to the capital stock so issued by the Townsite Company to the Belt Company; that the Trust Company denies the right of your intervenor to said lands, or any part thereof, and to said capital stock, and claims to hold the said capital stock as collateral security to an alleged indebtedness from the Belt Company to it. By virtue of the premises your intervenor is entitled in equity and good conscience to a decree

requiring the Trust Company to turn over to your intervenor all of the said capital stock representing moneys advanced by the Belt Company, and to the cancellation of any and all of the capital stock of said Townsite Company issued without consideration, or to a conveyance to the Belt Company of all the properties and assets of the Townsite Company upon repayment to the Trust Company by your intervenor of the said sum of $6,288.57, so advanced by the Trust Company to the Townsite Company.

213 12. Your intervenor further shows that, as above stated, the Trust Company at all times fully controlled and dominated all the corporate acts and doings of the Belt Company; that the Trust Company at all times caused its own officers and directors to be the officers and directors of the Belt Company, and was in a position to require, and did require, the said officers and directors of the Belt Company to do and perform the will and behest of the Trust Company in each and every act and deed. The Trust Company, while possessed with this power of domination and control, did not exercise the same for the interest or benefit of the Belt Company or its stockholders or bondholders whose bonds were secured by mortgage on the property of the Belt Company; nor did the Trust Company in and degree or in any way carry out the duties imposed upon it as trustee in said mortgage, but on the contrary the trust company at all times controlled the acts and doings of the Belt Company in the interest and for the benefit of the Trust Company and exercised its powers and duties as trustee in said mortgage in its own interest and in violation of its trust.

On April 1, 1899, the Gulf Company, being then insolvent, defaulted in the payment of a semi-annual installment of interest then due and on the same day all its railroads and properties were placed in the hands of receivers appointed by the Circuit Court of Jackson County, Missouri; and on April 28, 1899, upon bill filed by the State Trust Company all the railroads and property of the Gulf Company were placed in the hands of receivers appointed by the United States Circuit Court for the Western Division of the Western District of Missouri, the suit and proceedings in the State court being then dismissed. Prior to said default the Trust Company, whose officers and directors were also the officers and directors of the Gulf Company as well as of the Belt Company, knew that a default would occur and that receivers would be appointed and the Trust Company also knew if the Gulf Company became bankrupt or passed out of its possession and control the other auxiliary companies, to-wit, the Belt Company, the Air Line, the Union Terminal and the Consolidated Terminal, would soon likewise pass out of its control and domination; and the Trust Company, in violation of its duty as trustee in said mortgages and with a view of appropriating to itself whatever of value there was remaining in the possession of the said companies, contrived the plan of requiring said companies to turn over to it all of the personal property owned by said companies, of every nature and description, as and for security for alleged indebtedness from the Belt Company to it. In

pursuance of this plan the Trust Company on March 31, 1899, caused the Belt Company to turn over to it Ten thousand
214 five hundred (10,500) shares of the capital stock of the Terminal company to secure an alleged indebtedness; and on July 20, 1899, the Trust Company caused the Belt Company to turn over to it, as collateral security to secure said alleged indebtedness, four thousand nine hundred ninety eight (4998) additional shares of stock of the Union Terminal Company, four thousand nine hundred and ninety three (4993) shares of the stock of the Kansas City & Independence Air Line, eleven hundred twenty (1120) shares of stock of the Central Improvement Company, four hundred thirty nine (439) shares of stock of the Northern Townsite Company, four hundred and twenty five (425) shares of the stock of the Missouri Elevator & Terminal Company, twenty five (25) shares of the stock of the Fairmount Amusement Company, thirteen thousand nine hundred and twenty (13920) shares of the stock of the Kansas City & Northern Connecting Company, sixty seven and nine tenths (67.9) second mortgage bonds of the Kansas City & Northern Connecting Railroad Company, and also the right of the Belt Company to receive eighteen hundred and fifteen (1815) additional shares of the stock of the Northern Connecting Railroad Company; also two hundred and seven and five tenths (207.5) of the second mortgage bonds of the Kansas City & Northern Connecting Railroad Company. On September 30, 1899, the Trust Company caused the Belt Company to sell to it all of the stock of the Kansas City & Northern Connecting — held by the Belt Company at the price of one and three sevenths Dollars (1 3/7) per share to apply upon the alleged indebtedness from the Belt Company to the Trust Company. On February 5, 1900, a decree of foreclosure and sale was rendered in the foreclosure proceedings in the United States Circuit Court for the Western Division of the Western District of Missouri in the case of State Trust Company against the Gulf Company; the Trust Company knew some time prior to the rendition of said decree that said decree would be rendered and accordingly on February 1, 1900, the Trust Company caused the Belt Company to pretend to hold a meeting of its directors and to specifically turn over all of the afore-mentioned stocks and bonds to the Trust Company to secure said alleged indebtedness, and also to assign and transfer to the Trust Company by bill of sale as collateral security six hundred (600) tons, more or less, of sixty-pound (60-lb.) steel rails owned by the Belt Company and stored in its yards at East Kansas City; and to assign and transfer to the Trust Company an account owned by the Belt Company against the Gulf Company in the sum of One Hundred Thirty Three Thousand and fifty eight and 4/100 Dollars ($133,058.04) as collateral security for the said alleged indebtedness. This transaction com-
215 pletely stripped the Belt Company and the other companies of all portable personal property and there was nothing left which could be appropriated by the Trust Company under the guise of taking additional security.

Your intervenor further states that the said acts of the Trust Company in causing the Belt Company to turn over said stocks, bonds and property and account to the Trust Company, were unlawful and void and were solely due to the unlawful domination and control exercised by the Trust Company over the officers and directors of the Belt Company as aforesaid; that the matters and things so done and transacted were not known to or approved by any independent board of directors or to the persons in interest owning the stocks and bonds of the Belt Company.

Your intervenor further states that the Trust Company by reason of its control of the Belt Company had intimate and exact knowledg- of all the affairs and accounts, assets and liabilities of the Belt Company although it was trustee in the mortgage of the Belt Company, and thus bound to a high degree of fidelity to the interests of the Belt Company and its bondholders, yet it used its knowledge of the affairs of the Belt Company to its own advantage in endeavoring and undertaking to protect what it claimed its own indebtedness rather than the other indebtedness of the Belt Company, both floating indebtedness and also that secured by the mortgage aforesaid, all of which was contrary to equity and good conscience and in violation of its duties as trustee; the Trust Company by virtue of its position as trustee in said mortgage and its relation to the bondholders and to the mortgagor is estopped to assert that it took said security to secure its own alleged indebtedness, but it is deemed and held in equity to have received said collateral security above specifically described as trustee under the said mortgage of the Belt Line for the benefit of the outstanding bonds secured thereby. The equities, if any there be, in favor of the Trust Company are inferior and subordinate to the superior equity of your intervenor to the collateral security above described by virtue of the mortgage of the Belt Company and the purchase at foreclosure sale thereunder by your intervenor.

13. Your intervenor further states that, on September 6, 1900, the Cambria Steel Company, a corporation organized and existing under the laws of the State of Pennsylvania, exhibited its creditors' bill in this case based upon a judgment and unsati-fied execution against the Belt Company. It is claimed by the said Cambria Company that the collateral security now held by the Trust Company being a part of the collateral security above described, is not
216 covered by the mortgage executed by the Belt Line but that said collateral security so held by the Trust Company may be subjected to the payment of the judgment of the Cambria Company; but your intervenor states that the claims of the Cambria Company under the said creditors' bill are subordinate and inferior to the claims of your intervenor as aforesaid. Your intervenor further shows that, on the — day of November, 1901, the Belt Company and its receivers filed their ancillary bill against the Cambria Company and the parties defendant herein, claiming that the alleged indebtedness asserted by the Trust Company against the Belt Company was fictitious and that no such indebtedness in

fact existed; and further claiming that said indebtedness as well as the notes heretofore executed by the Belt Company to evidence the same, should be cancelled, and that the said collateral security held by the Trust Company should thereupon be returned to the said Belt Company and its receivers. Your intervenor shows that the claims of the Belt Company and its receivers, for the reasons hereinbefore set forth are inferior and subordinate to the claims of your intervenor. An injunction has been issued in this cause by this court restraining the Trust Company from disposing of said collateral until the final order and decree of this court as to all of said collateral security, except as to ninety-nine (99) first mortgage bonds of the Connecting Company which have heretofore been sold and the proceeds thereof, amounting to forty thousand dollars ($40,000.00) are held in lieu of said bonds to await the final judgment and decree of the court.

Wherefore, your intervenor prays:

a. For the judgment, order and decree of this court requiring the Central Improvement Company and its Receiver to convey to your intervenor all the real estate or other property standing in its name and to turn over to your intervenor all the moneys held by the Central Improvement Company, or its Receiver, or owing to it, or them, arising from the sale or the proceeds of said property;

b. That the defendant, Guardian Trust Company, be required to account for and pay to your intervenor the value of the steel rails and fastenings mentioned in paragraph seven (7), together with interest thereon;

c. That the defendant, Guardian Trust Company, be required to account for and pay to the intervenor the value of the five thousand (5,000) shares of Union Terminal stock, together with the value of four thousand nine hundred and ninety four (4,994) shares of the capital stock of the Air Line and also the value of
217 the fourteen thousand nine hundred and ninety seven (14,997) shares of the capital stock of the Terminal Company, together with interest thereon.

d. That the defendant, Guardian Trust Company, be required to account for and pay to your intervenor the value of the bonds of the Kansas City and Northern Connecting Railroad Company mentioned in the preceding paragraph nine.

e. That the defendant, Guardian Trust Company, be required to assign to your intervenor the account of the Belt Company against the Gulf Company mentioned in the foregoing paragraph ten.

f. That the defendant, Guardian Trust Company, be required to release to your intervenor all of the capital stock of the Northern Townsite Company and that said Northern Townsite Company and its receivers be required to convey to your intervenor all of the property held by said Northern Townsite Company and its receivers, together with all the moneys in their possession or owing to them as the proceeds of the property formerly held by said Townsite Company upon repayment to the Trust Company of such sum as the Court may find was contributed by said Trust Company for the pur-

chase of property taken in the name of the Townsite Company and for such further relief as may be equitable and just.

(Signed) S. W. MOORE,
T. R. MARKS,
Solicitors for Intervenor.

STATE OF MISSOURI,
County of Jackson, ss:

H. B. Johnson, of lawful age, being duly sworn upon his oath says, that he is the Auditor of The Kansas City Southern Railway Company, and makes this affidavit for and on its behalf; that he has read the foregoing intervening petition and knows the contents thereof; and that the matters and facts therein stated are true as he verily believes.

(Signed) H. B. JOHNSON.

Subscribed and sworn to before me this 27th day of February, 1905.

[SEAL.] CLARENCE R. HALL,
Notary Public in and for Jackson County, Missouri.

My commission expires Oct. 10, 1908.

Afterwards, to-wit, on the 7th day of March, A. D. 1905, the Guardian Trust Company filed its answer to the intervening
218 petition of the Kansas City Southern Railway Company. Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

The Answer of Guardian Trust Company to the Intervening Petition of the Kansas City Southern Railway Company.

To the Judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

The Guardian Trust Company, one of the defendants in the above entitled cause, and one of the respondents to the intervening petition

of the Kansas City Southern Railway Company, for its separate answer to said intervening petition, answering, says:

1. This respondent admits that the said intervenor is a corporation, duly organized and existing under the laws of the State of Missouri, as a railway corporation, and that it was incorporated, according to law in March, 1902.

2. This respondent admits that *on or* about March, 1890, the Kansas City Suburban Belt Railroad Company, a railroad corporation duly organized under the laws of the State of Missouri, executed and delivered its deed of trust to this respondent, as trustee, for the purpose of securing an issue of the first mortgage bonds of said Railroad company in the principal sum of one million ($1,000,000.) dollars; and this respondent admits that the provisions of said trust deed are substantially as set forth in said intervening petition. That default was made in the payments required by the terms of said mortgage or trust deed and that on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage or trust deed, as is alleged in said intervening petition, and that this respondent was a party to said proceedings.

This respondent admits that the Kansas City and Independence Air Line, being a railroad corporation duly organized under
219 the laws of the State of Missouri, did, on or about March 1, 1892, execute its deed of trust to this respondent as trustee to secure an issue of the first mortgage bonds of said last named railroad company in the principal sum of three hundred thousand ($300,000.) dollars, and that the provisions of said trust deed are substantially as set forth in said intervening petition. That default was made in the payments required by said last named mortgage, and that on September 6, 1900, proceedings were instituted for the foreclosure of said last named mortgage in the Circuit Court of the United States for the Western Division of the Western District of Missouri, and that this respondent was a party to said proceedings.

This respondent admits that the two foreclosure suits, above mentioned, were consolidated, and that upon the sixth of November, 1901, a final decree of foreclosure and sale was entered in said consolidated suit and the property therein involved decreed to be sold; that pursuant to said decree a sale was made and that the Kansas City Suburban Railway Company was the purchaser at said sale, but this respondent says that said mortgages were foreclosed and said suits were commenced and prosecuted and said sale made pursuant to and in accordance with the plan and scheme hereinafter described and under the circumstances hereinafter stated.

3. This respondent admits that the Union Terminal Railroad Company, being a railroad corporation organized under the laws of the State of Kansas, did on or about February 1, 1893, execute and deliver its deed of trust to this respondent and to the Provident Life and Trust Company, of Philadelphia, as trustees, and that the provisions of said mortgage or deed of trust are substantially as set forth in said intervening petition. That default was made in the payment required by the terms of said mortgage and trust deed and

that on February 6, 1900, proceedings were instituted for the foreclosure of said last named mortgage in the Circuit Court of the United States for the District of Kansas in the First Division; that such proceedings were had in said suit that upon the sixth day of November, 1901, a decree of foreclosure and sale was entered therein on the property and franchises embraced in said mortgage were decreed to be sold; that a sale was had pursuant to said decree, at which sale the Kansas City Southern Railway Company became the purchaser, but this respondent says that said mortgage was foreclosed and said suit was commenced and prosecuted and said sale made pursuant to and in accordance with the plan and scheme hereinafter described and under the circumstances hereinafter stated.

220 4. This respondent admits that the Kansas City, Pittsburg and Gulf Railroad Company, being a railroad corporation organized and existing under the laws of the State of Missouri did, on or about April 1, 1893, execute and deliver its deed of trust to this respondent and the State Trust Company of the City of New York, as trustees, to secure an issue of the first mortgage bonds of said last named railroad company, in the principal sum of twenty-three million ($23,000,000) dollars; that the provisions in said last named trust deed are substantially as set forth in said intervening petition; that default was made in the payments required by the terms of said last named mortgage or trust deed, and that on April 28, 1899, proceedings were instituted in the Circuit Court of the United States for the Western Division of the Western District of Missouri, for the foreclosure of said last named mortgage, and that such proceedings were had in that suit that on the fifth day of February, 1900, a decree of foreclosure and sale was entered therein, decreeing that the railroad's properties and franchises embraced in said mortgage should be sold; that pursuant to said decree said railroad's properties and franchises were thereafter sold to said intervenor, but this respondent says that said mortgage was foreclosed and said suits were commenced and prosecuted and said sale made pursuant to and in accordance with the plan and scheme hereinafter described and under the circumstances hereinafter stated.

This respondent admits that the several mortgages hereinabove referred to were all duly and properly acknowledged and recorded in the various counties in which the properties mentioned therein were respectively located at or about the dates of said mortgages respectively.

5. This respondent denies that about the year 1887, or at any other time it conceived and entered upon the plan and purpose to cause to be constructed railroads in and about Kansas City; it denies that it was part of said plan and purpose to cause said railroads to be built, constructed or operated by corporations to be organized by respondent and to elect certain officers agents and representatives of respondent as the officers and directors of said railroad companies so as to dominate and control the action of said railroad companies. It denies that it was a part of its plans and purpose to utilize one or more of said railroad companies to act on behalf of respondent in

building and operating railroads and in the issue of bonds and stocks, or either of them so as to gather under the Trust Company the profits and other advantages accruing therefrom and to foist upon the railroad companies the losses or liabilities resulting therefrom. It denies that either in building said roads, or in the
221 sale of stocks and bonds of said railroad companies it employed said railroad companies, or any of them, as its agents to further its own plans and purpose, and therefore denies that it was a principal, bound and charged with the duty to indemnify and protect said railroad companies against losses and liability arising in the premises; but admits that it was in some cases sole trustee in the mortgages above mentioned; but denies that in any case it was active trustee therein. It denies that it, in pursuance of said plans and purposes, or for any other reason, or in any other circumstances acquired the control of the Kansas City Suburban Railroad Company (hereinafter called the Suburban Company) in the year 1899, at or any other time. Denies that it caused said Suburban Company to issue bonds, secured by mortgage. Denies that it caused said Suburban Company to issue capital stock in a large amount, or in any amount and denies that it cause said company to construct and operate a railroad. It denies that in 1891, or at any other time it caused to be incorporated the Consolidated Terminal Railroad Company, (hereinafter called the Consolidated Company); denies that it caused said Consolidated Company to issue bonds and a mortgage or deed of trust to secure the same. Denies that it caused said company to issue capital stock and to construct a railroad.

It denies that in December, 1891, or at any other time, it caused to be incorporated the Union Terminal Railroad Company (hereinafter called the Terminal Company) or that it caused said company to issue and execute bonds and mortgage securing the same and capital stock, or any of them, as is alleged in said intervening petition.

It denies that it caused said company to construct a railroad.

It denies that it caused to be incorporated the Kansas City and Independence Air Line (hereinafter referred to as the Air Line). It denies that it caused the Air Line to execute and issue bonds and mortgage and to issue stock and construct a railroad, as alleged in said petition. On the contrary, this respondent says that each and all of the said corporations were organized in the manner and under the circumstances set forth in the answer of this respondent and Francis N. Black, its receiver, heretofore filed in this cause, to the bill called "Ancillary Bill of Complaint", filed by Stewart R. Knott and Edward F. Swinney, as receivers of the Kansas City Suburban Belt Railroad Company, which said answer is hereby referred to and made a part of the answer to said intervening petition.

222 This respondent denies that it at any time caused the said Consolidated Company to consolidate with the Suburban Company, forming a new company called the "Kansas City Suburban Belt Railroad Company" (hereinafter referred to as the Belt Company) but this respondent says that said companies did, of their own accord and volition affect said consolidation on or about

July 25, 1892, and that the Consolidated Company so formed was called the Kansas City Suburban Belt Railroad Company.

Respondent denies that it caused the Terminal Company to execute a lease of all its property, rights and franchises, or any part thereof, to the Belt Company, and that thereunder the Belt Company operated the line of the Terminal Company and its own line. On the contrary, this respondent alleges that said lease was made without the interference of this respondent and wholly at the volition of the parties to said lease.

This respondent denies that by virtue of its ownership and control of the capital stock of the Belt Company, Air Line and Terminal Company, it did at all times, or at any time cause its officers and directors to be elected as the officers and directors of said lines, or any of them. It denies that it dominated and controlled the affairs and business of said lines, or caused them or either of them to perform such corporate acts and things as this respondent deemed beneficial for its own interest. On the contrary this respondent says that the directors and officers of said company were elected by the stockholders of said respective companies in the free exercise of their own judgment, in the same manner as the directors and officers of any other company are elected; that in some instances a part of the officers and directors of said several corporations were also at the same time officers and directors of this respondent, but that in such instances such officers and directors had no personal interest in procuring for this respondent any undue advantage over the other companies.

This respondent denies that in the year 1893, or at any other time, it caused to be incorporated the Kansas City, Pittsburg and Gulf Railroad Company (hereinafter called the Gulf Company) or caused it to issue, and execute bonds, mortgages and stock, or any of them, as is alleged in said intervening petition. It denies that it caused the Gulf Company to construct a railroad from Kansas City to the Gulf of Mexico, or any part thereof. It denies that it caused the Gulf Company to enter into contracts with the Belt Company for the use of the latter's terminals at Kansas City. On the contrary it says that said contract between the Belt Company and said Gulf Company was freely made and entered into
223 by the parties thereto, without any interference on the part of this respondent, and that said contract was made in the manner and under the circumstances stated in said answer to said Ancillary Bill.

This respondent denies that it caused its officers and directors to be elected officers and directors of the Gulf Company, and by that means, or by any other means dominated and controlled the affairs of the Gulf Company and caused it to perform such corporate acts as this respondent deemed to be for its benefit and advantage. On the contrary it says that said Gulf Company was managed and controlled by directors and officers, freely and voluntarily elected by the stockholders thereof in the usual and ordinary manner.

This respondent denies that it had complete and intimate knowl-

edge of all the affairs and transactions of all the said companies, as is alleged in said intervening petition.

6. Respondent denies that in the year 1895, or at any other time it caused to be incorporated the Central Improvement Company. It denies that the directors and officers of said Central Company were at all times made up from the directors and officers of this respondent, or that this respondent, in all or any of the transactions in said Improvement Company dominated and controlled the said Improvement Company. On the contrary, this respondent says that the directors and officers of said Central Company were freely elected by the stockholders of said company and that while some of the directors and officers of the Central Company were also officers and directors of this respondent, yet they had no personal interest in procuring any benefit or advantage for this respondent at the expense of the Central Company, and did not procure any such advantage.

This respondent admits that the Central Improvement Company was organized, but it says that it was organized at the instance and by the procurement of the Belt Company and the Gulf Company, for the purpose of securing and acquiring the title to various tracts of land in and about Kansas City, which was needed for the use of said railroad companies but it is true that the Belt Company furnished some of the money paid for said land bought by the Central Company. It is also true that the Gulf Company advanced some money for the same purpose, but whether or not the list of said properties so purchased by the Central Company is correctly shown on "Exhibit A", attached to said intervening petitions, this respondent is not advised and therefore neither admits nor denies the same. This respondent, however, denies that the titles to said real estate, so purchased, were for mere convenience placed in the name of the Central Company; but says that said Central
224 Company was duly organized for the purpose of acquiring said lands, and that it did acquire title to the same and whatever interest said Belt Company, or said Gulf Company have, or had, in said lands is represented by the stock in said Central Company which was issued to them when said moneys were advanced.

This respondent denies that said Belt Company, or said Gulf Company, or any other company or person advancing money to said Central Company became the equitable owner of the land which was purchased by the money so advanced; but on the contrary says that the interest of the company, or the person so advancing money is represented by the stock issued by the Central Company.

This respondent further shows that the said Belt Company and Gulf Company, or their assigns, hold substantially all of the stock of said Central Company and in that sense they are the beneficial owners of the property of said Central Improvement Company, subject, however, to any liens thereon for unpaid portions of the purchase price thereof, or for other valid liens; but this respondent has not now, and never has had, any interest in the property of the Central *Improved* Company, except that it holds a mortgage on a certain piece of property owned by said Central Improvement

Company to secure certain promissory notes, aggregating the principal sum of $5000, which mortgage was a subsisting lien upon the property at the time the Central Company bought it, and which mortgage was subsequently purchased and is now held by this respondent.

This respondent denies that the properties so purchased by the Central Company were necessary for the use of said respective railroad companies in connection with the operation of their respective roads, and it denies that such property came within the "After Acquired" property clause of said mortgages, or either of them. It denies that the equitable liens of said mortgages, or either of them attached to and became a charge upon said properties in favor of the bank holders. It is not advised as to whether any of said properties have been sold by the receiver of said Central Company.

This respondent denies that by the foreclosure proceedings, above mentioned and decrees of sale thereunder, the intervenor acquired the equitable title to all of said properties, or any part thereof so held by the Central Company, and it denies that said intervenor became and is now entitled to the conveyance of the same and to the proceeds of the sale thereof. On the contrary, this respondent says that no part of said property was covered by said mortgages,
225 or any of them; that said property was not in any way appurtenant or necessary to the operation of said railroads, or any of them and that in and by he said foreclosure proceedings said intervenor obtained no title to said lands or any part of the same.

7. This respondent denies that on or about February 1, 1900, the Belt Company had purchased and then had in its possession, approximately 600 tons of steel rails and fasteners. On the contrary, this respondent says that there was less than 361 tons of said rails and fastenings.

This respondent denies that by virtue of the "After Acquired" property clause in the mortgage of the Belt Company, said rails and fastenings became charged with a lien to secure the payment of the bonds; and denies that upon the foreclosure of said mortgage and the sale thereunder that the equitable title of said rails passed to and vested in the intervenor, or that it become the equitable owner thereof. On the contrary, respondent says that said intervenor obtained no title whatever, either legal or equitable to said rails by means of said foreclosure proceedings and sale.

This respondent further says that said mortgage did not by its terms cover said rails, and further that said rails were purchased for the consolidation of the said Consolidated Company and the Suburban Company, forming the new company called the Belt Company and long after the execution of said mortgage, and for the further reason that said rails were not appurtenant to the operation of said railroad.

This respondent admits that it formerly held said rails as collateral security to the indebtedness hereinafter referred to from the Belt Company to this respondent, but it denies that the value of said rails and fastenings was of the value stated in said petition, and that such rails and fastenings were subsequently sold by this respondent

for the sum of approximately eleven thousand ($11,000.) dollars, and that respondent has credited the net proceeds thereof on its accounts against said Belt Company; that notwithstanding said Company had assigned said rails and fastenings to this respondent as collateral security, said Company afterwards refused to deliver the same to respondents, and respondent was compelled to bring a suit of replevin therefor in the Circuit Court of Jackson County, Missouri, and said suit was subsequently determined in favor of this respondent; and that such judgment (which was entered on the — day of ——) is res judicata and cannot be there inquired into.

8. This respondent admits that the railroad of the Terminal Company was a connecting railroad with the line of the Belt Com-
226 pany and that the Belt Company was authorized to aid in the construction of the line of the Terminal Company. It admits that the Belt Company acquired 5000 shares of the capital stock of the Terminal Company; but denies that by virtue of the "After Acquired" property clause in the Belt Company mortgage that the lien of the mortgage in equity or in any manner attached to the 5000 shares of the Terminal stock so acquired by the Belt Company, or that said lien inured to the benefit of the bondholders of the Belt Company.

Respondent admits that it acquired possession of said 5000 shares of Terminal stock as collateral security, but denies that it was collateral security to an alleged indebtedness, but on the contrary says it was a just and bona fide indebtedness of said Belt Company to this respondent.

Respondent admits that about June 14, 1900, it sold said 5000 shares of stock for $25,000.00, which sum was the fair and full value thereof at that time. Respondent denies that by virtue of said mortgage of the Belt Company and the foreclosure and sale thereunder that the intervenor became entitled in equity to said 5000 shares of stock, or the proceeds thereof, or any part thereof. On the contrary, this respondent says that *that* said mortgage did not by its terms cover said stock; that said stock was not in any manner appurtenant to the operation of said railroad; that said stock was acquired after the consolidation, as aforesaid, and that the said intervenor, by said foreclosure proceedings acquired no title or interest whatever in and to said stock, or the proceeds thereof.

Respondent admits that the Air Line owned and operated a railroad connecting with the railroad from the Belt Line, and that the two formed a continuous line of railroad, and that the Belt Company became and was entitled to aid the Air Line in the construction of its road and to purchase and hold the stock of the Air Line.

Respondent admits that prior to June 11, 1900, the Belt Company acquired and owned 494 shares of the capital stock of the Air Line, and also 14997 shares of the Terminal Company's stock, in addition to the 5000 shares above mentioned. In denies that it acquired said stock as collateral security to an alleged indebtedness from the Belt Line to it, but on the contrary says that the respondent held said stock as collateral security to a bona fide indebtedness owing from the Belt Company to this respondent. This respondent denies that

said stock, or any part thereof, — recovered by the "After Acquired" property clause in the mortgage of the Belt Company and denies
227 that upon the foreclosure of said mortgage and sale thereunder that the intervenor acquired the equitable title to said stock or to the value of the proceeds thereof. On the contrary this respondent says that no part of said stocks *were* covered by the terms of said mortgage; that said stocks were in no way appurtenant or necessary to the operation of said railroad and the said stocks were all acquired after the consolidation aforesaid and therefore that said intervenor acquired no right, title, or interest to said stocks, or any part thereof, by means of said foreclosure proceedings.

This respondent admits that on or about June 11, 1900, it sold said 14,997 shares of Terminal stock and 4994 shares of Air Line stock for the sum of $9,996.65, which sum was the full and fair value of said stocks at the time.

9. This respondent denies that in the year 1896, or at any other time, it caused to be incorporated the Kansas City Northern Connecting Railroad Company (hereinafter called the Connecting Company) for the purpose alleged in the intervening petition, or for any other purpose. It admits that said Connecting Company was organized for the purpose of constructing a railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with the railroads at that point running to Quincy, Illinois, and to Council Bluffs, Iowa.

Respondent denies that it caused said Connecting Company to execute bonds, mortgage and stock, or any of them, as alleged in said intervening petition, and denies that it caused said Connecting Company to enter into a contract, under which the Belt Company undertook to carry the right of way for said Connecting Company, and under which said Connecting Company agreed to give the Belt Company its bonds and stocks.

This respondent admits that such a contract was made between said companies, but it was made freely and of their own accord and without the interference of this respondent.

This respondent admits that pursuant to such contract the Belt Company began the construction of a railroad for the Connecting Company and the acquisition of its right of way and received as a consideration for so doing a large amount of the first mortgage bonds and of the capital stock of the Connecting Company, and that the Belt Company so held said stock and bonds on and prior to July 20, 1899.

This respondent denies that at various dates, or at any date it took and converted same to its own use, and denies that it ever at
228 any time converted any bonds or stocks belonging to said Belt Company.

Respondent denies that about July 20, 1899, it took from the Belt Company mortgage bonds and stock in the Connecting Company belonging to the Belt Company as collateral security for an alleged indebtedness from the Belt Company, to respondent, but on the contrary says that it did take said bonds and stock as collateral security to a bona fide indebtedness due to it from the Belt Company.

Respondent denies that said bonds or stocks, or any of them, came

under the "After Acquired" property clause of the mortgage made by the Belt Company and denies that they, or any of them were charged with an equitable lien to secure the bonds of the Belt Company. It denies that by means of the foreclosure proceedings and sale to the intervenor that the equitable title to said stocks and bonds, or the proceeds thereof, vested in equity in the intervenor. On the contrary this respondent say- that said mortgage did not by its terms cover said bonds and stocks, or any part thereof; that said bonds and stocks were not necessary or appurtenant to the operation of said railroad; that all of said stocks and bonds were acquired after the consolidation, as aforesaid, and that said intervenor acquired no right, title or interest of any kind whatsoever in and to said stocks or bonds by means of said foreclosure proceedings.

This respondent admits that on or about September 30, 1899, it sold 13920 (not 3920) shares of Northern Connecting Company's stock, which it at one time had held as collateral, as aforesaid, for the sum of $19,885.70, which sum was the full and fair value of said stock at the time. That prior to said sale this respondent had accepted said stock as part payment on its said indebtedness at the same price for which respondent afterward sold said stock.

10. This respondent denies that in 1896, or at any other time, it caused the Belt Company to enter into a Terminal contract with the Gulf Company, by the terms of which the Belt Company gave to the Gulf Company an entrance into Kansas City and valuable terminal rights and facilities, and whereby the Gulf Company undertook and agreed to pay to the Belt Company certain rentals for such rights as were granted to the Gulf Company in said contract. On the contrary, this respondent says that said contract was entered into by said parties freely and as an act of said companies represented by their independent and adult officers and board of directors.

229 This respondent admits that said parties operated under said contract until April 1, 1899, when receivers for the Gulf Company were appointed; that at said last named time there was due to the Belt Company from the Gulf Company under said contract about the sum of $133,000.00.

This respondent denies that said terminal contract, by virtue of the provisions of the "After Acquired" property clause in the said mortgage of the Belt Company became charged in equity with a mortgage lien to secure the bonds issued by said Belt Company, and denies that the rents, issues and profits, or any part thereof at that time due the Belt Company under said contract became charged in equity with such lien. It denies that by virtue of said foreclosure proceedings and sale thereunder to the intervenor that the latter required all equitable right title, or any right and title to said contract and rentals thereon.

Respondent admits that the Belt Company, on or about February 1, 1900. did transfer and assign to it the said account against the said Gulf Company as collateral security to a bona fide indebtedness from the Belt Company to this respondent.

This respondent says that said intervenor acquired no right, title or interest whatever to said contract, or the rentals thereunder by

virtue of said foreclosure proceedings, because said contract and rentals thereunder are not covered by the terms of said mortgage, and because it is in no way appurtenant to the operation of said railroad, and because said rentals accrued after the said consolidation, as aforesaid.

11. This respondent denies that the Northern Townsite Company, (hereinafter referred to as Townsite Company) was organized by the officers of the Trust Company. On the contrary, says that said Townsite Company was organized at the behest of said Belt Company for the purpose of acquiring certain lands along the line of the railroad of the Connecting Company.

This respondent admits that all the money used by the Townsite Company in purchasing its lands was furnished by the Belt Company and by this respondent, but it denies that the sum of $46,463.75 was furnished and provided by the Belt Company and this [respondent*m*], but on the contrary says that a much smaller amount was furnished.

Further answering, it says that the total amount of money furnished by the Belt Company for the purchase of said lands was $6286.57, and that the Belt Company received therefor 439 shares of the capital stock of said Townsite Company, at the par value
230 of $100.00 each, and that the total amount of money furnished by this respondent for the same purpose was $6720.07, and that it received 489 shares of the capital stock of said Townsite Company.

This respondent denies that in equity the said lands represented by the money furnished by the Belt Company belong to the Belt Company and were covered by the "After Acquired" property clause in the said mortgage. It denies that by virtue of said foreclosure proceedings and sale thereunder to the intervenor that the intervenor became vested with the title to said lands, or any part thereof, and denies that said intervenor thereby became entitled to the capital stock so issued by the said Townsite Company to the Belt Company, or any part thereof.

This respondent denies that it holds the capital stock so issued to the Belt Company as collateral security to an alleged indebtedness from the Belt Company to it, but on the contrary says that it holds said stock as collateral security to a bona fide indebtedness from the Belt Company to this respondent. This respondent says that said intervenor is not entitled, either at law or in equity to any interest or title in said lands, or said stock, because the same are not covered by the terms of said mortgage, because they are not appurtenant to the operation of said railroad and because they were acquired after the consolidation, as aforesaid.

12. This respondent denies that it at any time dominated and controlled the acts of the Belt Company, or that it caused its officers and directors to be the officers and directors of the Belt Company. Denies that it required the officers and directors of the Belt Company to perform the will and behest of this respondent in any respect, but on the contrary alleges that the officers and directors of said Belt

Company at all times exercised their independent judgment and acted in good faith for the best interests of the said Belt Company.

This respondent further says that in all respects and at all times it fully and in good faith performed the duty imposed upon it as trustee in said mortgage, and that at no time did it control the acts and doings of the Belt Company in its own interest.

This respondent admits that about April 1, 1899, the Gulf Company was insolvent; that it defaulted in payment of interest and that it was placed in the hands of receivers, as alleged in said petition, but it denies that it knew that a default would occur prior to the time default was made, and denies that it knew that if the Gulf
231 Company became bankrupt that the so-called auxiliary companies would pass out of its control and denies that the so-called auxiliary companies were ever in its control. It denies that there was any violation of its duty as trustee of said mortgages with a view to appropriate to itself whatever value there was remaining in possession of said auxiliary companies it acquired the plan to require said companies to turn over to it all or any part of the personal property of said companies as and for security for an alleged indebtedness from the Belt Company to it, but on the contrary it alleges that at all times it acted in good faith and that in procuring the collateral security, as hereinafter stated, it acted in good faith towards the Belt Company and its creditors.

This respondent denies that on March 31, 1899, or at any other time, it caused the Belt Company to turn over to it the collateral, as alleged in said intervening petition, with the exception that said Belt Company did turn over to this respondent as collateral security to a bona fide debt then owing to this respondent from said Belt Company, collateral security as is shown in the said answer to said Ancillary Bill.

This respondent denies that on September 30, 1899, or at any time it caused the Belt Company to sell to it all of the stock of the Kansas City and Northern Connecting Company held by the Belt Company, at the price of one and three-sevenths dollars per share to apply upon as alleged indebtedness from the Belt Company to this respondent, but on the contrary this respondent says that said stock was a fair and open sale at a full fair value of said stock, and that the indebtedness upon which the same applied was a bona fide indebtedness from the Belt Company to this respondent.

Respondent admits that a foreclosure decree was entered on February 5, 1900, in the case of State Trust Company against the Gulf Company.

Respondent denies that it knew prior to the rendition of said decree that the same would be rendered.

It denies that on February 1, 1900, or at any time it caused the Belt Company to pretend to hold a meeting of its directors and to specifically turn over all of the stocks and bonds, as alleged in said intervening petition, or any part thereof, to secure an alleged indebtedness, and to assign and transfer to respondent the said steel rails, and to assign and transfer to respondent the account owned by the Belt Company against the Gulf Company, as aforesaid, as col-

lateral security for an alleged indebtedness. On the contrary, this respondent says that the meeting of said board of directors of
232 said Belt Company was held at their own volition, and without any interference or direction from this respondent, and that the action of the said board of directors in turning over said collateral security was the free act of the directors of said Belt Company.

Respondent denies that the action of the Belt Company in turning over said stocks, bonds and property to it as collateral was void, and denies that such action was due to the unlawful combination and control exercised by respondent over the officers and directors of the Belt Company, but on the contrary says that said action was the voluntary act of said officers and directors in the exercise of their independent judgment.

This respondent denies that by reason of its control of the Belt Company it had knowledge of the affairs and situation of the Belt Company, but it admits that it did, by reason of its connection with said Belt Company, have considerable knowledge of the affairs and situation of the Belt Company, and denies that it used its knowledge of the affairs of the Belt Company to its own advantage rather than for the purpose of the other indebtedness of said Belt Company, but on the contrary it says that it acted in good faith in protecting its own interests and in doing so did not violate any duty which it owed to the bondholders, or any other creditors of said Belt Company.

This respondent denies that on account of its position as trustee in said mortgage that it is estopped to assert that it took said security to secure its own indebtedness, and denies that it is deemed in equity to have received said collateral as trustee under said mortgages. On the contrary, it says that said mortgages, for the reasons hereinbefore stated, did not cover said security or any part thereof.

Further this respondent says that all of said transactions took place more than five years ago; and it hereby pleads to each and all of such transactions the statutes of limitations of the State of Missouri; that ever since the organization of said intervenor it has had full knowledge of all the facts and circumstances in connection with the taking of said collateral security and has made no protest against the same and has taken no steps to enforce any rights which it has, or claims to have in and to said collateral; that said intervenor has been guilty of laches in the premises and should not now be permitted to come into a court of equity and assert any claim to said property, or any part thereof.

13. This respondent admits that on September 6, 1900, the Cambria Steel Company filed its bill in this case, and that the allegations of said bill are substantially as set forth in said inter-
233 vening petition. That in November, 1901, the Belt Company, by its receivers, filed their Ancillary Bill herein, and that the allegations therein are substantially as set forth in said intervening petition.

This respondent admits that an injunction has been issued in this cause, restraining respondent from disposing of said collateral until the final order and decree of this court as to all of said collateral, ex-

cept 1899 first mortgage bonds of the Connecting Company, as is alleged in said intervening petition.

This respondent further answering, says that the indebtedness from said Belt Company to this respondent is evidenced by certain promissory notes, executed by said Belt Company, and by an open account, as set forth and fully stated in the said answer to said Ancillary Bill.

14. This respondent, the Guardian Trust Company, further shows that on or about the 14th day of June, A. D. 1899, William F. Harrity, B. M. Baker, August Hecksher, Edward Wagner, Samuel R. Shipley, Silas W. Pettit and Winthrop Smith entered into an agreement for the re-organization of the Kansas City Pittsburg & Gulf Railroad Company, Kansas City Suburban Railroad Company, and the Port Arthur Channel and Dock Company and their so-called subsidiary or auxiliary companies, including said Kansas City Suburban Belt Railroad Company, Union Terminal Railroad Company, Consolidated Terminal Railroad Company, and Kansas City and Independence Air Line Railroad Company; that said persons, calling themselves a re-organization committee formed a so-called "plan of re-organization," which was promulgated under date of November 7, 1899, and invited all holders of bonds and stocks of said several companies above named, to deposit the same with said re-organization committee under said plan of re-organization which proposed to organize a new corporation to be known as the Kansas City Southern Railroad Company, which should acquire the properties of all said above named corporations, and issue in payment therefor the bonds and stocks of said re-organized or new corporation in the proportions and on the terms and in the manner set out in the said plan of re-organization, which is hereby referred to and ready to be produced upon the hearing of this cause.

15. That after the promulgation of said plan on November 7, 1899, there was deposited with said re-organization committee the proportion of bonds and stock required by said plan to make the same operative; and on the 20th day of December, 1899, said plan was declared operative; that thereafter said committee caused to be organized and incorporated the Kansas City Southern Rail-
234 road Company under the statutes of the State of Missouri, for the purpose of acquiring title to the properties of said corporations named in the foregoing paragraph, and the stocks and bonds of said new corporation were thereafter exchanged for the stocks and bonds of said several corporations in the proportion and manner set out in said re-organization plan; that by means of said exchange said Kansas City Southern Railroad Company came to be the owner of practically all the bonds and stocks of said corporations above mentioned, and particularly of the said Kansas City Suburban Belt Railroad Company, and said corporation caused to be elected directors and officers of said Belt Railroad Company, who conducted the same and managed and operated it in the interests of and as a component part of the railroad system of said Kansas City Southern Railroad Company.

16. This respondent further shows that the organization of said

Kansas City Southern Railroad Company and exchange of its stocks and bonds above alleged for the stocks and bonds of said Belt Railroad Company, and the other steps taken in pursuance of said re-organization plan, effected a consolidation of said Kansas City Southern Railroad Company and said Kansas City Suburban Belt Railroad Company under the statutes of the State of Missouri; or a consolidation de facto, and that said Kansas City Southern Company is estopped to deny such consolidation, or to claim that the same was not legally complete; and that said Kansas City Southern Railroad Company thereby became and is liable for all the debts incurred by said Belt Railroad Company to the same extent as said last mentioned company, including the debts of this respondent heretofore mentioned and alleged in this answer.

17. Further answering, this respondent shows that said re-organization committee, when working out said plan of re-organization, expressly represented to this respondent that, in consideration of the debt due and owing from said Belt Company to this respondent, said committee would provide for the payment of all debts and obligations due to this respondent from all of said corporations proposed to be included in said re-organization plan, and particularly said Belt Railroad Company, and expressly promised this respondent that said committee would pay or cause to be paid all debts of every character due to this respondent from several corporations proposed to be consolidated, and particularly from said Belt Railroad Company; and that the said new and re-organized company would pay such debts; that certain members of said re-organization com-
235 mittee, constituting a so-called purchasing committee, purchased at the foreclosure sale of said Kansas City, Pittsburg and Gulf Railroad Company all its assets, right of way, rolling stock, etc., and thereafter assigned said bid to said Kansas City Southern Railroad Company, which said company entered into a contract with said re-organization committee, wherein and whereby it assumed and agreed to complete and carry out all the obligations undertaken and assumed by said re-organization committee; that under and by reason of said agreement and contract said Kansas City Southern became liable and agreed to pay all the obligations of said Belt Railroad Company to this respondent, and is still so liable.

18. That said Kansas City Southern was at the time of the foreclosure and sale of the Belt Company's assets the holder and owner of practically all the bonds and stock of said Belt Company; that, in order to obtain and control the stock of said Belt Company, said Kansas City Southern Railroad Company exchanged its stock in the proportions and in the manner specified in said plan of re-organization, which is hereby referred to, for the stock of said Belt Company, and thereupon proceeded to secure a foreclosure of said bonds of said Belt Company; that said scheme of re-organization and exchange of stocks aforesaid resulted in the stockholders of the Belt Railroad Company securing a large amount of stock of said Kansas City Southern Railroad Company, which was at that time and is yet very valuable, and was at that time and is yet of much greater market value than the total claims of this respondent against said Belt Rail-

road Company; that said scheme legally implied the payment by said Southern Company of all the claims of this respondent against said Belt Company.

19. This respondent therefore alleges and shows that if said scheme of re-organization and exchange of securities was intended by said re-organization committee and by said Kansas City Southern Railroad Company and its officers to deprive this respondent of all security and opportunity of collecting its said claims against the Belt Railroad Company, while preserving and securing to the stockholders of said Company said advantage and valuable interests through said scheme of transfer of stocks, that said foreclosure of said properties of said Belt Company, would have been a fraudulent scheme, and in that case should be held void and invalid, so far as this relator is concerned, and the property thereby transferred to said Kansas City Southern Railroad Company should be held subject to the debts and claims of this respondent and subjected to
236 their payment, even if it should be held by the Court that a legal consolidation, or actual or de facto consolidation, was not brought about as hereinabove alleged, whereby said Kansas City Southern Railroad Company became legally obligated to pay the claims of this respondent against said Belt Railroad Company.

20. All of which matters and things hereinbefore stated this respondent is ready to aver, maintain and prove as this Honorable Court may direct. Wherefore respondent prays that the so called intervening petition of the said Kansas City Southern Railway Company may be dismissed as without equity, and for its costs in this behalf most wrongfully expended.

GUARDIAN TRUST COMPANY,
By H. S. MECARTNEY AND J. C. ROSENBERGER,
Its Solicitors.

Afterwards, to-wit, on the 22nd day of March, 1905, an Amended and Supplemental Ancillary Bill of Complaint was filed in the cause wherein Stuart R. Knott, et al., are complainants, and the Cambria Steel Company, et al., are defendants.

Said Amended and Supplemental Ancillary Bill is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,
vs.
CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

237 *Amended and Supplemental Ancillary Bill of Complainants.*

To the Judges of the United States Circuit Court for the Western Division of the Western District of Missouri, in the Eighth Circuit, sitting in equity:

Your orators, Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company and the Kansas City Suburban Belt Railroad Company, with leave of court, bring this their amended and supplemental ancillary bill of complaint against the Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company and Thomas T. Crittenden, its Receiver, Cambria Steel Company, Fairmount Amusement Company, and Northern Townsite Company, each and all of which said corporations, both complainant and defendants, are corporations organized and existing under and by virtue of the laws of the State of Missouri and citizens and residents of said state and each of them having their principal office and place of business at Kansas City in said state and each of them being an inhabitant of the Western Division of the Western District thereof, except the Cambria Steel Company, which is a corporation duly created and existing under the laws of the state of Pennsylvania and a non-resident of the State of Missouri.

Your orators state that on November 30, 1900, in the suit of W. W.

Bierce, et al., complainants, against the Guardian Trust Company, defendant, then pending in the United States Circuit Court for the Western District of Missouri, Francis M. Black was appointed receiver of the defendant Guardian Trust Company and was at the time of filing the original ancillary bill herein the duly qualified and acting receiver of said company, but that since the filing of said bill the receiver for the Guardian Trust Company has been discharged and the said Trust Company is now in possession of its corporate property, operating and conducting its own business in connection therewith; that in this suit Wash Adams was heretofore appointed receiver for the Missouri Elevator & Terminal Company but the property and assets of the said Missouri Elevator & Terminal Company had since the filing of the original ancillary bill herein been turned over to the Guardian Trust Company, the mortgagee in certain mortgages covering the property of said Missouri Elevator & Terminal Company; that at the time of filing said original ancillary bill Wash Adams was the duly qualified and acting receiver for the Central Improvement Company, since which time the said Adams has resigned and Thomas T. Crittenden has been appointed as his successor and is now the duly qualified and acting receiver of
238 said company; that said Thomas T. Crittenden is a citizen and resident of the Western Division of the Western District of the State of Missouri.

And, thereupon, your orators complain and say that the above-named complainant, the Cambria Steel Company, heretofore exhibited to this Honorable Court its bill of complaint against the Kansas City Suburban Belt Railroad Company, a defendant, and the other corporation defendants above named, in and by which said bill of complaint said Cambria Steel Company, as such complainant, set up the recovery of a judgment by it against the Kansas City Suburban Belt Railroad Company for the sum of One Hundred Thousand Nine Hundred Sixty-Two and 91-100 Dollars ($100,962.91), and the issuance and delivery, and return unsatisfied of an execution thereon, and in and by said bill of complaint sought to subject to the payment and satisfaction of said judgment certain rights, properties and assets belonging to the Kansas City Suburban Belt Railroad Company and the other defendants above named.

Your orators further show that prior to the filing of said bill of complaint by said Cambria Steel Company four certain bills of complaint were duly filed in this court by the Provident Life & Trust Company of Philadelphia, two of said bills being filed against the Kansas City Suburban Belt Railroad Company as the sole defendant; another of said bills was filed against the Union Terminal Railroad Company, a Kansas corporation, and the said The Kansas City Suburban Belt Railroad Company as defendants; and the other of said bills was filed against the Kansas City & Independence Air Line, a Missouri corporation, and the said Kansas City Suburban Belt Railroad Company. Each of said bills sought the foreclosure of a first mortgage upon certain railroad property described in the said bills of complaint respectively, and which said several described pieces of railroad property, together for a long time have been oper-

ated by the Kansas City Suburban Railroad Company as a continuous and allied system, said Kansas City Suburban Belt Railroad Company being also the beneficial owner of said properties by reason of owning the capital stock of said several companies. Upon the same day upon which the said bills of complaint were filed an application was made for the appointment of a receiver of all the property of said Kansas City Suburban Belt Railroad Company and on the same day, to-wit, on the sixth day of September, 1900, an order was duly entered of record in each of said causes, as well as in the above entitled cause, appointing your orators Stuart R. Knott and Edward F. Swinney as Receivers of the said Kansas City Suburban Belt Railroad Company,
239 and vesting your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, with all the rights, title, estate, property and interest of the said the Kansas City Suburban Belt Railroad Company, and authorizing and directing your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, to proceed to take such steps and institute such proceedings, legal or otherwise, as might be necessary and requisite to compel a restoration to said The Kansas City Suburban Belt Railroad Company, and your orators, Stuart R. Knott and Edward F. Swinney, as its receivers, of any property rights belonging to it and to com-el an accounting from any and all persons, firms or corporations from whom the said Kansas City Suburban Belt Railroad Company might be entitled to such accounting; that your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, were also authorized to appear in any and all suits theretofore or thereafter instituted against the said Kansas City Suburban Belt Railroad Company, in its name or in the names of your orators, Stuart R. Knott and Edward F. Swinney, as the receivers, to defend any and all such suits. Your orators further show unto the court that under and by virtue of the powers and authorities so vested in them, as aforesaid, your orators for and on behalf of the Kansas City Suburban Belt Railroad Company, which is made a defendant to the bill of complaint in the above entitled cause, have appeared and filed their answer to said bills of complaint, as will appear of record herein, and having so filed said answer, your orators bring this, their ancillary bill of complaint herein against the defendants above named, and now file this, their amended supplemental ancillary bill of complaint against said defendants.

Your orators further show unto the court that immediately upon the appointment of your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, they took possession of each and all the property of the said The Kansas City Suburban Belt Railroad Company, and under and pursuant to the orders of the court so appointing them, and thereafter and until the foreclosure sale hereinafter referred to, did operate the railroad property of the said Kansas City Suburban Railroad Company. That such proceedings were had in the causes above referred to that on the 6th day of November, 1901, decrees of foreclosure and sale were duly rendered directing the sale of the railroad and properties of the Kansas City Suburban Belt Railroad Company, Kansas City & Independence Air Line, Consolidated Terminal Railroad Company and the Union Terminal Railroad Com-

pany, covered by the mortgages upon said railroads and property respectively, and on December 31, 1901, the said properties so covered by said mortgages, as aforesaid, were in pursuance of said decrees of foreclosure and sale duly sold and conveyed to the purchaser, The Kansas City Southern Railway Company.

240 And our orators further charge and aver that the matters and things mentioned and set forth in this, your orator's amended and supplemental bill of complaint are ancillary to the said suits so pending in this court wherein your orators, Stuart R. Knott and Edward F. Swinney, were appointed as such receivers and are properly cognizable in this court, which has possession of each and all property of the said Suburban Belt Railroad Company, except such as was covered by its mortgage and has been heretofore conveyed as aforesaid. For convenience, the Kansas City Suburban Belt Railroad Company will be hereinafter referred to as the Belt Company; the Guardian Trust Company will hereinafter be referred to, for convenience, as the Trust Company; the Missouri Elevator and Terminal Company will be hereinafter referred to, for convenience, as the Elevator Company; the Central Improvement Company will hereinafter, for convenience, be referred to as the Central Company; the Fairmount Amusement Company will hereinafter, for convenience, be referred to as the Amusement Company.

Your orators show unto the court that the Trust Company was incorporated according to law in and about the year 1883, and that on or about the month of June, 1899, and until on or about the month of June, 1899, the name of the Trust Company was the Missouri, Kansas & Texas Trust Company, but that at said latter date such proceedings were taken as are provided by the statutes of the State of Missouri in such case made and provided, so that its name was changed to the Guardian Trust Company.

Your orators upon information and belief further show unto the court that on or about the first day of January, 1887, a corporation was formed under the laws of the State of Missouri known as The Kansas City Suburban Belt Railroad Company, hereinafter for convenience called the Suburban Company, for the purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas. That as your orators are informed and believe and so charge the facts to be said Suburban Belt Railroad Company was either organized by the said Trust Company, or the control of the Suburban Company passed to the Trust Company shortly after its incorporation, so that the servants and employes of the Trust Company were elected as its officers and directors and the said Trust Company at all times hereinafter mentioned dominated and controlled the said Suburban Company. That as your orators are informed and believe and so charge the fact to be the Trust Company so dominating and controlling the Suburban Company by virtue of holding possession of the offices of its board of directors and

241 officers caused the Suburban Company to issue and deliver to it, the Trust Company, each and all of the capital stock of the Suburban Company, and also caused the Suburban Company to execute its bonds secured by a first mortgage upon all of its corporate

property then held and to be thereafter acquired amounting in the aggregate to the sum of One Million Dollars ($1,000,000.00), and that said bonds in like manner, by virtue of the domination and control of the Trust Company were delivered to the Trust Company, and the Trust Company thereupon proceeded to sell and otherwise dispose of said bonds and stock and to apply the proceeds thereof as claimed by it for the corporate purposes of the Suburban Company in the construction and operation of its road; but the Trust Company although often requested to do so, did not at any time and never has truly accounted to the Suburban Company for the proceeds realized by it from said bonds and stock, and never has accounted in any way for said proceeds or the manner in which it has so expended the same, except as hereinafter stated.

Thereafter, as your orators are informed and believe, and so charge the fact to be, the Trust Company caused to be formed under the laws of the State of Missouri, a corporation known as the Consolidated Terminal Railway Company, for the purpose of building a line of road to connect with the line of road constructed or proposed to be constructed by the Suburban Company, although the Suburban Company had full power under its charter to have constructed the said road itself. The Consolidated Terminal Railway Company is hereinafter, for convenience, referred to as the Consolidated Company.

That, as your orators are informed and believe and so charge the fact to be, the Consolidated Company was formed and controlled by the Trust Company, electing as its officers and directors the servants and employes of the Trust Company so that at all times it dominated the Consolidated Company, and the Trust Company thereupon caused the Consolidated Company to issue and deliver to it its entire capital stock and also bonds secured by a first mortgage upon its corporate property then and to be thereafter acquired aggregating the sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00), and caused all said bonds to be delivered to the Trust Company, and the Trust Company thereupon proceeded to sell and dispose of said bonds and stock of the Consolidated Company so delivered to it as aforesaid and to apply the proceeds thereof as alleged by it for the corporate purposes of the Consolidated Company in the construction and operation of its road; but the Trust Company, although often requested so to do, did not and never has truly accounted to the Consolidated Company for the disposition made by it of said bonds
242 and stock so delivered as aforesaid and the proceeds derived therefrom and the purposes to which said proceeds were applied, and never has accounted in any way therefor, except as hereinafter stated.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that thereafter and on or about the 25th day of July, 1892, the Consolidated Company and the Suburban Company, as authorized by the Statutes of the State of Missouri, entered into articles of consolidation whereby the said two companies became one consolidated corporation, thereafter known as the Kansas City Suburban Belt Railroad Company, of which your orators, Stuart R. Knott and Edward F. Swinney, were appointed

Receivers, as aforesaid, and under and by virtue of said articles of consolidation, as well as the statutes of the State of Missouri in such case made and provided, the said the Kansas City Suburban Belt Railroad Company and your orators, Stuart R. Knott and Edward F. Swinney, as its receivers, have succeeded to each and all of the rights of both the Consolidated Company and the Suburban Company.

Your orators further show unto the court that they are informed and believe, and so charge the facts to be, that at the time of the consolidation of said two companies, as aforesaid, the Trust Company caused its officers and employes to be elected to the positions of officers and directors of the Belt Company, the company so formed by said consolidation, and continued such persons in such positions respectively, continuously until about the month of April, 1900, whereby the Trust Company at all times, up to said last mentioned date, completely dominated and controlled the actions of the Belt Company.

Your orators further show unto the court that they are informed and believe, and so charge the facts to be, that some time prior to said consolidation and on or about the 30th day of December, 1891, it was found advisable in the course of the construction of the line of road of the Suburban Company to have a corporation formed under the laws of the state of Kansas for the purpose of building and holding the title to that portion of the line of road of the Suburban Company lying within the State of Kansas and for that purpose the Union Terminal Railroad Company, hereinafter referred to as the Union Company, for the sake of convenience, was by the Trust Company caused to be incorporated under the laws of the State of Kansas and the Trust Company, as in the other instances, caused its officers and employes to be elected the officers and directors of the Union
243 Company, and the Union Company was a corporation organized for the sole purpose of holding the title to said property of the Suburban or Belt Company in the State of Kansas; that the Trust Company thereupon caused all of the stock of the Union Company to be issued to the Suburban or Belt Company and also caused the Union Company to execute its first mortgage bonds in the amount of Two Million Dollars ($2,000,000.00); and said bonds were secured by a first mortgage upon all the property of the Union Company then and to be thereafter acquired; that said bonds were thereupon issued and delivered to the Trust Company for the use and benefit of the Suburban or Belt Company; that the Trust Company immediately proceeded to sell, or otherwise dispose of, the said bonds and stock of the Union Company, which had been theretofore delivered to it by the Belt Company, and to apply the proceeds derived from such sale in part, as alleged by it, the construction and operation of the road so built for the Belt Company and held and operated in the name of the Union Company; that the Trust Company thereupon became liable to account to the Belt Company for the proceeds and disposition of the same derived from the sale of the said bonds and stock, but although often requested so to do it always has failed and refuse to account truly to the Belt Company for the disposition made by it of said

bonds and stock, the proceeds derived from such disposition and the manner in which said proceeds were disposed of, and has never accounted therefor in any way except as hereinafter stated.

Your orators further show unto the court that they are informed and believe and so charge the facts to be that thereafter and on or about the 23d day of January, 1891, the Trust Company caused to be incorporated under the laws of the State of Missouri, a corporation known as the Kansas City & Independence Air Line, hereinafter, for convenience, referred to as the Air Line; said company being incorporated for the purpose of building a line of road connecting the line of the Suburban Belt Company and the City of Independence, Missouri; that the capital stock of said company was placed at the sum of Five Hundred Thousand Dollars ($500,000.00). The Trust Company immediately caused its officers and employes to be elected directors and officers of the Air Line and thereupon caused the Air Line to issue its first mortgage bonds to the amount of Three Hundred Thousand Dollars ($300,000.00), secured by a first mortgage upon all of its corporate property then and to be thereafter acquired; and by virtue of the fact that the officers and directors of the Air Line were officers and employes of the Trust Company it at all times dominated and controlled the Air Line up to and until the month of April, 1900; that
244 thereafter the Trust Company acquired each and all of the bonds and stock of the Air Line, the Trust Company in fact constructing the railroad of the Air Line and acquiring said bonds and stock in consideration therefor; afterwards it proceeded to dispose of the same and to apply the proceeds, as it alleged, for the corporate purposes of the Belt Company; but the Trust Company, although often requested so to do, has never at any time truly accounted to the Belt Company for the disposition made by it of the said bonds and stock, and the proceeds realized by it therefrom and has never accounted to the Belt Company in any manner except as hereinafter stated.

Your orators further show that they are informed and believe and so charge the facts to be that the Trust Company at all times up to and about the month of April, 1900, absolutely and completely dominated and controlled the affairs of the Belt Company by reason of the fact that the officers and employes of the Trust Company were elected officers and directors of the Belt Company at the behest of the Trust Company and were simply dummies acting as the agents of the Trust Company; that the Trust Company itself attended to the disbursement of all the moneys which were realized from the sale of the bonds and stock of the several companies hereinbefore named, and itself attended to the disbursement of the moneys which were used in the construction and building of the lines of road of said different companies. That your orators are informed and believe, and on such information and belief state that the total cost of the lines of all of the said companies did not exceed the sum of about Two Million Dollars ($2,000,000.00), but that there was actually delivered to and disposed by the Trust Company secured bonds and stock aggregating more than Five

Million Dollars ($5,000,000.00), and that the Trust Company has never at any time truly accounted to the Belt Company or to your orators for the proceeds derived by it from the sale of said bonds and the disposition made by it of such proceeds and has never accounted to the Belt Company in any way, except as hereinafter stated.

Your orators upon information and belief further charge and aver that on or about the 30th day of June, 1896, the Trust Company, either in its own name or in the name of some of its officers, or some corporation controlled by it, had entered into a contract whereby it was obligated to construct a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, for the purpose of connecting at that point with the Omaha & St. Louis Railroad Company and the Omaha, Kansas City & Eastern Railroad Company; that the Trust Company thereupon caused to be incorporated under the laws of the State of Missouri a corporation known as the
245 Kansas City & Northern Connecting Railroad Company, hereinafter for convenience called the Connecting Company, and caused certain of its officers and employes to be elected officers and directors of the Connecting Company and by virtue thereof at all times dominated and controlled the affairs of the Connecting Company; that the Trust Company being under obligation to construct said road as aforesaid set about to discover a way in which it could cause said railroad to be constructed without incurring any liability itself and without making itself liable for the possibility of a loss in such construction; that it thereupon conceived the idea of having the Belt Company undertake the construction of said railroad on consideration of the issuance of bonds and stock of the Connecting Company that therefore, by virtue of the domination and control which the Trust Company exercised over the affairs of both the Belt Company and the Connecting Company, the Trust Company caused a contract to be entered into between the Belt C mpany and the Connecting Company whereby the Belt Company agreed to construct and did construct said line of railroad for the Connecting Company in consideration, among others, of the issuance to the Belt Company of certain first and second mortgage bonds and stock of the Connecting Company, more fully specified in said contract; that said contract so entered into as aforesaid is set up in Exhibit A to the answer of the Trust Company filed in this cause to which reference is hereby made. The said line of railroad so built as aforesaid was constructed for the sole use and benefit of the Trust Company and for the purpose of enabling it to comply with its obligations to so furnish the said railroad; that the said railroad so furnished, as aforesaid, was not and never has been of any value whatsoever to the Belt Company; that the construction of said road, as aforesaid, by the Belt Company was the result of the Trust Company's domination and control of the Belt Company, utilizing the Belt Company to further and consummate its own purposes and ends and for its own benefit; and the said contract for the construction of said railroad of the Connecting Company was so entered into by it as aforesaid solely by the domination and control exercised over the Belt Company by

the Trust Company, and the Trust Company in so constructing said railroad as aforesaid, simply used the Belt Company as an unwilling agency in the building of the same and occupied towards the Belt Company the relation of principal; that each and all of the moneys paid out by the Belt Company for the construction of said connecting road passed through the hands of the Trust Company and all the bonds and stock which were to have been delivered to the Belt Company under the terms of said pretended con-
246 tract in like manner passed through the hands of the Trust Company and the Trust Company proceeded to sell or otherwise dispose of the same; that the Trust Company never at any time truly accounted to the Belt Company for the amount realized by it from said bonds and stock, and has never accounted in any manner to the Belt Company therefor, except as hereinafter stated. Your orators particularly charge and aver that the Trust Company in so using the Belt Company in the construction of said line is charged in law and equity with the amount of the said loss claimed by the Trust Company to have resulted to the Belt Company and should be held accountable therefor.

Your orators further show unto the court that they are informed and believe and so charge the fact to be, that, during the time the Trust Company so dominated and controlled the affairs of the Belt Company, it at various times had the Belt Company advance to it or take out of the earnings and assets of the Belt Company large sums of money which it pretended to expend for and on account of the Belt Company; that by reason of the fact that the Trust Company at all times dominated and controlled the affairs of the Belt Company and had its employes and servants elected as officers and directors of the Belt Company; your orators are unable to state the amount of money so appropriated by the Trust Company and belonging to the Belt Company and which the Trust Company alleges was expended for the corporate purposes of the Belt Company, but upon information and belief your orators charge and aver that said amount aggregates upwards of Five Hundred Thousand Dollars ($500,000.00); and that the Trust Company has never at any time truly accounted for the said money so received by it, nor the manner in which it was expended, and has never accounted in any manner therefor, except as hereinafter stated.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that during the times hereinbefore mentioned the Trust Company took upon itself the business of paying out practically all the moneys which were paid out for the benefit of the Belt Company and of buying for the Belt Company practically all the property which the Belt Company needed to acquire in its business of operating said road and used the moneys of the Belt Company for that purpose, but, instead of taking the title of the property so purchased, in the name of the Belt Company, the Trust Company caused other corporations to be formed for the purpose of holding the naked legal title to said respective properties, and caused the capital stock of said corporations so organized as aforesaid to be issued to the Belt Company and then turned over to the Trust Company, or to be issued
247 to the Trust Company direct, in trust, for the use and benefit of the Belt Company; and the Trust Company caused it

own servants and agents and employes to be elected and continued as officers and directors of such companies respectively and at all times, down to the month of April, 1900, so that the Trust Company, in the same manner that it controlled the affairs of the Belt Company, dominated and controlled the actions and affairs of the said subsidiary companies; that among the companies so organized by the Trust Company, in the manner aforesaid, is the Missouri Elevator & Terminal Company, with a capital stock of One Hundred Thousand Dollars ($100,000.00), of which Forty-two Thousand Dollars ($42,000.00) has been issued; that the said company owns two certain elevators in Kansas City, Missouri, along the line of the Belt Company; and that the Trust Company caused the construction of said elevators, and one other elevator, which has since been destroyed by fire, and in the construction of the same used the money of the Belt Company; said money being paid out to the Trust Company upon its request; that no true accounting has ever been had between the Trust Company and the Belt Company as to the amount of money which it actually expended for the construction of said elevators or of the manner in which it disposed of the funds received by it from the Belt Company for the alleged purpose of undertaking such construction, although requests for such accounting have frequently been made upon the officers of the Trust Company, and no accounting has ever been made therefor, except as hereinafter stated. That the Trust Company caused the Belt Company to assume all the outstanding debts and liabilities of the Missouri Elevator & Terminal Company, and upon said outstanding debts and liabilities the Belt Company paid large sums of money, for which said Belt Company has never been reimbursed. That upon the 8th day of November, 1900, one Wash Adams was appointed Receiver of the Missouri Elevator & Terminal Company; that since that date the court in this cause has made an order turning over to the Trust Company the said properties of the Elevator Company for the collection of the rents therefrom and the application of said rents upon underlying mortgages or encumbrances held by the Trust Company; that the Trust Company also caused to be organized the Central Improvement Company, a corporation organized under the laws of the State of Missouri, with a capital stock of Two Hundred Thousand Dollars ($200,000.00), of which One Hundred Forty-one Thousand Five Hundred Dollars ($141,500.00) par value has been issued; that said company was organized for the purpose of holding the title to various pieces of real estate in Kansas City, Missouri, and elsewhere, purchased for the use and benefit of the Belt Com-
248 pany, and the Kansas City, Pittsburg & Gulf Railroad Company, another Missouri railroad, and other of the companies above mentioned so organized, dominated and controlled by the Trust Company; that the officers and employes of the Central Company, all of whom were the officers, servants or employes of the Trust Company, continued nominally in office and to control and manage such company until about the month of April, 1900; that certain pieces of real estate which are of vital importance to the

Belt Company are held in the name of the Central Company; that the Trust Company took upon itself the duty of purchasing the said pieces of property and using for that purpose funds of the Belt Company; that various sums of money were, during the period above mentioned, paid out by the Belt Company to the Trust Company for the purpose of purchasing such pieces of real estate; that the Trust Company has never truly accounted to the Belt Company, although often requested so to do, for the sums of money so received by it and the disposition made by it of such sums of money, and has never accounted at all therefor, except as hereinafter stated. That certain shares of stock of the said Central Improvement Company were also, although belonging to the Belt Company, issued to the Trust Company and it has disposed of the same, and, although frequently requested so to do it has never truly accounted to the Belt Company therefor and has never accounted at all therefor, except as hereinafter stated. That a large amount of property was purchased with money advanced by the Belt Company, the title to which property, however, was taken in the name of the Central Improvement Company; that all of said property in truth and in fact has belonged to the Kansas City Suburban Belt Company; that the Belt Company has never been reimbursed for the money so advanced as aforesaid; that upon the 8th day of November, 1900, one Wash Adams, Esq., was appointed Receiver of the Central Improvement Company; that thereafter said Wash Adams resigned and T. T. Crittenden, Esq., was duly appointed receiver, as the successor of Wash Adams, and the said Crittenden since his appointment has held possession of the property of the Central Improvement Company; that thereafter said Wash Adams resigned and T. T. Crittenden, Esq., was duly appointed receiver, as the successor of Wash Adams, and the said Crittenden since his appointment has held possession of the property of the Central Improvement Company, all of which in truth and in fact belonged to the Kansas City Suburban Belt Railroad Company and now belongs to it, unless the title thereto has passed from it by virtue of the foreclosure sale of the property covered by its mortgage, as hereinbefore stated; that another subsidiary company organized by the Trust Company was the Fairmount Amusement Company, with a total capital stock of Twenty-Five Hundred Dollars ($2,500.00), all of which belongs to the Belt Company; that said company was organized, dominated and controlled in the same manner by the Trust Company as the other corporations hereinabove set
249 forth; that all of the moneys expended by the Fairmount Amusement Company were moneys supplied by the Belt Company or supplied by the Trust Company and charged to the Belt Company; and the Trust Company took upon itself the duty of disbursing all of the said funds, and that large sums of money were paid by the Belt Company to the Trust Company for that purpose, but the Trust Company has never at any time truly accounted to the Belt Company for said money so received by it or the manner in which it expended the same, although often requested so to do, and has never accounted in any way therefor, except as hereinafter stated. That said Fairmount Amusement Company was organized

for the purpose of operating what is commonly known as Fairmount park, along the line of the Kansas City & Independence Air Line road; that during the time that the Trust Company so dominated and controlled the Belt Company it caused the Belt Company to advance to it large sums of money for the purpose of fitting up said Fairmount Park; that the Trust Company took upon itself the duty of expending said sums of money for the purpose of fitting up Fairmount Park; that as your orators are informed and believe, upward of Three Hundred and Fifty Thousand Dollars ($35-,000.00) was thus supplied to the Trust Company for the purpose of fitting up Fairmount Park; that the Trust Company has never at any time truly accounted to the Belt Company for the manner in which it expended such sums of money, although frequently requested so to do, and has never accounted at all therefor except as hereinafter stated; that another company organized by the Trust Company was the Northern Townsite Company, a Missouri corporation, with an authorized capital of One Hundred Thousand Dollars ($100,000.00) of which Ninety-Two Thousand Eight Hundred Dollars ($92,800.00) has been issued; that the said company was organized by the Trust Company in connection with the construction of the Kansas City & Northern Connecting Railroad for the purpose of acquiring property at or near townsites along the line of said road, that the Trust Company in the same manner as it dominated the other corporations above named caused its own servants and employees to be elected and maintained as officers and directors of said Townsite Company and at all times dominated and controlled the affairs of said Townsite Company; and the Trust Company caused the Belt Company to advance to it upwards of Forty-Seven Thousand Dollars ($47,-000.00), which it used in the purchase of property which was taken in the name of the Townsite Company; and your orators are informed and believe and on such information and belief state that substantially all the money with which the property of the said Townsite Company was acquired was money advanced by
250 the Belt Company, and that the Trust Company instead of issuing the Belt Company all the capital stock of the Townsite Company issued large portions of it to itself or to other persons for its use and benefit, or otherwise disposed of the same; that the Trust Company has never truly accounted to the Belt Company at any time for the money so received by it for the *purpose* of said Townsite Company from the Belt Company, or the manner in which it expended the same, although frequently requested so to do, and has never accounted in any manner therefor, except as hereinafter stated.

Your orators further show unto the court that they are informed and believe and so charge the fact to be that the Trust Company also caused to be organized under the laws of the State of Missouri a corporation known as the Kansas City, Pittsburg & Gulf Railroad Company, for the purpose of constructing a line of railroad from Kansas City, Missouri, to the Gulf of Mexico; and that the said railroad was so constructed under the direction of the Trust Company acting through the said railroad corporation; and for the pur-

pose of acquiring funds with which to construct the said railroad the said Railroad Company issued its first mortgage to secure the issue of bonds herein specified, and on or about the first day of April, 1899, there were issued and outstanding bonds to the amount of Twenty-Three Million Dollars ($23,000,000.00); that at that time a default was made in the payment of an installment of interest due on the said bonds, and a bill was forthwith filed for the foreclosure thereof and receivers of the said railroad were appointed, and thereafter such proceedings were had that the said railroad was sold under the foreclosure decree.

Your orators further show unto the court that they are informed and believe and so charge the fact to be that the Suburban Belt Railroad Company, the Union Company and Air Line above named were very largely dependent upon the said Kansas City, Pittsburg & Gulf Company for their earnings, and an operating contract was in existence between the Belt Company and the said Kansas City, Pittsburg & Gulf Railroad Company; so that it was well known to the Trust Company that if the said Kansas City Pittsburg & Gulf Railroad Company went into the hands of receivers it would necessarily and inevitably result in insolvency of the Belt Co. and other companies hereinbefore named and would necessitate their ultimately being thrown into the hands of receivers and the mortgages upon the property being foreclosed; that the Trust Company by reason of the domination and control which it exercised over the affairs of the said Kansas City, Pittsburg & Gulf Railroad Company well knew that at and for some time prior to the first day
251 of April, 1899, said company would make default in the payment of the installment of interest due on that date and that such default would inevitably result in the filing of a bill to foreclose the mortgage and for the appointment of receivers for the said road and that the Trust Company thereupon set about to contrive a scheme whereby it might appropriate to itself, before the Belt Company passed beyond its control, all of the remaining property and assets of the Belt Company which were in such shape that they could by any possibility be transferred to the Trust Company. That the Trust Company thereupon caused to be exhibited to its own officers and employes who were holding the positions of officers and directors of the Belt Company various claims and demands which it alleged were due and owed by the Belt Company to it and caused such of its own officers and employes as were holding the positions of officers and directors of the Belt Company to pass upon and approve said claims and demands, and thereupon caused its own officers and employes so holding the positions of officers and directors in the Belt Company between the 31st day of March, 1899, and the 9th day of February, 1900, to execute to the Trust Company various pretended promissory notes and other negotiable instruments for the alleged purpose of securing to the Trust Company the payment of the said pretended claims which it held against the Belt Company, and caused its own officers and employes so holding the positions of officers and directors of the Belt Company to cause to be delivered or transferred to it various stocks, bonds and

accounts and other personal property belonging to the Belt Company as collateral security for the said pretended indebtedness of the Belt Company to the Trust Company.

Your orators further charge and aver, upon information and belief, that the notes so fraudulently caused to be made by the Belt Company to the Trust Company are as follows:

Note dated March 31st, 1899, payable on July 2d, 1899, for $50,000, with interest at the rate of 6 per cent per annum.

Note dated July 26th, 1899, payable on demand with 6 per cent interest for $203,900.

Note dated Sept. 21st, 1899, payable on demand, with 8 per cent interest, for $23,056.48.

Note dated Oct. 23d, 1899, payable on demand, with 8 per cent interest, for $7162.40.

Note dated November 7th, 1899, due January 9th, 1900, with 8 per cent interest, for $50,000.00.

252 Note dated January 25th, 1900, due May 25th, 1900, with 6 per cent interest, for $25,000.

Note dated February 8th, 1900, due May 12th, 1900, with 6 per cent interest, for $10,400.

Note dated February 9th, 1900, due June 11th, 1900, with 8 per cent interest, for $10,400.

The stocks and bonds and other property which the Trust Company fraudulently caused its own officers and employes as officers and directors of the Belt Company to turn over to it for the purpose of securing the payment of the said pretended notes as aforesaid, are as follows:

338 first mortgage, 30 year 5 per cent gold bonds of the Kansas City & Northern Connecting Railroad Company of the denomination of $1000, dated January 1, 1897, being bonds numbered 1467, 1769 to 1733, both inclusive; 1799 to 1818, both inclusive; 1324 to 1331, both inclusive; 1756 to 1768, both -clusive; 1184 to 1216, both inclusive; 1466, 1369 to 1400, both inclusive; 1431, to 1440, both inclusive; 1609 to 1658, both inclusive; 1659 to 1708, both inclusive; 1819 to 1851, both inclusive; 1774 to 1798, both inclusive; 1301 to 1323, both inclusive, and 76 of said bonds, the numbers of which are not known to your orators.

67 and 9-10 second mortgage, 30 year 5 per cent income bonds of the Kansas City & Northern Connecting Railroad Company, of the denomination of $1000 each, dated January 1st, 1897, being bonds numbered 1064 to 1098, both inclusive; 1149 to 1157, both inclusive; 1162 to 1173, both inclusive; 1192 to 1202, both inclusive.

Certificate No. 227, entitling the holder to 250-1000 of said mortgage income bonds.

Certificate No. 229, entitling the holder to 250-1000 of said second mortgage income bonds.

Certificate No. 220, entitling the holder to 150-1000 of said second mortgage income bonds.

25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100 each, as evidenced by certificates Nos. 9, 6, 5 and 4.

1120 shares of the capital stock of the Central Improvement Company of the par value of $100 each, as evidenced by certificate Nos. 148, 149 and 147.

439 shares of the capital stock of the Northern Townsite
253 Company of the par value of $100 each, as evidenced by certificate No. 11.

425 shares of the capital stock of the Missouri Elevator and Terminal Company of the par value of $100 each, as evidenced by certain certificates Nos. 36, 34, 37, 40 and 38.

19,997 shares of the 20,000 shares constituting the capital stock of the Union Terminal Railroad Company.

4994 shares of the capital stock of the Kansas City and Independence Air Line.

15 Kansas City and Northern Connecting Railroad Company's second mortgage income bonds.

About 600 tons of new steel rails, theretofore purchased by, and then belonging to said Belt Company, and being stored in its yards.

Your orators further charge that the Trust Company also caused the Belt Company to assign to it an open account against the Kansas City, Pittsburg & Gulf Railroad Company in an amount of One Hundred Thirty-Three Thousand Fifty-Eight and 4-100 Dollars ($133.058.04), to secure said alleged indebtedness.

Your orators further charge and aver upon information and belief that the said notes were executed and the said account assigned and the said property above described given as collater- security solely under and by virtue of the domination and control of the Trust Company over the Belt Company, and at the time the said action was pretended to have been taken by the Belt Company the officers and directors of the Belt Company so causing the Belt Company to take such action were either officers and directors or servants of the Trust Company, and as such officers and directors or servants and employes of the Trust Company were personally interested in securing to the Trust Company all the available assets of the Belt Company, and that the execution of said promissory notes and delivery of said collateral security under such circumstances was fraudulent and void as against the Belt Company, and in law and in equity ought to be set aside.

Your orators further charge and aver upon information and belief that the Trust Company continued to keep its own officers, servants and employes filling the positions of officers and directors of the Belt Company down to about the month of April, 1900, when the said Kansas City, Pittsburg & Gulf Railroad Company having been sold under foreclosure decree and a re-organization of
254 said property joined with the Belt Company having been undertaken, the control of the said Belt Company passed into other hands, and that during all the time until said month of April, 1900, the said Trust Company continuously kept its own officers and employes in the positions of officers and directors of the Belt Company, so that at no time were there any persons holding the positions of officers and directors of said Belt Company, who were not personally interested in said Trust Company, and desirous of

assisting the said Trust Company in every possible way; and at no time was there ever any true accounting had between the Trust Company and the Belt Company, for or by reason of the matters and things hereinabove set forth, except such an accounting as the officers and employes of the Trust Company, so holding the positions of officers and directors of the said Belt Company pretended to make in looking over and going through the form of approving the accounts and statements rendered to the Belt Company by the Trust Company.

Your orators further show unto the court that ever since the control of the Belt Company passed out of the hands of the Trust Company the Belt Company prior to the appointment of your orators and receivers, endeavored to procure from the Trust Company a true accounting for and by reason of the matters and things hereinabove set forth, for the purpose of determining the true state of accounts between the Belt Company and the Trust Company; but all such demands of the Belt Company have been refused by the Trust Company.

Your orators further show that, since the filing of the original and ancillary bill herein the Trust Company has prepared and submitted a statement of account which it pretends and claims to be a full and complete statement of account of all the matters and transactions had between it and the Belt Company covering the matters hereinbefore set forth; but your orators charge the fact to be that the said account is insufficient, untrue, and that it does not properly or truly account for the stocks and bonds and other properties received by the Trust Company from, for or on account of the Belt Company; that many of the charges against the Belt Company contained in said account are untrue, illegal, unauthorized and ought not in law or equity to be permitted to stand as charges against the Belt Company; that the Trust Company in making said account has omitted therefrom a large number of credits to which the Belt Company is properly and lawfully entitled; and your orators hereby set forth their objections to said account by reference to specific items and instances, without, however in any degree waiving their right to object to said account as a whole or to insist that no such account has been rendered by the Trust Company as is
255 contemplated and required by law or equity or the equity rules governing such matters.

In the said pretended statement the accounts of the Trust Company against the Union Company, Consolidated Company and Air Line were consolidated with the account of the Belt Company in 1893, so that all charges made against or on account of said lines now appear in the statement of the account of the Belt Company.

1. Your orators further show that the Suburban Company was organized under the laws of the State of Missouri on or about January 8th, 1887; that nothing was done by the Suburban Co. in the way of construction of its road or the issue or sale of its securities until on or about May 31, 1889. Prior to said date Mr. A. E. Stillwell, Vice President of the Trust Company, and his associates among the officers and directors of the Trust Company, came into control

of the Suburban Company; and the Trust Company, through them, undertook to promote and finance the Suburban Company and to construct, or cause the construction, of its line of railroad. The plan adopted by the Trust Company for this purpose was to cause the Suburban Company to issue a large amount of securities, consisting of bonds and stocks, to be used in securing money with which to construct the railroad, and for this purpose to organize as its agency a construction company which, directly or through some contractor, should construct the line of the Suburban Company, and nominally take the securities of the Suburban Company in payment therefor. It was the further intention and purpose of the Trust Company, as a part of the same plan to cause securities of the Suburban Company to be issued very largely in excess, in value, of the cost of constructing the line of the Suburban Company, and to cause said securities to pass through the Trust Company, which would exact large and exorbitant amounts (under the guise of commissions and services for promotion and of a similar nature), and to cause such securities finally to be distributed among the stockholders and directors of the Construction Company which was to be organized very largely from the officers and directors of the Trust Company; so that the large profits arising from the enterprise might inure to the Trust Company and its officers, directors and their friends and associates; and in accordance with the aforesaid plan the Trust Company caused the Suburban Company on or about May 31, 1889, to enter into a contract with A. E. Stilwell (said contract being hereinafter referred to as the Stilwell contract) dated June 1, 1889, by the terms of which said Stilwell, or assigns, agreed to organize a construction company within sixty days from the date of said contract, to be called
256 the Kansas City Terminal Construction Company, for convenience hereinafter called the Construction Company, and to cause said Construction Company to build the line of railroad of the Suburban Company from Broadway Street in Kansas City, Missouri, and along Second Street to Harrison Street; thence in a northeasterly direction along the recorded survey of said line, as near as may be, to Cecil Station near the Blue River; said road to be double track the entire distance, with not less than sixty-pound steel rails and to be built in all particulars in a first class manner. It was further provided in said contract that the work should begin not later than the first day of September, 1889, and to be completed within twelve months from that date; that the Construction Company should buy such grounds as it might deem necessary for the use of said railroad company for depot purposes and to pay for all rights of way remaining unsecured by the railroad company; that the Construction Company should build a depot of such dimensions and cost and locate same at such a point and equip the road in such manner as it might deem for the best interest of the railroad company, and to pay all and every nature of expense incurred by the building of said road. In consideration for the building of the road, as above stipulated, the Suburban Company agreed in said contract to issue its first mortgage bonds upon that portion of its line above described in the sum of Five Hundred Thousand Dollars ($500,000.00), bearing six per cent interest, the bonds to be in such form

and of such denomination and to run such length of time as the said Stilwell or his assigns might designate; that of this issue of bonds the Suburban Company should place in escrow with the Trust Company, Four Hundred and Fifty Thousand Dollars ($450,000.00) of the same, face value, along with Nine Hundred Thousand Dollars ($900,000.00), face value, of the stock of the Suburban Company, to be delivered by said Trust Company as trustee to the said Stilwell, or his assigns, upon the faithful completion of said road as in said contract provided. On the day of the execution of said contract, to-wit, June 1, 1889, said A. E. Stilwell duly transferred and assigned the said contract to the Trust Company in consideration of the sum of Ten Thousand Dollars ($10,000.00), and the Trust Company, as the assignee of said Stilwell, thereupon undertook to comply with and perform all the conditions and terms of said contract imposed upon said Stilwell.

Your orators further show that, in pursuance of the duty and obligation cast upon the Trust Company by said contract, it proceeded to and did organize a corporation called the Kansas City Terminal Construction Company; and the Trust Company
257 caused its own stockholders, employes, officers and directors to be elected and appointed officers and directors of the Construction Company, so that the Trust Company by reason thereof at all times absolutely dominated and controlled the Construction Company. The stockholders of the Construction Company were also made up of the stockholders, employes, officers and directors of the Trust Company and such of their friends as they were willing to permit to come in and enjoy the fruits and profits of the plan. The Construction Company thereupon began the construction of the railroad of the Suburban Company between the points above designated as Broadway Street and Cecil Station; and had only partially completed the construction of said road, the acquirement of the right of way and the performance of their duties and obligations required by said contract, when, on or about May 9, 1890, the officers of the Construction Company and of the Suburban Company and of the Trust Company (who were substantially the same persons and having the same purposes and ends in view), with the intent to secure to themselves large and exorbitant profits through their interest in the Construction Company and the Trust Company, and contracting with themselves as the representatives of the said corporations, caused the Construction Company and the Suburban Company to go through the form of agreement, by the terms of which the Suburban Company agreed to receive and accept the uncompleted railroad so partially constructed by the Construction Company as aforesaid as a full compliance with the requirements of said Stilwell contract and to authorize and direct the Trust Company to turn over to the Construction Company the stocks and bonds described in said Stilwell contract; and accordingly by virtue of such control and domination so exercised by the Trust Company over the Suburban Company, the latter went through the form of accepting the said uncompleted railroad and directing the Trust Company to release the said securities, and the Trust Company did release and turn over to the Construction Company bonds of the

Suburban Company in the amount of Four Hundred Thousand Dollars ($400,000.00), face value, and stock of the Suburban Company in the amount of Six Hundred Thousand Dollars ($600,000.00), face value, retaining for itself and its officers Fifty Thousand Dollars ($50,000.00), par value of the bonds, and Three Hundred Thousand Dollars ($300,000.00), par value of the stock, as hereinafter set forth; and said stocks and bonds in the amount of Six Hundred Thousand Dollars ($600,000.00) and Four Hundred Thousand Dollars ($400,000.00), respectively, were there-
258 upon distributed by the Trust Company and by the Construction Company to the stockholders, employes, officers and directors of said two companies and their friends who had been permitted to participate in the scheme as aforesaid.

Your orators further show that the action of the Trust Company in causing the Suburban Company to accept a partial compliance with its terms as and for a full compliance, and in causing said securities to be issued, was contrary to the best interests of the Suburban Company, oppressive, inequitable and was solely by virtue of the said domination and control and to the end that the persons so in control and domination might realize unlawful gains and profits; and the said transaction ought not in equity to be permitted to stand as against parties in interest in the Suburban Company.

(*a*) Your orators further show that the cost of the road and right of way so constructed and acquired by the Construction Company did not exceed the sum of Two Hundred and Ninety-Two Thousand Dollars ($292,000.00), and that the bonds and stock as aforesaid so turned over to the Trust Company and the Construction Company as the pretended consideration were of the reasonable value of Four Hundred and Eighty Thousand Dollars ($480,000.00), and that the unlawful profits of said transaction amounting to the sum of One Hundred and Eighty-Eight Thousand Dollars ($188,000.00), with interest thereon from May 9th, 1890, at six per cent per annum, ought in equity and good conscience to be accounted for by the Trust Company and paid to your orators, and that the pretended account rendered by the Trust Company omits said item, to which the complainants are properly entitled.

(*b*) Your orators further show that at the time of issuing the bonds aforesaid there were issued the sum of Five Hundred Thousand Dollars ($500,000.00) par value, and that those remaining after delivery of the Trust Comapny to the Construction Company of bonds of par value of Four Hundred Thousand Dollars ($400,000.00), to-wit, bonds in the sum of One Hundred Thousand Dollars ($100,000.00), par value, were fraudulently, wrongfully and unlawfully taken and appropriated by the Trust Company for its own benefit; and that said bonds so wrongfully taken and appropriated were of the reasonable value of Ninety Thousand Dollars ($90,000.00); that at the same time the capital stock issued by the Suburban Company was of the par value of One Million Dollars ($1,000,000.00), and that remaining after the delivery by the Trust Company to the Construction Company of Six Hundred Thousand Dollars ($600,000.00), par value, of as aforesaid, to-wit,

the sum of Four Hundred Thousand Dollars ($400,000.00),
259 par value, of said capital stock was fraudulently, wrongfully and unlawfully taken and appropriated by the Trust Company to its own use, and the said stock so wrongfully taken and appropriated was at that time of the reasonable value of Eighty Thousand Dollars ($80,000.00); that your orators are entitled in equity and good conscience to have the Trust Company account for and pay over to your orators the value of said stocks and bonds, to-wit, the sum of One Hundred and Seventy Thousand Dollars ($170,000.00), with interest thereon from May 9, 1890, at six per cent per annum, all of which the Trust Company refuses to do and all of which said items are omitted as credits from said pretended statement of the Trust Company.

(c) Your orators further show that by reason of the failure of the Trust Company and its agents to fully complete said contracts as provided for under the terms of the said Stilwell contract, the Suburban Company, its successor the Belt Company, one of your orators, as well as the receivers of the Belt Company, who are also your orators, were compelled to and did expend large sums of money to complete the construction of said railroad, and for the purchase of certain right of way which should have been procured and furnished by the Trust Company or by its agent, the Construction Company under said Stilwell contract, and which would have been so furnished but for the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said contract as and for a full performance thereof; that a partial list of the amounts so expended by the Suburban Company during the year 1890-1891, are as follows:

For Right of Way and Expenses in Connection Therewith.

Date.	Name.	Amount.
May .., 1890	M. Uhrig, Curator	$101.10
" 10, 1890	Emma Ackerman and others	50.56
" .., 1890	Dobson & Trimble	1,767.00
" 22, 1890	H. H. Noland, Cl'k 1st Div	650.00
June .., 1890	Winford Dougherty	550.00
" 14, 1890	Winford Dougherty	10.00
" 25, 1890	Chi. & Alton, damages	4,202.00
July 17, 1890	Dobson & Trimble	1,198.73
" 29, 1890	C. R. Barnhart	441.50
.., 1890	G. Friday	75.00
Aug. 8, 1890	T. D. Windrate	54.00
" 8, 1890	Sedden & Edwards Brick Co	400.00
.., 1890	J. P. Knoche	252.50
Oct. 28, 1890	Land Title & Guar. Co	42.50
" 23, 1890	T. S. Case	20.40
Jan. 21, 1891	Jennie Barber	25.00

260 *For Construction Work.*

Date.	Name.	Amount.
May 10, 1890	Nat'l W. Wks. Co	11.25
" 14, "	Smith & Bradbury	251.25
" 14, "	Smith & Bradbury	403.57
" 20, "	Mrs. S. J. Crute	300.00
" 31, "	K. C. Switch & Frog Co	333.00
" 31, "	K. C. Switch & Frog Co	666.00
" 31, "	K. C. Switch & Frog Co	128.00
June 6, "	K. C. Bolt & Nut Co	252.00
June 6, "	Am. Supply Co	180.48
" 19, "	Richards & Conover H. Co	4.17
"	Western S. & D. Co.	37.50
" 19, "	American Supply Co	128.97
" 3, "	Pay Roll, Cons. Train	208.75
" 19, "	Am. Supply Co	120.42
.., "	Smith & Bradbury	3,682.10
June .., "	Am. Supply Co	225.70
July 7, "	Am. Supply Co	60.87
" .., "	Smith & Bradbury	695.66
" 17, "	K. C. Switch & Frog Co	1,161.00
" .., "	C. R. Barnhart	314.00
" 26, "	J. Smith	10.00
" .., "	Holton, Warren Lbr. Co	128.01
" .., "	Holton, Warren Lbr. Co	104.55
July .., 1890	Holton, Warren Lbr. Co	183.60
" " "	Holton, Warren Lbr. Co	124.95
" " "	Holton, Warren Lbr. Co	199.92
" " "	Holton, Warren Lbr. Co	74.06
Aug. 8, 1890	Kansas City Switch & Frog Co	1,440.00
" 9, "	Kit Colyer	95.00
Aug. 8, "	Smith & Bradbury	842.30
.., "	Smith & Bradbury	643.50
Aug. 5, "	J. H. Knoche	100.00
" .., "	J. Whitaker	62.00
Aug. 24, "	Smith & Bradbury	318.45
Sept. 6, "	Kansas City Switch & Frog Co	576.00
" 6, "	Pinkerton Detective Agency	139.50
" 6, "	Kansas City Bolt & Nut Co	387.50
" 6, "	Kansas City Bolt & Nut Co	29.04
.., "	Richards & Conover	8.17
.., "	Smith & Bradbury	992.00
.., "	Kansas City Switch & Frog Co	824.40
Sept. 27, 1890	Smith & Bradbury	1,273.53
.., "	Kansas City Switch & Frog Co	43.75
.., "	Smith & Bradbury	1,602.00
Dec. 22, 1890	H. R. & Co	962.98
Jan. 13, 1891	F. M. & Co	210.00
May 26, 1890	Smith & Bradbury	3,500.00

That your orators are entitled in equity and good conscience to a credit upon the pretended account produced by the Trust Company for each and all of the amounts above set forth and interest thereon at six per cent per annum from the dates when said payments were made, all of which have been improperly and unlawfully omitted from the said pretended account by the Trust Company.

(*d*) Your orators further show that by reason of the failure of the Trust Company to fully comply with the terms of and conditions of the said Stilwell contract and to furnish the right
261 of way and depot required to be furnished by said Trust Company as a part of said contract, it became necessary to secure additional parcels of right of way, all of which the Trust Company was obligated to procure and furnish under the said Stilwell contract, and the Trust Company undertook to procure such right of way for the Suburban Company and did procure the same and in all cases charged the cost thereof, together with interest thereon, to the Belt Company, and the items so charged appear as debits in the pretended statement produced by the Trust Company; that in many instances the Trust Company caused the Suburban or Belt Company to itself purchase said necessary right of way and to execute notes for deferred payments thereon and said notes and the interest payments as they were made from time to time were duly charged to the Belt Company and appeared as debits in said pretended account; that the Trust Company failed to furnish a depot for the Suburban Company as in and by said contract it was obligated to do through itself or through its agent, the Construction Company, and the Trust Company after the pretended completion of said Stilwell contract undertook to and did construct a depot building for the Suburban Company at Second and Wyandotte Streets and charged the cost thereof to the Belt Company, and said charges appear as debits in the pretended account presented by the Trust Company. The amount so expended for right of way aggregates the sum of One Hundred and Twelve Thousand, Two Hundred Thirty-nine and Eighteen-hundredths Dollars ($112,239.18) the itemized statement of which, showing the amounts and dates when the various items were charged to the Belt Company appears upon the itemized statement marked Exhibit "1" under the head of "Right of Way," hereto attached and made a part hereof. The interest paid on right of way notes as aforesaid, the payment of which was made necessary by the Trust Company's failure to comply with said Stilwell contract, aggregates the sum of Forty-three Thousand Sixty-six and 30-100 Dollars ($43,066.30), an itemized statement of which showing the dates, and amounts paid is set forth in the said Exhibit "1" under the head of "Interest on Right of Way notes," herewith attached as aforesaid.

(*e*) In addition to the amounts appearing upon the pretended statement of the Trust Company as so expended for right of way by the Trust Company and charged to the Belt Company, the Belt Company on or about June 2d, 1896, paid to Louise W. Crane and others, who were then owners of an undivided half interest in lot 124, block 12, of old town, all in Kansas City, Mo., the sum of Three

Thousand Dollars ($3,000) as a partial payment for said
262 interest in said lot; that it was the duty of the Trust Company or the duty of its agent the Construction Company, to procure and furnish this tract of land as a part of the right of way called for under the Stilwell contract of June 1, 1889, the said payment was made necessary because of the failure of the Trust Company or its agent, the Construction Company, to comply with and perform the terms of the said Stilwell contract and because of the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said Stilwell contract as and for a full performance thereof; that said item of Three Thousand Dollars ($3,000.00) is wholly omitted in the pretended account or statement presented by the Trust Company and that the Belt Company is entitled to and should have credit for said item with interest thereon from the date thereof.

(*f*) In addition to the amounts appearing upon the pretended statement of the Trust Company as so expended for right of way by the Trust Company and charged to the Belt Company, the Suburban Company on or about April 4, 1890, paid to Thomas J. Emery, who was then the owner of lots 141 and 142 of block fourteen (14), old town, all in Kansas City, Mo., on account of the purchase of said lots the sum of Four Thousand Five Hundred Dollars ($4,500), and in addition thereto two notes of Five Thousand Dollars ($5,000) each were given as the balance of the purchase price of said lots in the manner hereinafter described; that it was the duty of the Trust Company or the duty of its agent, the Construction Company, to procure and furnish this tract of land as a part of the right of way that was called for under the Stilwell contract of June 1, 1889; and said payment was made necessary because of the failure of the Trust Company or its agent, the Construction Company, to comply with and perform the terms of the said Stilwell contract, and because of the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said Stilwell contract as and for a full performance thereof; that said item of Four Thousand Five Hundred Dollars ($4,500) is wholly omitted in the pretended account or statement presented by the Trust Company and that the Belt Company is entitled to and should have a credit for said item with interest thereon from the date of the payment thereof.

(*g*) It was the duty of the Trust Company or the duty of its agent, the Construction Company, to procure and furnish to the Suburban Company a right of way across lots ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), and fifteen (15), block ten (10), of old town, and lot one hundred and one (101),
263 of block ten (10), old town, all in Kansas City, Mo., as a part of the right of way called for under the Stilwell contract of June 1, 1889; that the right of way of the Suburban Company crosses the said lots and that the said Suburban Company's road, as so built by the Trust Company or its agent, the Construction Company, passes over and upon these said lots; that the Trust Company or its agents, the Construction Company, has omitted and wholly failed to procure and furnish such right of way for and upon said

lots as called for and provided under the terms of the said Stilwell contract; that at the time of the institution of this action the reasonable value of he right of way over and upon lots ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14) and fifteen (15), of block ten (10), of old town, so omitted to be provided by the said Trust Company or its agent, the Construction Company, was Eleven Thousand Two Hundred and Fifty Dollars ($11,250); that at the time of the institution of this action the reasonable value of the right of way over and upon lot one hundred and one (101), block ten (10), old town, so omitted to be provided by the said Trust Company or its agent, the Construction Company, was Five Thousand Dollars ($5,000.00); that the reasonable value of the right of way over and upon the said lots, to-wit, Eleven Thousand Two Hundred and Fifty Dollars ($11,250.00) and Five Thousand Dollars ($5,000.00) are wholly omitted in the pretended account or statement presented by the Trust Company, and that the Belt Company is entitled and should have credit for the said items of Eleven Thousand Two Hundred and Fifty Dollars ($11,250.00) and Five Thousand Dollars ($5,000.00) with interest thereon from the date of the omission of said Trust Company or its agent, the Construction Company, to procure and furnish said right of way.

(h) There was paid by the Trust Company as rental for certain right of way, all of which said right of way the Trust Company was obligated to procure and furnish under the said Stilwell contract, and charged against the Belt Company in the pretended statement, the sum of One Thousand Two Hundred Eighty-three and Twenty-hundredths Dollars ($1,283.20) an itemized statement of which is set forth in said Exhibit "1," under the head of "Rental Paid for Right of way," hereto attached, which said payment was made necessary because of the failure of the Trust Company to comply with and perform the terms of said Stilwell contract.

(i) In addition to the amounts appearing upon the pretended statements of the Trust Company as so expended for right of way and rental thereof, by the Trust Company and charged to the Belt Company, the Belt Company or its receivers, all of whom are
264 your orators herein, between March, 1897, and January 1, 1902, were compelled to pay to the Pacific Express Company (who was then the owner of lot one hundred and one (101), block ten (10), of old town, all in Kansas City, Mo.), as rental for right of way of said Belt Company across said lot the sum of Fourteen Hundred Seventy-five Dollars ($1,475.00); that the amounts so expended by the Belt Company or its receivers are as follows:

Amount Paid by the Belt Company.

March, 1897	$25.00
April, 1897	25.00
May, 1897	25.00
May, 1897	25.00
June, 1897	25.00
June, 1897	25.00

Sept.,	1897	25.00
Oct.,	1897	25.00
Nov.,	1897	25.00
Dec.,	1897	25.00
Jany.,	1898	25.00
Feb.,	1898	25.00
March,	1898	25.00
April,	1898	25.00
May,	1898	25.00
June,	1898	25.00
July,	1898	25.00
Aug.,	1898	25.00
Sept.,	1898	25.00
Oct.,	1898	25.00
Nov.,	1898	25.00
Dec.,	1898	25.00
Jany.,	1899	25.00
Jany.,	1899	25.00
Feby.,	1899	25.00
March,	1899	25.00
March,	1899	25.00
May,	1899	25.00
June,	1899	25.00
June,	1899	25.00
July,	1899	25.00
Sept.,	1899	25.00
Oct.,	1899	25.00
Nov.,	1899	25.00
Dec.,	1899	25.00
Jany.,	1900	25.00
Feby.,	1900	25.00
March,	1900	25.00
April,	1900	25.00
265		
May,	1900	25.00
June,	1900	25.00
July,	1900	25.00
Aug.,	1900	25.00
August,	1900	25.00
		$1,100.00

Amounts Paid by the Receivers of the Belt Company.

October,	1900	$25.00
November,	1900	25.00
December,	1900	25.00
January,	1901	25.00
February,	1901	25.00
March,	1901	25.00

April,	1901	25.00
May,	1901	25.00
June,	1901	25.00
July,	1901	25.00
August,	1901	25.00
September,	1901	25.00
October,	1901	25.00
November,	1901	25.00
December,	1901	25.00
		$375.00

That it was the duty of the Trust Company or the duty of its agent, the Construction Company, to procure and furnish the right of way over said lot as a part of the right of way called for under the Stilwell contract of June 1, 1889, and said payments were made necessary because of the failure of the Trust Company or its agent, the Construction Company, to comply with and perform the terms of said Stilwell contract and because of the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said Stilwell contract as and for a full performance thereof; that the said items of rental amounting to Fourteen Hundred and Seventy-five Dollars ($1,475.00) are wholly omitted in the pretended account or statement presented by the Trust Company and that the Belt Company and its receivers (your orators herein) are entitled to and should have credit for said items with interest thereon from date of payment thereof.

(*j*) There was expended by the Trust Company and charged to the Belt Company as appears in the said pretended statement the sum of Fifty-nine Thousand Two Hundred Sixty-five and Sixty-Two-One-Hundredths Dollars ($59,256.62) as the cost of the depot building at Second and Wyandotte Streets in Kansas City, Missouri, which said building should have been constructed by the
266 Trust Company, or its agent, the Construction Company, under and in pursuance of the terms of said Stilwell contract; an itemized statement of the items composing the charge of Fifty-nine Thousand Two Hundred Sixty-five and 62/100 Dollars ($59,265.62) is set forth in said Exhibit "1," under the heading "Second and Wyandotte Depots," hereto attached.

(*k*) There was expended by the Trust Company and charged to the Belt Company, as appears in the said pretended statement, the sum of Twenty-two Thousand One Hundred Fifty-eight and Seventy-five Hundredths Dollars ($22,158.75) as the cost of other station depots, platforms, sand house, round house and labor and material furnished, all of which should have been constructed, procured and furnished by the Trust Company or its agent, the Construction Company, under and in pursuance of the terms of the said Stilwell contract. An itemized statement of the items composing this charge of $22,158.75 is set forth in said Exhibit "1" hereto attached, under the head of "Other Buildings."

Your orators further say that all the foregoing matters, which ap-

pear (and are set forth in said exhibit) as debits in the pretended account presented by the Trust Company are unlawful and unjust and represent matters for which the Trust Company and not the Belt Company was and is responsible; that all of said items should be eliminated from said account and the Belt Company should be credited with interest thereon from the respective dates when said charges were made; that all of the foregoing matters not appearing upon the pretended statement or items which the Trust Company has unlawfully and improperly omitted therefrom and with which the Belt Company, in equity, should be credited.

(*l*) Your orators further show that, by reason of the failure of the Trust Company and its agents to fully complete said construction contract, it became necessary for the Suburban Company, or its successor, the Belt Company, one of your orators herein, to acquire ground for right of way and switching yards in Kansas City, Missouri, upon the line of its road, which should have been furnished and provided by the Trust Company, or its agent, the Construction Company, under and in pursuance of the said Stillwell contract; that accordingly the Trust Company caused the Second Street Improvement Company, which was also one of its auxiliary companies created and officered by it, to execute a lease from it to the Consolidated Terminal Railway Company covering a strip of land in section twenty-five (25), township fifty (50), range thirty-three (33), in Jackson County, Missouri, containing twenty-eight (28)
267 acres, which land adjoined the right of way and railroad tracks of the Suburban Company running parallel to such tracks at a distance of 4,809.8 feet. It was provided in said lease that the lessee should pay a yearly rental of Three Thousand Dollars ($3,000.00) and that the lessee should also have an option of purchase of said property on certain terms therein specified. Your orators duly paid said rent as it accrued from year to year, amounting to the aggregate sum of Twenty-six Thousand Two Hundred and Fifty Dollars ($26,250.00) and that the reasonable value of said property at the time of the institution of this action was Forty Four Thousand One Hundred Twenty-five Dollars ($44,125.00). Your orators are entitled in equity and good conscience to be credited upon the pretended accounts produced by the Trust Company for each and all said rental payments with interest thereon at six per cent per annum from the date of such payments and for the value of said property at the time of the institution of this action, with interest thereon as above stated; all of which credits have been improperly and unlawfully omitted from said account by the Trust Company.

(*m*) Your orators further show that by reason of the failure of the Trust Company and its agents to fully complete said Stilwell contract it became necessary for the Belt Company to acquire certain property at Second and Wyandotte Streets in Kansas City, Missouri, for depot purposes; that thereupon the Trust Company caused the said Second Street Improvement Company, one of its auxiliary corporations aforesaid, to lease to the Suburban Company for a period of ten years from June 1, 1891, lots one hundred and twelve

(112) and one hundred thirteen (113), block eleven (11), Old Town, all in Kansas City, Mo., which said property properly came within the terms of said Stilwell contract and should have been furnished and provided by the Trust Company or by its agent, the Construction Company; under the said lease for said lots 112 and 113 the Belt Company was caused to and did pay rental to the Second Street Improvement Company for the use of said lots from June 1, 1891, to October 31, 1901, a total of One Hundred and Twenty-Five (125) months, at the rental fixed in said lease of Two Thousand Five Hundred Sixty-Six and forty-hundredths Dollars ($2,566.40) per annum, or a total of Twenty-Six Thousand Seven Hundred Thirty-Three and sixty-four-hundredths Dollars ($26,733.64); and that the value of said lots at the time of the institution of this action was the sum of Twenty-Five Thousand Seven Hundred and Fifty Dollars ($25,750.00), and your orators are entitled in equity and good conscience to a credit upon the pretended account produced by the Trust Company for the sum paid as rentals with
268 interest thereon at six per cent per annum from the date of each payment and for the said sum of Twenty-Five Thousand Seven Hundred and Fifty Dollars ($25,750.00), with interest thereon; all of which credits have been improperly and unlawfully omitted from said pretended account by the Trust Company.

(*n*) Your orators further show that on March 20, 1890, the McClelland, Stumpf & Peltzer Brick Manufacturing Company owned lots one hundred forty-three (143), one hundred forty-four (144), one hundred forty-five (145), and one hundred forty-six (146), in block fourteen (14); lots one hundred nineteen (119), one hundred twenty-two (122), one hundred twenty-three (123), one hundred twenty-five (125), and an undivided half interest in lot one hundred twenty-four (124), in block twelve (12), and lot one hundred thirty-eight (138), in block thirteen (13), all in Old Town, Kansas City, Missouri, all of which property is located in the vicinity of Second and Wyandotte Streets and is a part of the depot grounds of the Belt Company and was a part of the right of way to be acquired and furnished by the Trust Company or by its agent, the Construction Company, under the Stilwell contract of June 1, 1899. In March, 1890, the said Brick Manufacturing Company conveyed all of the foregoing property to Alfred L. Howe, agent or dummy of the Trust Company, and on the same date the said Howe executed two notes for Forty-Nine Thousand Three Hundred Thirty-Three and thirty-three-hundredths Dollars ($49,333.33) each, to secure to the said Brick Manufacturing Company the balance of the purchase price of the same, and a deed of trust to secure said notes was placed upon all said property. On June 23d, 1890, the said Howe conveyed said property to the Belt Company. The first of said notes was for $49,333.33, which became due March 20, 1891, and the second became due March 20, 1892, both bearing six per cent interest; the first of said notes was paid by the Trust Company on March 23, 1891, and charged by it to the Belt Company. On March 14, 1890, the said Brick Manufacturing Company conveyed to W. S. Taylor, an agent and dummy of the Trust Company, lots nine (9), ten

(10), eleven (11), twelve (12), thirteen (13), fourteen (14), and fifteen (15), in block eleven (11) of King & Bouton's Re-survey of the East Half of block eleven (11), Old Town, in Kansas City, Missouri, for a consideration of Forty-One Thousand One-Hundred Dollars ($41,100.00), and said Taylor executed to said Brick Manufacturing Company three notes in the sum of Ten Thousand Dollars ($10,000.00) each, dated June 1, 1890, to secure the unpaid purchase money, and gave a deed of trust to secure said notes. The property just described is located at Second and Wyandotte
269 Streets in Kansas City, Missouri, upon which the depot building of the Belt Company was afterwards constructed, and it was a part of the property and right of way that should have been furnished by the Trust Company, or by its agent, the Construction Company, under the terms of the said Stilwell contract of June 1, 1889. The Kansas City Terminal Construction Company, in recognition of its obligation to pay for this property at or about the time of its purchase paid from its treasury to the said Brick Manufacturing Company or for it the sum of Eleven Thousand One Hundred Dollars, ($11,100.00), which, with the said three notes of Ten Thousand Dollars ($10,000.00), given for deferred payments, made up the purchase price of said property; the said Taylor, after the execution of the said three notes, conveyed said property to the Belt Company. On April 7, 1890, Thomas J. Emery owned the following described real estate in Kansas City, Missouri, to-wit, lots twelve (12), and thirteen (13) of King & Bouton's Re-survey of the west half of block ten (10), Old Town; also lots one hundred forty-one (141) and one hundred forty-two (142) block fourteen (14), Old Town; on said date he duly conveyed said property to the said Alfred L. Howe, who was acting in the same capacity as aforesaid; that said Howe gave back to said Emery two notes for Nine Thousand Three Hundred Seventy-Five Dollars ($9,375.00), with six per cent interest, to secure the unpaid portion of the purchase price, securing said notes with a deed of trust upon the property; and thereafter on June 23, 1890, conveyed lots one hundred forty-one (141) and one hundred forty-two (142) in block fourteen (14) to the Belt Company, and the remainder of the property was conveyed to the Second Street Improvement Company; that of said two notes of Nine Thousand Three Hundred and Seventy-Five Dollars ($9,375.00) each, the sum of Ten Thousand Dollars ($10,000.00), or Five Thousand Dollars ($5,000.00) on each of said notes, represented the deferred payments on the property acquired for and deeded to the Belt Company; that all of said Emery property was a part of the property and right of way that should have been procured and furnished by the Trust Company or by its agent, the Construction Company, under the terms of the said Stilwell contract of June 1, 1889.

Your orators further show that the notes described, representing deferred payments on property purchased for and afterwards conveyed to the Belt Company are as follows:

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Date of note.	Date due.	Int.	In favor of	Amount.
4- 4-1890	4- 4-1891	6 per cent	T. J. Emery.....	$5,000.00
4- 4-1890	4- 4-1892	6 per cent	T. J. Emery.....	$5,000.00
6- 1-1890	6- 1-1891	6 per cent	McClelland, Stumpf & Peltzer Brick Mfg. Company.	$10,000.00
6- 1-1890	6- 1-1893	6 per cent	Do.....	$10,000.00
6- 1-1890	6- 1-1893	6 per cent	Do.....	$10,000.00
3-20-1890	3-20-1892	6 per cent	Do.....	$49,333.33

Your orators further show, that on or about October 15, 1897, the Belt Company was embarrassed financially and insolvent and that it had outstanding notes of a large amount, including the notes above mentioned, which were secured by a first mortgage as aforesaid; that the stock of the Belt Company was depressed in value and certain of the officers of the Trust Company and certain investors in it and in the Belt Company became desirous of improving the financial condition of the Belt Company by getting off its books certain of its bills payable, including the notes mentioned, in order that by certain manipulations a dividend might be declared, and the market in the stocks of the Belt Company might be improved and the parties interested might profit therefrom in their stock dealings and transactions. Accordingly, an arrangement was made between certain officers of the Trust Company and J. de Goeijen, by the terms of which the Trust Company assumed and agreed to pay the said real estate notes, including the notes above mentioned, and the amount of said notes, including the said sum of Eighty Nine Thousand Three Hundred and Thirty-Three and thirty-three-hundredths Dollars ($89,333.33), was by the Trust Company charged to the Belt Company on the books of the Trust Company, and the same now appears as a debit to the Belt Company in the pretended statement submitted by the Trust Company. At the time of said transaction, and on or about October 15, 1897, pursuant to the plan aforesaid, the said J. de Goeijen purchased certain bonds belonging to the Belt Company, which were by the Trust Company credited upon its books to the Belt Company in an amount sufficiently large to cover all of said notes, so that upon the books of the Belt Company all of said bills payable had been eliminated, and the Belt Company was thus enabled to make out and send to stockholders and financial publications a clean statement showing an improved financial condition for the purpose of bolstering up the market value of its stock aforesaid, all of which was accordingly done. The said statements showing said credits extended by the Trust Company and the improved financial condition of the Belt
271 Company resulting therefrom were sent out to stockholders and investors and the financial publications aforesaid, and the public was invited to purchase and trade in the stocks as well as the bonds of the Belt Company, in reliance upon such statements. And your orators aver that thereafter the public did deal in, buy and

sell the stocks and bonds of the Belt Company, and investments were made in reliance upon said statements.

Your orators further show, that on or about the month of April, 1899, and after the appointment of receivers for the Gulf Company, the Trust Company had good reason to believe and did believe that it would soon lose control of the Belt Company, and that other and independent directors and officers would be elected, and it thereupon set about to relieve itself of its assumption and agreement to pay the said notes above mentioned, aggregating Eighty-Nine Thousand Three-Hundred Thirty-Three and 33-100 Dollars, and thereupon made the pretense and claim that the aforesaid credit which it extended to the Belt Company on or about October 15, 1897, was on the understanding that the funds for such credit should be supplied by the said J. de Goeijen, and that said J. de Goeijen had failed to supply said funds; and thereupon said Trust Company undertook by an entry upon its own books to relieve itself of its said assumption and agreement to pay said notes aggregating $89,333.33, but failed, neglected and refused upon so doing to credit the account of the Belt Company with said sum, as it should have done. At that time the said de Goeijen was indebted to the Trust Company in an amount which said De Goeijen was unable to pay, or by reason of their intimate financial relationship the Trust Company was unable or unwilling to collect from De Goeijen, and thereupon the Trust Company contrived the plan of causing the Belt Company to take over its worthless account against De Goeijen, in lieu of crediting the Belt Company with such sum, as it should have done as aforesaid. At said time the Trust Company well knew that said account against De Goeijen was worthless and uncollectable, and its action in causing said entries to be made on the books of the Belt Company and in refusing itself to credit the Belt Company, was a fraudulent and unlawful attempt on the part of the Trust Company to relieve itself of its assumption of the agreement to pay said notes in said sum of $89,333.33, and at the same time to release said amount charged to the Belt Company on account of such assumption. By reason of the premises, the Trust Company is estopped to deny that the credit it extended to the Belt Company as aforesaid was an absolute credit, and is so estopped from saying that said credit was a conditional one, and cannot in equity and
272 good conscience claim the right to unload upon the Belt Company the worthless claim against De Goeijen in lieu of crediting the Belt Company or paying said notes, neither of which has been done by the Trust Company.

Your orators claim, therefore, that the charge of Eighty-Nine-Thousand Three Hundred Thirty-Three and 33-100 Dollars ($89,333.33), made by the Trust Company to the Belt Company on or about October 15, 1897, which appears in the pretended statement submitted by the Trust Company, should be eliminated therefrom, together with all charges of interest which also appear in said pretended statement, and that the Belt Company should be credited with same amount and interest thereon from said date of

October 15, 1897, together with interest upon the charges of interest made in connection therewith as aforesaid.

(1) Your orators further state that on or about May 9, 1890, when the Suburban Company and the Construction Company undertook, as above stated, to declare the contract between them for the construction of the first section of the Suburban Company's road duly performed in all respects, the said Construction Company had an overdraft at one of the banks in Kansas City, Missouri, in the sum of Three Hundred and Thirteen and 76-100 Dollars ($313.76), whereby the said Construction Company owed said bank the said sum of money; that the Trust Company, through its officers and agents unlawfully and fraudulently caused the Suburban Company to take up and pay said overdraft in said sum on the 7th day of May, 1890, and said sum is wholly omitted in the pretended statement of account submitted, and the Belt Company should be and is entitled to be credited with interest thereon from the day of payment thereof.

2. Your orators further show that upon the organization of the various companies above named, to-wit, the Suburban Company, the Consolidated Company, the Union Company, the Air Line and the Northern Connection Company, the Trust Company as above set forth caused these companies respectively to issue stocks and bonds, and thereupon the Trust Company undertook the disposition of said stocks and bonds, in some instances going through the form of purchasing said stocks and bonds itself and in other cases disposing of said stocks and bonds to others, and in connection therewith made large and exhorbitant charges to the Belt Company under the guise of commissions for so doing.

(*a*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company un-
273 der the guise of commissions in connection with the Belt Company:

Aug.	8, 1890	$15,000.00
Dec.	22, 1893	4,000.00
Oct.	10, 1894	1,250.00
July	29, 1897	1.58
Feb.	8, 1899	75.00
Apr.	6, 1897	22.50
Nov.	20, 1895	62.50

(*b*) In addition to the foregoing amounts, the Trust Company on or about November 27, 1891, charged the Belt Company the sum of One Thousand Dollars ($1,000.00), as and for a commission in connection with the Belt Company; and the said amount was paid to the Trust Company by the Belt Company. The amount of this payment does not appear on the pretended statement presented by the Trust Company.

(*c*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Consolidated Company:

Oct.	26,	1891	$522.50
Apr.	4,	1892	6,000.00
Oct.	20,	1891	30,000.00
Dec.	17,	1891	6,000.00
Oct.	27,	1891	402.50
Oct.	26,	1891	120.00
Nov.	13,	1891	320.00
Nov.	2,	1891	150.00
Nov.	2,	1891	80.00
Nov.	12,	1891	1,182.50
Nov.	16,	1891	463.18
Nov.	21,	1891	750.00
Nov.	23,	1891	4,455.00
Dec.	4,	1891	24.00
Dec.	7,	1891	24.00
Dec.	19,	1891	300.00
Jan.	9,	1892	30.00
Jan.	12,	1892	300.00
Jan.	30,	1892	750.00
Feb.	11,	1892	90.00
Feb.	26,	1892	60.00
Feb.	29,	1892	225.00
Mar.	11,	1892	30.00
Mar.	18,	1892	60.00
Mar.	19,	1892	750.00
Apr.	6,	1892	2,802.80
Apr.	12,	1892	1,200.00
July	13,	1892	240.00
Aug.	2,	1898	46.88
Feb.	8,	1899	46.00

274 (*d*) In addition to the foregoing charges that appear upon the said statement, the Trust Company took and appropriated to its own use the stock and bonds of the Consolidated Terminal Company under the guise of commissions as follows:

Dec. 17, 1891, 1000 shares of stock of the value of $32,220.00.

Dec. 17, 1891, 30 bonds of the value of $25,410.00.

Mar. 17, 892, 240 shares of the stock of the value of $7,732.00.

July —, 1892, 3100 shares of stock of the value of $103,333.33.

(*e*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Union Terminal Company:

Oct.	7,	1892	$550.00
Dec.	31,	1892	500.00
Jan.	13,	1893	7,500.00
Jan.	23,	1893	3,200.00
Jan.	26,	1893	15,000.00
Apr.	5,	1893	6,250.00
Sept.	16,	1898	50.00

Oct.	6, 1898	100.00
Oct.	18, 1898	50.00
Jan.	17, 1899	231.25
Jan.	18, 1899	277.50
Feb.	17, 1899	230.00
Aug.	2, 1898	90.63
Feb.	8, 1899	117.00

(*f*) In addition to the foregoing charges the Trust Company charged the Belt Company under the guise of commissions and caused the Belt Company to pay the same in connection with the Union Company the following sums:

September,	26, 1892	$4,400.00
November,	10, 1892	800.00
December	31, 1892	550.00
January	7, 1892	250.00

The amount of these payments does not appear on the pretended statement presented by the Trust Company.

(*g*) In addition to the foregoing items appearing upon the pretended statement, the Trust Company took, appropriated and converted to its own use, under the guise of commissions, three hundred (300) shares of Union Company stock of the value of
275 Nine Thousand Eight Hundred Sixty-Four Dollars ($9,-864.00); which does not appear upon said statement.

(*h*) In addition to the foregoing items the Trust Company took, appropriated and converted to its own use, under the guise of commissions for services rendered, the following stocks and bonds of Union Company:

October 21, 1892, 60 bonds of the value of	$54,000.00
1,500 shares of stock of the value of	49,320.00

(*i*) In addition to the foregoing items the Trust Company took, without consideration, appropriated and converted to its own use one thousand (1,000) shares of Union Company stock of the value of Thirty-Two Thousand Eight Hundred and Eighty Dollars ($32,880.00).

(*j*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Air Line:

Mar.	17, 1892	$520.00
June	20, 1892	50.00
July	6, 1892	700.00

(*k*) In addition to the foregoing appearing on said statement there was taken and appropriated by the Trust Company and by it converted to its own use, on or about December 9, 1891, the following:

13 mortgage bonds of the Air Line of the value of $11,193.00.

500 shares of stock of the Air Line of the value of $15,950.00, for which no credit is given to the Belt Company in said statement.

(*l*) In addition to the foregoing appearing on said statement there was taken and appropriated by the Trust Company and by it converted to its own use in the year 1892, 500 shares of Air Line stock of the value of $15,950.00.

(*m*) In addition to the foregoing items the Trust Company in the year 1895 took, appropriated and converted to its own use under the guise of commissions and services for promotion in connection with the Air Line, 80 shares of stock of the East Kansas City Land Company (then the property of the Belt Company) of the value of Eight Thousand Dollars ($8,000.00).

(*n*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Kansas City & Northern Connecting Railroad Company:

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July	19, 1896	$400.00
July	29, 1896	400.00
Oct.	1, 1896	50.00
Dec.	10, 1896	8,250.00
Dec.	19, 1896	3,012.00
Dec.	23, 1897	50,000.00
Dec.	23, 1897	15,791.00
Dec.	23, 1897	1,250.00
Feb.	9, 1898	250.00
Feb.	24, 1898	300.00
Sep.	8, 1898	950.00
Dec.	27, 1898	250.00
Apr.	25, 1899	62.50

Your orators further show that as above set forth the Trust Company, at all times while it was handling the stocks and bonds of the companies mentioned, absolutely dominated and controlled said companies, and was using them, and each of them, as its own instrumentality or dummy for its own benefit and profit; that the Trust Company occupied a fiduciary relation to said companies and that any contract or contracts made or claimed to have been made between the Trust Company and said companies respectively, providing for commissions, donations or services were unlawful, inequitable and oppressive, and neither said contracts nor the charges above made were ever submitted to or approved by the parties in interest in said companies; that the said charges and exactions made under the guise of commissions or services were not only exorbitant, but by reason of the relationship between the Trust Company and the said companies the Trust Company did not have the right in law to charge the said companies any commissions whatsoever for the sale or handling of said securities or for anything done or services performed on account of which said charges

were made; that the charges for said commissions contained in said pretended statement should be eliminated and the Belt Company should be credited upon said account with interest on said charges from the dates when they were made; and in respect to the charges for commissions not appearing upon said pretended statement, the Belt Company should be and is entitled to a credit from the Trust Company with interest from the date of the payment thereof; and the value of the stocks and bonds so appropriated by the Trust Company as aforesaid, together with interest thereon from the dates respectively of such appropriation, should be credited to the Belt Company upon said statement.

3. Your orators further show that upon the organization of the various companies above named, to-wit, the Suburban Com-
277 pany, the Consolidated Company and the Union Company, the Trust Company as above set forth caused these companies respectively to issue stocks and bonds, and thereupon the Trust Company undertook the handling and disposition of said stocks and bonds, and, in addition to the exaction of commissions as above stated, the Trust Company exacted and caused the Belt Company to pay certain other charges under the name of trustee's fees, which your orators allege are wrongful and unlawful charges, for the reasons hereinbefore and hereinafter set forth, said charges being as follows:

(*a*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of trustee's fees in connection with Union Company, as follows:

Sept. 26, 1892.....	$13,200.00
Oct. 7, 1892.....	1,650.00
Nov. 10, 1892.....	2,400.00
Dec. 31, 1892.....	1,650.00
Jan. 7, 1893.....	750.00
Jan. 13, 1893.....	22,500.00
Jan. 23, 1893.....	9,600.00
Apr. 5, 1893.....	18,750.00
Feb. 27, 1893.....	375.00

(*b*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of trustee's fees in connection with Consolidated Company:

Apr. 25th, 1892.....	$7,000.00

(*c*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of trustee's fees in connection with the Suburban Company, to-wit:

From September, 1891, to and including May, 1900, at the rate of $17.00 per month, aggregating.....	$1,326.00

(*d*) In addition to the foregoing charges that appear upon the said statement, the Trust Company took and appropriated to its own use, the following stocks of the Suburban Company under the guise of trustee's fees or services, as follows:

Sept. 12, 1892, 1 share of the value of $33.00.

Your orators further show that, as hereinbefore set forth, the Trust Company at all times while it was handling the stocks and bonds of the companies mentioned absolutely dominated and controlled said companies and was using them and each of them
278 as its own instrumentality or dummy for its own benefit and profit; that the Trust Company occupied a fiduciary relation to said companies and that any contract or contracts made, or claimed to have been made, between the Trust Company and the said companies respectively, providing for trustee's fees, were unlawful, inequitable and oppressive, and neither said contracts nor the charges above made were ever submitted to or approved by the parties in interest in said companies; that the said charges and exactions made under the guise of trustee's fees were not only exorbitant, but, by reason of the relationship between the Trust Company and the said companies, the Trust Company did not have the right in law to charge the said companies any trustee's fees whatsoever in connection with the sale or handling of said securities, or for anything done or services performed, on account of which said charges were made; that the charges for said trustee's fees contained in said pretended statement should be eliminated and the Belt Company should be credited upon said account, with interest on said charges from the date when they were made; and the value of the stocks so appropriated by the Trust Company as aforesaid, together with interest thereon from the date of such appropriation, should be credited to the Belt Company upon said statement.

4. Your orators further show that upon the organization of the various companies above named, to-wit, the Suburban Company and the Consolidated Company, the Union Company, the Air Line and the Northern Connecting Company, the Trust Company as above set forth cause- these companies respectively to issue stocks and bonds, and thereupon the Trust Company undertook the handling and disposition of said stocks and bonds and appropriated and converted to its own use large amounts of the stock of said companies under the pretense that said stock was taken by the Trust Company as a bonus.

(*a*) On or about August 8, 1890, the Trust Company took and appropriated, under the guise of a bonus, 2,200 shares of stock of the Suburban Company of the value of $72,600.00.

(*b*) Upon the following dates the Trust Company appropriated and converted to its own use, under the guise of a bonus, the following shares of stock of the Consolidated Company:

Dec. 1, 1891,	248 shares of the value of.....	$7,990.56
Nov. 7, 1892,	16 shares of the value of.....	515.52
Nov. 7, 1892,	104 shares of the value of.....	3,350.88
Dec. 8, 1892,	388 shares of the value of.....	12,501.36
Dec. 4, 1891,	24 shares of the value of.....	773.28

(c) Upon the following dates the Trust Company appro-
279 priated and converted to its own use, under the guise of a bonus, stock of the Union Company, as follows:

Oct. 31, 1892,	230 shares of the value of.....	$7,595.28
Dec. 31, 1892,	9 shares of the value of.....	295.92
Dec. 31, 1892,	2 shares of the value of.....	65.76
Jan. 5, 1893,	5 shares of the value of.....	164.40
Jan. 7, 1893,	20 shares of the value of.....	657.60
Jan. 7, 1893,	2,400 shares of the value of.....	78,912.00
Jan. 23, 1893,	504 shares of the value of.....	16,571.52
Apr. 5, 1893,	1,000 shares of the value of.....	32,880.00
Jan. 20, 1894,	350 shares of the value of.....	11,508.00

(d) Upon the following dates the Trust Company appropriated and converted to its own use, shares of stock of the Kansas City & Independence Air Line under the guise of a bonus, as follows:

June 23, 1892,	70 shares of stock of the value of.....	$2,333.00
June 23, 1892,	7 shares of stock of the value of.....	223.30

(e) Upon the following dates the Trust Company took from the Belt Company and appropriated and converted to its own use the following shares of stock of the Kansas City & Northern Connecting Railroad Company, under the guise of bonus:

Oct. 9, 1896,	2,000 shares of the value of.....	$6,000.00
July 20, 1896,	140 bonds.....	$63,000.00

And on the following dates the Trust Company took from the Belt Company and appropriated to itself and converted to its own use the second mortgage bonds of the Kansas City & Northern Connecting Railroad Company as follows:

July 20, 1896,	140 bonds.....	$63,000.00
Sept. 21, 1897,	4 9-10 bonds.....	2,205.00

Your orators further show that as hereinbefore set forth the Trust Company at all times while it was handling the stocks and bonds of the companies mentioned, absolutely dominated and controlled said companies, using them and each of them as its instrumentality or dummy for its own benefit and profit; that the Trust Company occupied a fiduciary relation to said companies and was the promoter and organizer of each and all of them; that there was no consideration whatever for the above mentioned stocks and bonds so taken by the Trust Company as between the Trust Company and the Belt Company, but that said stocks and bonds were so taken by the Trust Company solely by virtue of its domination and control over it; that in equity and good conscience the Trust Company
280 should account to the Belt Company for the value of all of said stocks and bonds so unlawfully taken by it from the Belt Company, and the Belt Company is entitled to credit

upon the pretended statement presented by the Trust Company for the value of said stocks and bonds so unlawfully appropriated as aforesaid, together with interest thereon from the dates respectively of such appropriations.

5. Your orators further show that upon the organization of the various companies above named, to-wit: The Suburban Company, the Consolidated Company, the Union Company, the Air Line, and the Northern Connecting Company, the Trust Company began the practice of loaning money to the said companies, taking the promissory notes of the company to which the money was so loaned, and charging such loan to the Belt Company; that from time to time moneys were advanced by the Trust Company to or for said companies, and the same were charged to the Belt Company in open account and from time to time the securities, consisting of stocks and bonds of said companies, were bought by the Trust Company from said companies, or sold by the Trust Company, for them, and the proceeds credited in open account to the Belt Company; that in this manner there were from time to time many notes of large amounts given by the Belt Company upon which the Trust Company charged the Belt Company with interest and discount in large sums; that interest on daily balances upon said open accounts was also computed, usually at the close of each month, and if the balance was in favor of the Belt Company, an allowance was made of interest on the average daily balance for such month at the rate of two per cent. per annum, but if the balance was in favor the Trust Company, interest upon the average daily balance for such month was allowed at the rate of from seven per cent. to ten per cent. and the amount of such interest charged to the Belt Company in open account, and the interest so charged to the Belt Company in open account was included in the daily balances for subsequent months, and also in the promissory notes of the Belt Company taken from time to time, and in that manner the interest exacted by the Trust Company was compounded monthly upon daily balances, and at stated periods upon the said promissory notes.

Your orators further show that in the pretended statement of account presented by the Trust Company there are unlawful charges of interest and discount as follows:

(a) Between the dates of June 14, 1890, and June 4, 1900, there is charged in open account by the Trust Company against the Belt Company various items of interest on daily balances at the
per cent. above stated, which after the deductions of interest
281 allowed the Belt Company on daily balances, amounts to the sum of $16,105.45, an itemized statement of which, showing the dates upon which said charges were made upon the pretended statement presented by the Trust Company, and the amount of each charge is set forth in a statement under the heading "Interest on Daily Balances," hereto attached and made a part hereof of Exhibit "2."

The item shown on the Exhibit in red represents the allowance of interest on daily balances where the same are in favor of the

Belt Company; the items in blue show the charges of interest in favor of the Trust Company and against the Belt Company.

(b) On May 16, 1892, there was charged in open account as shown by the pretended statement presented by the Trust Company in connection with the Air Line Company against the Belt Company Eighty-Five and 18-100 Dollars ($85.18), interest on open account.

(c) Between the dates of June 14th, 1890, and November 7th, 1899, there was charged by the Trust Company against the Belt Company for discount on said notes, the sum of Nineteen Thousand Eight Hundred Thirty-Two and 9-100 Dollars ($19,832.09); an itemized statement of which, together with the dates upon which said charges were made in the pretended statement presented by the Trust Company, with the amount of each charges, appears on said Exhibit "2" under the head of "Discount on Notes."

(d) Between the dates of June 14, 1890, and November 7, 1899, there was charged by the Trust Company upon its books against the Belt Company for interest on said notes above mentioned, the sum of Forty-Four Thousand Seven Hundred Sixty-Three and 48-100 Dollars, ($44,763.48), and same appears as charges against the Belt Company upon the pretended statement presented by the Trust Company, an itemized statement of which, with the dates upon which said charges were made, and the amount of each charge is shown on said Exhibit "2," under the heading of "Interest on Notes."

(e) During the year 1892 there were charged as shown upon the pretended statement of the Trust Company, in connection with the Air Line, against the Belt Company, items of interest upon notes given by the Air Line to the Trust Company as hereinbefore described as follows:

May 16, 1892	$146.67
June 17, 1892	437.50
Dec. 8, 1892	66.67

282 (f) Between the dates of September 1, 1896, and January 1, 1897, there were charged in open account, as shown by the pretended statement, by the Trust Company, against the Belt Company, certain items of interest upon alleged anticipated payments upon the subscriptions by various parties, including the Trust Company, to the bonds of the Northern Connecting Company, and that said items are as follows:

September 28, 1896	$41.91
October 7, 1896	1,179.17
December 11, 1896	3.64
" " 1896	14.88
" " 1896	17.22

(g) On August 11, 1892, there were charged in open account, as shown on the pretended statement by the Trust Company, in connection with the Consolidated Company, against the Belt Company,

certain items of interest upon alleged anticipated payments upon the subscriptions by various anticipated — to the bonds of the Consolidated Terminal Company, amounting to the sum of $10,195.93.

(*k*) In addition to the amounts appearing upon the pretended statement presented by the Trust Company between the dates September 15, 1896, and June 4, 1900, there were charged by the Trust Company against the Belt Company by reason of the Belt Company constructing the railroad of the Connecting Company, various items of interest on daily balances at the per cent above stated, which after deduction of interest allowed the Belt Company on daily balances amount to the sum of Twenty-Eight Thousand Three Hundred Thirty and 1-100 Dollars ($28,330.01), an itemized statement of which, showing the amount of each charge, is set forth in the statement, under the heading "Interest on Daily Balance," hereto attached and made a part hereof as *as* Exhibit "3;" the items shown on the exhibit in read represent the amount of interest on daily balances where the same are in favor of the Belt Company; the items in blue show the charges of interest in favor of the Trust Company, as against the Belt Company.

(*i*) In addition to the amounts appearing upon the pretended statement presented by the Trust Company between the dates of September 15, 1896, and June 4, 1900, there was charged by the Trust Company, or the Trust Company caused other persons to charge against the Belt Company, for interest on notes that the Trust Company caused the Belt Company to give by reason of the Belt Company constructing the Connecting Company, the sum of
Thirty-Six Thousand Four Hundred Nineteen and 86-100
283 Dollars ($36,419.86), an itemized statement of which, showing the said charges and the amount of said charges, is set forth in the statement under the heading of "interest on Notes," hereto atached and made a part hereof as Exhibit "3."

(*j*) That the amount of compound interest so compounded as hereinbefore described by the Trust Company and charged against the Belt Company by the Trust Company amounts to the sum of Seventeen Thousand Nine Hundred Twenty-Nine and 44-100 Dollars ($17,929.44).

(*k*) In addition to the foregoing charges of interest and discount there were other charges of interest and discount made by the Trust Company against the Belt Company in the amount of One Hundred and Fifty Thousand Dollars ($150,000.00), which the Belt Company was caused by the Trust Company to pay from funds in its treasury.

Your orators further show that as hereinbefore stated, the Trust Company at all times, covering the period of the charges aforesaid, absolutely dominated and controlled the said companies and was using them, and each of them, as its own instrumentality or dummy for its own benefit and profit; that the Trust Company, as the promoter of said companies, and by reason of its control and domination over them, at all times, occupied a fiduciary relation to said companies and was not entitled in equity and good conscience to make excessive and unreasonable charges and exactions; that

by reason of the relationship between the Trust Company and the said companies as hereinbefore stated, the Trust Company did not have the right to charge the said companies any interest whatever upon daily balances, or otherwise, and that the charges for said items of interest contained in said pretended statement should be eliminated, and the Belt Company should be credited upon said account with interest on said charges from the dates when they were made, and there should be credited upon said account also the amount of compound interest and the interest which the Belt Company was caused to pay from its own funds to the Trust Company, together with interest on said payments from the time when they were made, respectively.

6. Your orators further show that the Trust Company during the period beginning with the year 1892 down to the year 1900, maintained what is called its "Building Department," which consisted of a limited number of employes, whose duty it was to make contracts for such building or construction work as the Trust Company might desire to have done in carrying out its various enterprises in connection with its auxiliary companies, including the Belt
284 Company, the Consolidated Company, the Union Company, the Air Line, the Elevator Company and Amusement Company, Co.; that all of the work done for said companies could, and should have been done by said companies, respectively, but the Trust Company contrived the scheme of its Building Department in order that work of that character might be done by the Trust Company and large and exorbitant charges made therefor, from which the Trust Company might reap a large profit by causing the Belt Company to pay, not only the cost of such work and materials, but also large sums in addition thereto under the guise of superintendence; that the aforesaid plan was carried out to the extent that a large amount of work was done by the said Building Department, for the companies above named, and the Trust Company caused the Belt Company to pay not only the cost thereof, but from ten per cent. to fifteen per cent. additional under the guise of superintendence; that the amount of said superintendence so charged by the Trust Company to the Belt Company, together with the dates on which said charges were made, and the amount of each charge, is shown under the heading of "Superintendence," on Exhibit "2," hereto attached, and aggregates the sum of Forty Thousand Four Hundred Fifty-six and 32/100 Dollars ($40,456.32); that of said sum fifty (50) per cent. was clear profit to the Trust Company; that the Trust Company charged to the Belt Company the said sum of $40,-456.32, and the same appears upon the pretended statement pre-sen-ed by the Trust Company; that the Trust Company by reason of its relation to the said companies did not have the right in law to charge the said companies any sum whatsoever as superintendence in excess of the actual cost thereof, and did not have the right to profit out of said transactions; that the said profits of the Trust Company arising from said transactions should be eliminated from said pretended statement, and the Belt Company should be credited

upon said account with interest on the amounts so eliminated from the dates when the said charges were made.

7. Your orators further show to the court that in the year 1895 the Trust Company, under the pretense of increasing the earnings of the Air Line, caused the incorporation of the Fairmount Amusement Company, and the establishment and exploitation of Fairmount Park, and in so doing the Trust Company caused to be expended by the Air Line and by the Belt Company, large sums of money in the acquisition of a large tract of land near the railroad of the Air Line between Kansas City and Independence, and the construction of buildings thereon and the adaptation of said grounds for the purpose of a public park: that the moneys so furnished by the Air Line as aforesaid were afterward, by the direction
285 of the Trust Company, charged to and assumed by the Belt Company so that ultimately all of the expenses in connection with the exploitation of Fairmount Park were charged to the Belt Company, and the various items making the aggregate thereof appear as debits to the Belt Company upon the pretended statement presented by the Trust Company; that the result of the organization and operation of Fairmount Park was a net loss of Two Hundred Ninety-three Thousand Three Hundred Three and 68/100 Dollars ($293,303.68), all of which the Belt Company was required by the Trust Company to stand; that the scheme of Fairmount Park was a financial failure and the Trust Company knew, or should have known, that it would be such failure, and the conduct of the Trust Company in causing the Belt Company to organize and carry on said enterprise and to stand the loss arising therefrom was and is inequitable, unjust and oppressive, and the Trust Company should in equity and good conscience be required to stand said loss itself, and the amount of said loss should be eliminated from the charges against the Belt Company upon the pretended statement produced by the Trust Company, or if that is impossible by reason of inability to identify the various items going to make the deficiency, then the amount of said loss, together with interest thereon should be credited upon said pretended statement.

8. Your orators further show to the court that the Trust Company caused the incorporation of the Missouri Elevator and Terminal Company on or about January 4, 1892, and after its incorporation the Trust Company caused to be constructed for it by the building department of the Trust Company three elevators, and caused the Elevator Company to operate said elevators and to execute upon its corporate property mortgages in large amounts to pay the purchase price of its properties.

(*a*) The operation of said elevator by the Elevator Company resulted in a loss, which was represented in part by a charge upon the books of the Trust Company against the Elevator Company in the amount of Three Hundred Ninety-One and 17-100 Dollars ($391.17); that the Trust Company on or about the 29th day of April, 1893, found that the Elevator Company was hopelessly insolvent and unable to pay said amount, and thereupon it charged said amount so due it from the Elevator Company, together with

other items alleged to be due from the Elevator Company, to the Trust Company, amounting in all to the sum of Fifteen Thousand Two Hundred Ninety-Six and 68-100 Dollars ($15,296.68) to the Belt Company, and said charge of $15,296.68 now appears in the pretended statement presented by the Trust Company as a
286 charge against the Belt Company; that the action of the Trust Company in so charging against the Belt Company the debt of the Elevator Company was wrongful, and said charge was without consideration, and the said charge should be eliminated from the said pretended statement.

(*b*) On or about June, 1893, and while the Trust Company, then holding all the stock of the Elevator Company in its name and in the names of its directors and officers and their wives, knew that the Elevator Company was hopelessly involved and could not be made a success, the Trust Company caused the Belt Company to go through the form of an agreement with the Elevator Company, by the terms of which the Belt Company was to acquire and take title to all of the elevators and other properties of the Elevator Company, except one thousand four hundred and sixty-one (1461) shares of stock of the Belt Co. theretofore exchanged by the Trust Company and its directors, officers and their wives, for Elevator stock, and in consideration thereof the belt Company was to issue to the Elevator Company 146.1 shares of the capital stock of the Belt Company and to assume the liabilities of the Elevator, all of which were then owing by the Elevator Company to the Trust Company; that said shares of stock were duly issued by the Belt Company and delivered to the Elevator Company and the liabilities of the Elevator Company were charged to the Belt Company, but the contract was never carried out in any other respect. The said 146.1 shares, upon being so received by the Elevator Company, together with the shares of the Belt stock above referred to, were caused by the Trust Co. to be delivered to it and its directors and officers and their wives, so that the Belt Company never at any time received any consideration for said 146.1 shares of Belt stock, of the reasonable value of Four Thousand Seven Hundred and Seventy Dollars ($4,770.00), which said amount should be allowed as a credit upon the pretended statement presented by the Trust Company, together with interest thereon at the rate of six per cent. per annum from said 8th day of June, 1893.

(*c*) From September, 1892, to September, 1894, the Trust Company caused the Belt Company to pay out from its own treasury to the Trust Company for the completion of the property of the Elevator Company the sum of Fourteen Thousand One Hundred Eighty-Five and 4-100 Dollars ($14,185.04), for which the Belt Company received no consideration. The said sum of $14,185.04 was paid out of funds of the Belt Company advanced to it by the Trust Company, and charged to the pretended statement presented by the Trust Company, and, therefore, said sum with interest thereon should be credited to the Belt Company on said statement.
287 (*d*) On or about September 1, 1894, the Trust Company caused the Belt Company to go through the form of an agree-

ment with the Elevator Company, by the terms of which the Elevator Company was to reacquire and take title to all the property of the Elevator Company that had been received by the Belt Company by reason of the pretended agreement of June, 1893, above mentioned, together with all improvements and additions made upon and to the said elevators and property by the Belt Company, amounting in value to the sum of Fourteen Thousand One Hundred Eighty-Five and 4-100 Dollars ($14,185.04), and in consideration thereof, the Elevator Company was to issue and did issue to the Belt Company 425 shares of the Elevator Company's stock, and was to re-assume and did re-assume Thirty-Two Thousand Dollars ($32,000.00) of the liabilities of the Elevator Company that had been assumed by the Belt Company by reason of the said agreement of June, 1893; and the Belt Company, in addition to the transfer of said property to the Elevator Company, was to continue its assumption of the balance of the liabilities of the Elevator Company, amounting to Fifteen Thousand Two Hundred Ninety-Six and 68-100 Dollars ($15,296.68), that had been assumed by the Belt Company by reason of said agreement of June, 1893. The stock of the Elevator Company so received by the Belt Company was worthless, as the Trust Company well knew, and the said $32,000 of liabilities re-assumed by the Elevator Company was evidenced by certain promissory notes of the Elevator Company secured by certain deeds of trust upon the elevators and properties of the said Elevator Company.

Between Sept. 1, 1894, and June 1, 1900, the excess of expenditures occasioned by the operation of the properties and elevators of the Elevator Company over the receipts therefrom amounted to Seventeen Thousand Eight Hundred Seventy-Seven and 92-100 Dollars ($17,877.92), and this loss to the Elevator Company, the Trust Company, solely by reason of its coercion, domination and control over the Belt Company, unlawfully caused to be charged to and paid by the Belt Company without any consideration therefor; the act of the Trust Company in having said charge made and paid was inequitable and oppressive and the Belt Company is entitled to a credit upon the pretended statement of the Trust Company for $17,877.92), with interest thereon, from the date of payment thereof.

(*e*) In addition to the charges appearing upon the pretended statement, the Trust Company unlawfully caused the Belt Company to pay to it, without consideration therefor, between December, 1894, and June, 1899, as interest upon the said $32,000 of notes of the Elevator Company all of which were the obligations
288 of said Elevator Company, the sum of Ten Thousand Dollars ($10,000.00), of this amount so paid Two Thousand Dollars ($2,000) appear as charges against the Belt Company upon the pretended statement presented by the Trust Company; and the Belt Company was caused by the Trust Company to pay the balance, Eight Thousand Dollars ($8,000.00), to it from funds in its treasury; all of said payments were made solely by reason of the coercion, domination and control of the Trust Company and said pay-

ments are inequitable and oppressive; the Belt Company is entitled to a credit upon the said pretended statement for the said Two Thousand Dollars ($2,000.00) with interest thereon from the date of payment thereof; and the Belt Company is further entitled to a credit from the Trust Company for the said $8,000.00 with interest thereon from the date of payment thereof.

9. Your orators further state that in the year 1895, the Trust Company caused to be incorporated a railroad corporation under the laws of the States of Missouri, called the "Kansas City & Northern Connecting Railroad Company," herein referred to as the Connecting Company, for the purpose of constructing a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with the railroads at that time running eastwardly to Chicago, Illinois, and northwardly to Council Bluffs, Iowa.

Afterwards, and in the same year, the Trust Company caused the Belt Company to enter into a contract with the Connecting Company, by the terms of which the Belt Company undertook to acquire the right-of-way and to construct the railroad of the Connecting Company between the points aforesaid, in consideration of which the Connecting Company agreed in said contract to execute, issue and deliver to the Belt Company, bonds and stocks of the Connecting Company; that the Belt Company was caused by the Trust Company to enter upon the execution of said contract and to construct the said railroad, and the Belt Company did secure the right-of-way and construct the railroad of the Connecting Company between Kansas City and Pattonsburg. In so doing the Belt Company was caused to expend large sums of money for right-of-way, material and for construction, and the stocks and bonds of the Connecting Company were wholly inadequate in value to reimburse the Belt Company for the money so expended, so that there resulted a large loss to the Belt Company in the matter of said contract, amounting to the sum of One Hundred Sixteen Thousand Six Hundred Forty-Four and 53-100 Dollars ($116,644.53), all of which of said deficiency was by the Trust Company charged to the Belt Company and the various items going to make the said deficiency appear upon the
289 pretended statement presented by the Trust Company as charges against the Belt Company.

Your orators further state that the action of the Trust Company in so requiring the Belt Company to enter into said contract and construct said railroad, resulting in said loss, was wrongful, oppressive and was done solely for the benefit of the Trust Company, that it might profit from the handling of the securities of the Connecting Company, which, under said contract, would be received nominally by the Belt Company, but in reality by the Trust Company; that the Trust Company knew and should have known that said venture would result in a large loss to the Belt Company, and the amount of said loss in equity and good conscience ought not to be charged to and borne by the Belt Company, and the same should be eliminated from the pretended statement presented by the Trust Company, together with interest thereon; or, if the same cannot be identified, then that credit be given for the amount thereof with interest.

10. Your orators further show that on January 1, 1897, July 1, 1897, January 1, 1898, and July 1, 1898, there fell due certain coupons upon bonds of the Kansas City & Northern Connecting Railroad Company, outstanding in the hands of various holders; that said coupons were the obligations, of said Connecting Company and were not in any manner, obligations either direct or contingent on the part of the Belt Company.

(*a*) When the said coupons became due on said dates respectively the Kansas City & Northern Connecting Railroad Company was without funds to pay the same, and the Trust Company in order to bolster up and protect the credit of the Kansas City & Northern Connecting Company, and to prevent a default on its part in the payment of its interest, did take up and pay said coupons in the amounts and on or about the dates hereinafter stated, to-wit:

Jan.	18, 1897.	Interest allowed to Jan. 1, 1897, on $100,000 K. C. & N. C. R. R. bonds	$2,500.00
July	14, 1897.	Interest allowed on $51,000 K. C. & N. C. R. R. 5 per cent bonds due July 1, 1897	1,275.00
Aug.	3, 1897.	Interest on $100,000 K. C. & N. C. R. R. bonds, due July 1, 1897	2,500.00
Oct.	12, 1897.	Interest on $300,000 K. C. & N. C. R. bonds, due July 1, 1897	7,500.00
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Dec.	31, 1897.	Interest on $100,000 K. C. & N. C. R. R. bonds, due July 1, 1898	2,500.00
Dec.	31, 1897.	Interest on $700,000 K. C. & N. C. R. R. 5 per cent bonds, due Jan. 1, 1898, interest being computed from date bonds were sold	7,375.67
Dec.	31, 1897.	Interest paid on $51,000 K. C. & N. C. R. R. 5 per cent bonds	1,275.00
Aug.	13, 1898.	Interest on $10,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1898, paid by Trust Company to A. & P. Roberts	250.00
July	28, 1898.	Interest on $1,234,000.00 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1898	30,850.00
		Total	$56,025.67

(*b*) Your orators further show that the Trust Company by virtue of its domination and control over the Belt Company did cause the Belt Company to pay, and it did pay from the funds in its treasury, the interest upon certain bonds of the Kansas City & Northern Connecting Railroad Company, falling due as aforesaid, at or about the said dates, to the persons and in the amounts following, to-wit:

Oct. 14, 1897,	John H. Carr interest on $4,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	$100.00
Oct. 13, 1897,	Estate of P. C. Hollis, interest on $5,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	125.00
Oct. .., 1897,	F. B. Hubbell, interest on $1,000 K. C. & N. C. R. R. bonds, due July 1, 1897	25.00
Oct. .., 1897,	Mrs. Frances A. Weeks, interest on $1,000 K. C. & N. C. R. R. bonds, due July 1, 1897	25.00
Oct. .., 1897,	Wm. H. Nicholson, interest on $5,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	125.00
Oct. .., 1897,	Wells-Fargo Company, interest on $100,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	2,500.00
... .., 1897,	N. Norton, Ass't Secretary, account various parties, interest on $249,000 K. C. & N. C. R. R. 5 per cent bonds, due Jan. 1, 1898	6,225.00
Total		$9,125.00

The amount of these payments does not appear on the pretended statement furnished by the Trust Company.

291 (c) Your orators further show that all of the foregoing payments made by the Trust Company are charged to the Belt Company in the pretended statement of account except the item of $9,125.00 in the amounts and at the dates above set forth and there is also charged to the Belt Company in said statement interest upon the said payment of $30,850.00, amounting to $167.95, and also the amount of $77.13 as commission or brokerage for paying said coupons.

The said charges made by the Trust Company against the Belt Company and entered on said pretended statement, including the item of Nine Thousand One Hundred Twenty-five Dollars ($9,125.00) are unlawful, inequitable and were caused to be paid by the Belt Company or made arbitrarily by the Trust Company without reason or excuse, but for the pretended reason that the claim of the Trust Company arising out of its payments of said interest could not be collected from the Kansas City & Northern Connecting —, because of its financial inability to make said payment, and that the Belt Company being in better financial standing could be made to pay same by charging it to the account of the Belt Company; and your orators are entitled to have said items so appearing in said pretended account eliminated as charges against the Belt Company. The aforesaid payments made by the Belt Company on account of said interest coupons were unlawful and inequitably made by the Belt Company as a result of the coercion and domination of the Trust Company, and not by reason of any liability therefor on the

part of the Belt Company, and the Belt Company is in equity and good conscience entitled to be credited with the amount thereof, together with interest thereon from the dates of payment at the rate of six per cent per annum.

(*d*) Your orators further show that on or about July 31, 1898, the Belt Company was the owner of the first mortgage bonds of the Kansas City & Northern Connecting Company, and also the owner of Three Hundred and Fourteen (314) coupons attached thereto, which said coupons were then due; that said coupons were the direct obligation of the Kansas City & Northern Connecting Railroad Company, due and payable to the Belt Company, said bonds being at that time in the control of the Trust Company. The Trust Company on or about said date, did wrongfully cause the said coupons, amounting in value to the sum of Seven Thousand Eight Hundred and Fifty Dollars ($7,850.00) to be taken from said bonds and cancelled as having been paid, and denied and still denies to the Belt Company the right to said coupons or the interest thereon; that said act of the Trust Company was wrongful and inequitable and operated to deprive the Belt Company of said sum of Seven
292 Thousand Eight Hundred and Fifty Dollars ($7,850.00) and interest thereon at six per cent from said date, for which in equity and good conscience the Trust Company should account to the Belt Company and said sum has been omitted by the Trust Company from its pretended statement.

11. Your orators further state that on or about September 25, 1893, the Belt Company was the owner of Two Hundred second mortgage bonds of the par value of One Thousand Dollars ($1,000) each, issued by the Kansas City & Independence Air Line and secured by a mortgage upon the property of that company. The Belt Company on that date was also the owner of Twenty-five Hundred (2,500) shares of stock of the par value of One Hundred Dollars ($100.00) each, issued by the Union Company. On said 25th day of September, 1893, a contract in writing was entered into between the Belt Company and the Trust Company, which recited that the Belt Company was the owner of the entire issue of the second mortgage bonds of the Kansas City & Independence Air Line, which issue consisted of Two Hundred (200) bonds of the par value of One Thousand Dollars ($1,000.00) each, subject to the interest which the Trust Company had as trustee in thirty (30) of said bonds, numbered from one seventy-one (171) to two hundred (200), both inclusive, aggregating the principal sum of Thirty Thousand Dollars ($30,000.00), and held in trust by the Trust Company under the mortgage or deed of trust, given by the Kansas City & Independence Air Line of date March 1, 1893, and also reciting that the Belt Company was the owner of Twenty-five Hundred (2,500) shares of the capital stock of the Union Terminal Railroad Company, of the par value of One Hundred Dollars ($100.00) each; and further reciting that the Belt Company was desirous of selling and disposing of the entire issue of said second mortgage bonds and the said 2,500 shares of stock for the purpose of raising money and means to properly extend, equip, repair, maintain and operate its road and to meet its

obligations then and thereafter incurred, and that the Trust Company had agreed to purchase said bonds and stock at and for the price and sum thereafter stated in said contract. It was, therefore, mutually agreed in said written contract that the Belt Company should sell and deliver and that the Trust Company should purchase and receive and pay for the entire issue of the second mortgage bonds of the Kansas City & Independence Air Line, aggregating the principal sum of Two Hundred Thousand Dollars ($200,000.00), and also Two Thousand Five Hundred (2,500) shares of the capital stock of the Union Terminal Railroad Company, of the par value of Two Hundred and Fifty Thousand Dollars ($250,000.00) at and for the price of the earned interest on said
293 bonds, at the time of their delivery to the Trust Company, and the sum of One Hundred and Fifty Thousand Dollars ($150,000.00), to be paid upon the terms and at the times hereinafter stated; that is to say, that the Belt Company should deliver to the Trust Company the said 2,500 shares of the capital stock of the Union Terminal Railroad Company upon the execution of said contract, and whenever the Belt Company should demand the Trust Company should take in amounts of Ten Thousand Dollars ($10,000.00), par value or multiples thereof, so many of said second mortgage bonds as the Belt Company might deliver; and the Trust Company agreed to pay the Belt Company therefor upon said contract all of the earned interest on the bonds so delivered to it and seventy-five per cent (75) of the face value of the principal sum thereof. It was further agreed in said written contract that said second mortgage bonds, numbered from one (1) to one hundred and seventy (170) both inclusive, aggregating the principal sum of One Hundred and Seventy Thousand Dollars ($170,000.00), should be delivered and paid for on or before eighteen (18) months from the date of said contract, and that so many of said bonds, numbered from one hundred and seventy-one (171) to two hundred (200), both inclusive, aggregating the principal sum of Thirty Thousand Dollars ($30,000.00), as should remain unsold by the Trust Company as trustees, under and by virtue of the terms of said mortgage or deed of trust, securing said bonds, on the first day of March, 1898, should be delivered and paid for within six months from said March 1, 1898.

(a) Your orators further show that in accordance with said contract there was delivered to the Trust Company by the Belt Company the entire issue of said second mortgage bonds, being two hundred (200) bonds, of the par value of One Thousand Dollars ($1,000.00) each, and the Trust Company gave to the Belt Company credit for one hundred and thirty (130) of said bonds at the sum or price of Seven Hundred and Fifty Dollars ($750.00) each, as follows:

Oct., 1893, 100 bonds at 75	$75,000.00
Mar., 1904, 6 bonds at 75	4,500.00
Jan., 1895, 6 bonds at 75	4,500.00
Mar., 1895, 6 bonds at 75	4,500.00
Dec., 1895, 6 bonds at 75	4,500.00
Mar., 1894, 6 bonds at 75	4,500.00
	$97,500.00

Your orators further state that the Trust Company failed, neglected and refused within the time limited in said con-
294 tract, or at any time thereafter, to purchase and pay for the remaining seventy (70) second mortgage Air Line bonds, of the par or face value of One Thousand Dollars ($1,000.00) each, as specified in said contract; but on the contrary, the Trust Company afterwards discovered that the said second mortgage bonds could not be sold upon the market, and were worthless, and it thereupon devised a plan or scheme to re-sell and unload the same upon the Belt Company; and accordingly to carry out said plan, it caused the Belt Company to enter into a pretended agreement rescinding said contract of September 25, 1893, and attempting to release the Trust Company from its obligation to take the remaining seventy (70) of said bonds all of which was inequitable and against good conscience and the same is not binding upon your orators.

(*b*) In further consideration of said fraudulent plan the said Trust Company caused entries to be made upon its books and upon the books of the Belt Company charging the Belt Company as and for a return of said 130 bonds so purchased by the Trust Company at Seven Hundred and Fifty Dollars ($750.00) each as aforesaid, as follows:

July, 1894, 80 bonds at 75	$60,000.00
June, 1896, 50 bonds at 75	37,500.00
	$97,500.00

(*c*) Your orators further show that the Trust Company in equity and good conscience should be held to account and pay to the Belt Company the contract price of the said seventy second mortgage bonds, being the amount of Fifty-Two Thousand Five Hundred Dollars ($52,500.00), together with interest thereon at 6 per cent from the 25th day of March, 1895.

(*d*) Your orators further show unto the court that the 2,500 shares of the Union Company stock, so delivered to the Trust Company under said contract as aforesaid, were appropriated by the Trust Company to its own uses and for its own benefit and that it never at any time returned said stock to the Belt Company or accounted for the proceeds thereof. On or about May, 1894, the Trust Company exchanged said stock with the Belt Company for 2,500 shares of the par value of $100.00 each of the capital stock of the Belt Company, which was worth at that time Sixty-Two Thousand

Five Hundred Dollars ($62,500.00); that the Trust Company received and thereafter disposed of the said stock of the Belt Company and has never accounted to your orators thereofor, as in equity and good conscience it is bound to do, together with interest thereon at six per cent per annum from the 25th day of March, 1895.

295 Your orators are entitled to have allowed to them upon the pretended account presented by the Trust Company a credit represented by the contract price of said seventy bonds, to-wit, the sum of Fifty-Two Thousand Five Hundred Dollars ($52,500.00) with interest thereon, or if the court should find that said contract was duly rescinded, then your orators are entitled to a credit, represented by the value of said 2,500 shares of stock, to-wit, the sum of Sixty-Two Thousand Five Hundred Dollars ($62,500.00) and interest thereon.

Your orators further show that the act of the Trust Company in charging back to the Belt Company the said one hundred and thirty (130) bonds at Seven Hundred and Fifty Dollars ($750.00) per bond was unlawful and inequitable for the reason that said bonds were then worthless, as the Trust Company well knew, and that in equity and good conscience said charges should be eliminated from said pretended account.

12. Your orators further show that the Trust Company caused to be constructed the railroad of the Air Line and used for that purpose a corporation previously created by it, called the Kansas City Terminal Construction Company.

The Trust Company caused the Air Line to enter into a contract with said Construction Company for the construction and completion of the railroad of the Air Line; under the terms of said contract the Construction Company was to receive the stocks and bonds of the Air Line in certain amounts fixed in said contract. The Construction Company entered upon the construction *or* said railroad, but before the same was fully completed, the Trust Company caused the Air Line and the said Construction Company to go through the form of an agreement by the terms of which the Air Line was to accept the then partially completed railroad as and for full compliance with said contract, and was to turn over to the Construction Company the securities provided in said contract to be turned over, upon its final completion.

And it was further provided that the Air Line should assume all the liabilities of the Construction Company and should succeed to and take over all of its assets. This plan was carried out and the uncompleted railroad was turned over to the Air Line, the securities were delivered to the Trust Company and the Air Line assumed the liabilities and took over the assets of the Construction Company.

(*a*) Among the assets of the Construction Company was the subscription made by the Trust Company in the name of A. E. Stilwell, trustee, to the capital stock of the Construction Company in

296 the sum of Twenty Thousand Dollars ($20,000.00), which had been duly subscribed by the Trust Company, but upon which nothing had ever been paid. In the disposition of the securities received by the Construction Company as aforesaid, this unpaid

subscription on the part of the Trust Company was treated as paid, and a proportionate amount of the securities of the Air Line, to-wit: One Hundred and Ninety-Five (195) shares of stock, Twenty-Four and 375-1000 bonds (24.375) of the then aggregate value of Twenty-six Thousand Dollars ($26,000.00) was turned over to and received and retained by the Trust Company, but the Trust Company notwithstanding refused, and has ever since refused to pay such subscription, or any part thereof, but caused entries to be made upon its books and upon the books o fthe Air Line, cancelling said stock subscriptions by a fictitious charge. Your orators show, therefore, that by reason of the premises the Trust Company ought in equity and good conscience to account for and pay over to the Belt Company the amount of said subscription, to-wit: Twenty Thousand Dollars ($20,000.00) with interest thereon from the date that per cent per annum to date, or that the Trust Company should account for and pay over to the Belt Company the reasonable value of the securities so wrongfully received by the Trust Company as aforesaid, together with interest thereon at the rate of six per cent per annum from the date of such delivery, to-wit: the 18th day of March, 1892, and that your orators are entitled to a credit upon the pretended statement presented by the Trust Company in the amount of said subscription, with interest, or in the amount of the value of said securities with interest, as your orators may elect.

Your orators further show that if it should be claimed by the Trust Company and made to appear that the subscription mentioned in the preceding paragraph as having been made by A. E. Stilwell, trustee, was not in fact and in law the subscription of the Trust Company, then your orators show that the said charge made by the Trust Company against the Air Line for the sum of Twenty Thousand Dollars ($20,000.00), some two years after the transactions mentioned in the preceding paragraph, was an unlawful and fictitious charge and fraudulent as against the Belt Compayn; that the reason assigned by the Trust Company for making said charge was that it was for services, when as a matter of fact, no services were rendered by the Trust Company, and the charge was merely an unlawful method adopted by the Trust Company to get rid of its liability on said stock subscriptions.

297 (*b*) Your orators further state that on or about May 17, 1892, when the Air Line and Construction Co. undertook, as above stated, to declare the contract between them for the construction of said Air Line road duly performed in all respects, the said Construction Co. had an overdraft of $2,436.08, and owed the Trust Co. in open account the sum of $13,436.08; the Trust Co. through its officers and agents, unlawfully and fraudulently caused the said overdraft of $2,436.08 and $600.00 of said open account to be charged in open account upon the books of the Trust Co. against the Air Line; and $10,400.00 of said open account that was paid by the Air Line to the Trust Co. does not appear on the pretended statement; and the charges afterwards, by the consolidation of accounts, becoming a charge against the Belt Co.; the said $600.00

and $2,436.08 items appear as debit charges against the Belt Co. in the pretended statement presented by the Trust Co. and the Belt Co. should be and is entitled to a credit for the said items on the pretended statement, including the item of $10,400.00, with interest thereon from the date of payment thereof.

13. Your orators further show that in December, 1891, a contract was entered into between the West Kansas City Land Company and the Consolidated Terminal Railroad Company, under the terms of which the Land Company agreed to sell to the Consolidated Company a strip of land twenty-eight (28) feet in width over and across certain land in Kansas City, Jackson County, Missouri, for a consideration of Ten Thousand Dollars ($10,000.00) of which amount Four Thousand Dollars ($4,000.00) was to be paid upon the delivery of a warranty deed and the balance three years thereafter; while the contract was in the name of the Consolidated Company, it was for the benefit of the Belt Company and the said payment of $4,000.00 was made by the Belt Company. The Belt Company in November, 1892, gave its note to the West Kansas City Land Company for Five Thousand Six Hundred Dollars ($5,600.00), being the balance of the purchase price of said land, and the Trust Company guaranteed the payment of said note and interest to the West Kansas City Land Company and took from the Belt Company the sum of $5,600.00 in cash and retained the same as a special deposit to cover its liability on said note and agreed to pay interest thereon at the rate of six (6) per cent per annum; that afterwards such proceedings were had that your orators, by the judgment and decree of the Circuit Court of Jackson County, Missouri, affirmed by the judgment of the Supreme Court of the state, were adjudged to pay and did pay said note and interest on June 13, 1901, amounting to Seven Thousand Nine Hundred Ten and 32-100 Dollars ($7,910.32); and thereupon the Trust Company be-
298 came in duty bound to return and refund to your orators the said sum of Five Thousand and Six Hundred Dollars ($5,600.00), and interest thereon; but the Trust Company has failed and refused and ever since has failed and refused to pay said sum to your orators, and the Trust Company has failed in its pretended account to give your orators credit therefor, to which in equity and good conscience it is entitled; that the same appears upon the pretended account submitted by the Trust Company as a charge against the Belt Company under date of November 28, 1892, which said charge is unlawful and should be expunged; and the interest thereon should be credited to the Belt Company.

14. Your orators further state that on or about November, 1899, a judgment in the sum of Five Thousand Dollars ($5,000.00) was rendered against the Belt Company in the suit of one Zumwalt to recover for personal injuries sustained by him. That the Belt Company thereupon appealed said case to the Supreme Court of the State of Missouri, and gave an appeal bond as by law required; that the Trust Company signed said appeal bond as surety and required the Belt Company to deposit with it the sum of Five Thousand Dollars ($5,000.00) to cover its liability as surety on said bond; that such

proceedings were had that the judgment in said case of Zumwalt was on or about the 19th day of May, 1903, reversed without being remanded, and thereupon the liability of the Trust Company, as such surety, ceased, but notwithstanding such release from liability the Trust Company has refused and still refuses to account for or pay over to your orators the said sum of $5,000.00, together with interest thereon, to which your orators in equity and good conscience are entitled; and the Trust Company has failed and omitted to credit your orators on its said pretended statement of account, with said sum of $5,000.00 to which, with interest thereon from said 29th day of November, 1899, your orators are entitled.

15. The orators further show to the court that it was the habit and practice of the Trust Company in the disposition of bonds and stocks of the Belt Company, the Consolidated Company, the Air Line and the Union Company, to make sales of said bonds and stocks at such prices as the Trust Company should decide upon, and then when such sales had been made, to credit the Belt Company with a less amount, representing to the Belt Company that the sale so made by the Trust Company as aforesaid, had been made at and for a much less price than the amount or rate at which the sale had actually been made. In other instances the Trust Company would have an opportunity to make an advantageous sale of stock or bonds, and with such sale in view would cause the Belt Company to go through the form of selling
299 such stock or bonds to the Trust Company, and the latter would then, or within a short time thereafter consummate the sale in contemplation. In this manner the Trust Company derived large profits from the transactions in addition to all the charges for commissions and services hereinbefore mentioned, the said profits consisting of the difference between the amounts at which the sales would be made by the Trust Company and the amounts reported by it to the Belt Company as the amount of the sale, and for which the Belt Company received credit, or the amount of the pretended purchase by the Trust Company; that the amount of said profits is to your orators unknown, but your orators are informed and believe, and so charge upon their information and belief, that the profits so received by the Trust Company, and unlawfully retained by it, exceed the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00); that the Trust Company has never at any time accounted to the Belt Company for such profits so unlawfully retained by it, and your orators are entitled to have said profit ascertained and determined and the amount thereof, with interest thereon, credited upon the pretended statement presented by the Trust Company.

16. Your orators further show that, on the 24th day of August, 1893, the Belt Company was insolvent, as its directors, who were made up of the officers and directors of the Trust Company, then well knew; that notwithstanding such insolvency the said directors were caused by the Trust Company to go through the form of declaring a dividend payable in the capital stock of the Company and, accordingly, the Belt Company, acting under the domination

and control of the Trust Company and being coerced into such action, did declare a stock dividend and did deliver to its various stockholders its capital stock of the par value of Fifty-one Thousand Two Hundred Sixty-two and 20-100 ($51,262.20) Dollars and of the reasonable market value of Seventeen Thousand Eighty-seven and 40-100 Dollars ($17,087.40), all of which was unlawful and fraudulent as against the Belt Company and amounting to an appropriation by the Trust Company of the capital stock of the Belt Company in said amount; that of the said stock dividend so paid the Trust Company received as a holder of the capital stock of the Belt Company its stock of the par value of Four Thousand Six Hundred Eighteen and 20-100 Dollars ($4,618.20) and of the market value of One Thousand Five Hundred Thirty-nine and 40-100 Dollars ($1,539.40); your orators show, therefore, that in equity and good conscience they are entitled to a credit upon the pretended statement presented by the Trust Company in the
300 sum of $17,087.40 with interest thereon at six (6) per cent from the 1st day of November, 1893.

17. Your orators further show that, on the 7th day of April, 1894, the Belt Company was insolvent, as its directors who were made up of the officers and directors of the Trust Company then well knew; that notwithstanding such insolvency the said directors were caused by the Trust Company to go through the form of declaring a dividend payable in the capital stock of the Company and, accordingly, the Belt Company, acting under the domination and control of the Trust Company and being coerced into such action, did declare a stock dividend and did deliver to its various stockholders its capital stock of the par value of Seventy-eight Thousand Six Hundred Fifteen and 86-100 Dollars ($78,615.86) and of the reasonable market value of Twenty-six Thousand Two Hundred Five and 28-100 Dollars ($26,205.28), all of which was unlawful and fraudulent as against the Belt Company and amounting to an appropriation by the Trust Company of the capital stock of the Belt Company in said amount; that of the said stock dividend so paid the Trust Company received as a holder of the capital stock of the Belt Company, stock of the par value of Sixteen Thousand Three Hundred Thirty-eight and 20-100 Dollars ($16,338.20) and of the market value of Five Thousand Four Hundred Forty-six and 6-100 Dollars ($5,446.06); your orators show, therefore, that in equity and good conscience they are entitled to a credit upon the pretended statement presented by the Trust Company in the sum of Twenty-six Thousand Two Hundred Five and 28-100 Dollars ($26,205.28) with interest thereon at six (6) per cent from the 1st day of May, 1894.

18. Your orators further show that in November, 1897, the Belt Company was wholly insolvent as the Trust Company then well knew, but notwithstanding that fact the Trust Company caused the Belt Company to go through the form of declaring a dividend of one and one-half per cent upon all outstanding stock and a resolution was accordingly adopted by the directors of the Belt

Company declaring such dividend; that thereafter the Belt Company, so acting under the coercion and control of the Trust Company, as aforesaid, did pay out as and for such dividend the sum of Seventy-one Thousand Two Hundred and Fifty Dollars ($71,250.00) of which said amount the Trust Company, as a stockholder of the Belt Company, received a large amount. That the action of the Trust Company in so requiring said dividend to be paid was unlawful, wrongful and the amount so caused to be paid out by the Belt Company together with interest thereon should in equity and good conscience be allowed as a credit upon the pretended statement by the Trust Company.

301 19. Your orators further show that after the incorporation of the Union Terminal Railroad Company, the Trust Company caused it to execute its bonds in the sum of Two Million Dollars, and in order to secure the same to execute a mortgage upon all of its corporate property, then or thereafter acquired; that it was provided in said mortgage that the proceeds of all of the bonds, except one hundred and fifty (150) reserved for interest paying purposes, should be used in the construction and equipment of the railroad of said company; that after said railroad had been constructed the Trust Company caused the Union Company to deliver to the Belt Company and caused the Belt Company to deliver to the Trust Co. one thousand one hundred and sixty (1,160) Union Co. bonds of the par value of One Million One Hundred and Sixty Thousand Dollars ($1,160,000.00) and the cash value of One Million, Forty-four Thousand Dollars ($1,044,000.00); that although the Trust Company was the Trustee in said mortgage and knew of the authorized purpose for which said bonds could be used as aforesaid, it wrongfully sold said bonds to various investors and used the proceeds thereof to credit the account of the Belt Company, the debit side of which had been greatly augmented in amount by the fraudulent conduct on the part of the Trust Company in making to the Belt Company excessive and exorbitant charges for services, interest and commissions and upon other pretexts in the manner hereinbefore set forth; that the said bonds so wrongfully put afloat by the Trust Company by their terms drew interest at the rate of — (5) per cent per annum and the Belt Company which had theretofore been required by the Trust Company to guarantee said bonds was thereafter required and compelled by the Trust Company to pay interest in large amounts upon said bonds in the amount of Four Hundred and Thirty-two Thousand Dollars ($432,000.00); that the conduct of the Trust Company in the premises was wrongful and in violation of its trust and resulted in imposing upon the Belt Company the unnecessary burden of said interest payments which appear as charges to the Belt Company in the pretended statement by the Trust Company. That your orators are entitled in equity and good conscience to have said charges of interest eliminated from said statements or if the said charges in respect to the particular bonds cannot be identified with certainty in said account, then to have

said account credited with the amount so paid by the Belt Company together with [*in*] interest thereon from the respective dates of payment.

20. Your orators further show that on or about April 28th, 1892, the Trust Company sold to one Caroline A. Perkins three Consolidated Company bonds for twenty-five hundred and fifty
302 dollars ($2,550.00); that said bonds were the property of the Belt Company, but that the Trust Company fraudulently and wrongfully refused and neglected and has ever since refused and neglected to pay said proceeds of said bonds to the Belt Company, or to in any way account for them, and the Belt Company is entitled to credit for said sum as of said date, together with interest thereon.

21. Your orators further state that on or about the — day of —, 1890, the Trust Company charged against the Belt Company the sum of Five Thousand Dollars ($5,000.00) and credited the same to "Arkansas Lands;" that your orators are informed and believe that said charge was fictitious and fraudulent and that in truth and in fact said sum of Five Thousand Dollars was not then nor at any time advanced by the Trust Company to or for the Belt Company, and that the Belt Company received no benefit or consideration therefrom and that the said charge of Five Thousand Dollars in equity and good conscience ought to be eliminated from the pretended statement presented by the Trust Company and that the Belt Company should be credited with interest on said amount from the time when said charge was made.

22. Your orators further show to the court that about the year 1892, the Trust Company caused the incorporation of the Fruit Auction and Cold Storage Company under the laws of the State of Missouri; that the incorporators of said company were Arthur E. Stillwell, Arthur A. Mosher, Edward L. Martin and William S. Taylor; that the articles of incorporation of said company recited that one-half of the capital stock thereof, to-wit, Seventy-five Thousand Dollars ($75,000.00) had been paid up in lawful money of the United States, when in truth and in fact no part of said capital stock had been paid up; that the Trust Company caused said Cold Storage Company to engage in the business of the sale of fresh fruits in Kansas City, Missouri, and after said business had been conducted for a few months it went out of business owing the Trust Company a large sum of money; that thereupon and on or about the 13th day of February, 1894, the Trust Company, in order to recoup its losses sustained in the matter of said Fruit Auction & Cold Storage Company, appropriated to its own use two hundred and eighty-six (286) shares of the stock of the Belt Company of the value of Six Thousand Two Hundred Ninety-two Dollars ($6,292.00) and used the same to wipe out the debt owing by the said Cold Storage Company to the Trust Company; that the taking of said stock and its appropriation to wipe out the debt of said Cold Storage Company on the books of the Trust
303 Company was fraudulent and wrongful as against the Belt Company as was without any consideration whatsoever given

to it; the pretended statement presented by the Trust Company does not contain any credit for the value of said stock but your orators show that a credit for such amount with interest thereon should be allowed.

23. Your orators further state that in the pretended account presented by the Trust Company, there is, under date of September 13, 1898, a charge against the Belt Company of Two Thousand and Five Hundred Dollars ($2,500.00) for moneys represented to be paid by the Trust Company in unlawful stock transactions in the stock of the St. Joseph & Grand Island Railroad Company purchased as a speculation on margins alleged to have been carried on the account of the Belt Company; and in the same account, under date of September 15, 1898, there appears a charge of Two Thousand Dollars ($2,000.00) and on the 9th day of December, 1898, a charge of Two Thousand Dollars ($2,000.00) for similar unlawful transactions in margins in stock of the St. Joseph & Grand Island Railroad Company alleged to have been for the account of the Belt Company; that said transactions were unlawful and were beyond the corporate power of either the Trust Company or the Belt Company and it is inequitable and unfair that the said transactions and the loss resulting therefrom in the sum of Five Thousand Nine Hundred Eighty-nine and 50-100 Dollars ($5,989.50) should be charged against the Belt Company and said entries therefor are incorrect and should be expunged from the alleged account, and credit allowed for interest thereon.

24. Your orators further show that, in addition to the stock of the Belt Company taken and appropriated by the Trust Company as above set forth, the Trust Company did on or about September, 1890, take, appropriate and convert to its own use Four Hundred and Ninety-nine Thousand Dollars ($499,000) par value of the capital stock of the Belt Company, of the actual value at that time of One Hundred and Sixty-six Thousand Three Hundred Thirty-three and thirty-three one-hundredths Dollars ($166,333.33) for which the Trust Company has failed and refused to account upon its pretended statement or otherwise; and your orators are entitled to be credited upon the said pretended statement with the value of said stock as aforsaid, together with interest thereon from the date when the same was so appropriated.

25. Your orators further show that on or about the —, 1902, the Trust Company took, appropriated and converted to its own use 2,455 shares of the capital stock of the Union Company of
the par value of Two Hundred Forty-five Thousand Five
304 Hundred Dollars ($245,500.00) and of the actual value of Forty-nine Thousand One Hundred Dollars ($49,100.00), for which the Trust Company has failed, neglected and refused to account on its pretended statement and your orators are therefore entitled to credit on said statement for said sum of Forty-nine Thousand One Hundred Dollars ($49,100.00) with interest thereon from said date.

26. Your orators further show that the Trust Company caused to be constructed the railroad of the Air Line and used for that

purpose a corporation previously created by it called the Kansas City Terminal Construction Company, as set forth in paragraph twelve herein; that the Trust Company caused the Air Line to enter into a contract with the said Construction Company for the construction and completion of the railroad of the Air Line; under the terms of said contract the Construction Company was to receive Three Hundred Thousand Dollars par value of the stock and Three Hundred Thousand Dollars par value of the first mortgage bonds of the Air Line. The Construction Company entered upon the construction of said railroad, but before the same was fully completed the Trust Company caused the Air Line and the said Construction Company to go through the form of an agreement by the terms of which the Air Line was to accept the then partially completed railroad as and for a full compliance with said contract and was to turn over to the Construction Company the securities provided in said contract to be turned over upon its final completion as aforesaid, and thereupon the said railroad was turned over to the Air Line and the said securities above mentioned, which had at all times remained in the custody of the Trust Company, were by the Trust Company appropriated to its own use; that the actual cost to the Trust Company of the construction of said Air Line was the sum of One Hundred Seventy Thousand Seven Hundred Forty-seven and twenty-nine-one-hundredths Dollars ($170,747.29), and the Trust Company realized from said transaction a profit of One Hundred Twenty-nine Thousand Two Hundred Fifty-two and seventy-one-one-hundredths Dollars ($129,252.71); that, by reason of the relation of the parties as hereinbefore more specifically set out, it is unjust and inequitable that the Trust Company should retain said profits or any of them, but it should be required to account to the Belt Company therefor and the same should be allowed as a credit upon the pretended statement presented by the Trust Company, together with interest thereon.

27. Your orators further show that in connection with the contract between the Belt Company and the Connecting Company aforesaid, and as a part of the obligation assumed by the Belt Company to procure the right of way for the railroad of the Connecting Company, the Belt Company was caused by the Trust Company to purchase and acquire certain lands along the line of said railroad in addition to the right of way and take the title thereto in a corporation which the Trust Company caused to be organized under the laws of the State of Missouri called the Northern Townsite Company, hereinafter referred to as the Townsite Company, one of the defendants herein, which corporation was at all times offered by the officers and employes of the Trust Company and at all times dominated and controlled by the Trust Company.

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a. The Trust Company caused the Belt Company to advance to the Townsite Company and also to advance in the purchase of lands which were conveyed to the Townsite Company a large sum of money, to-wit, the sum of $46,463.75; that all the lands now held by the Townsite Company were purchased with money

so caused to be furnished by the Belt Company and the greater portion of said lands still stand in the name of the Townsite Company; but certain lands heretofore standing in the name of the Townsite Company have been sold and the proceeds thereof are now held by your orators, Stuart R. Knott and Edward F. Swinney, as Receivers of the Townsite Company heretofore appointed by this court. That the Trust Company furnished to the Townsite Company the sum of $6,288.57 and no more. Your orators show, therefore, that by reason of the premises they are entitled to have the properties now standing in the name of the Townsite Company conveyed to them as and for the property rightfully belonging to the Belt Company and also to have the said moneys arising from the sale of said lands and also from the rentals thereof, transferred to them in like manner, together with any other assets of the Townsite Company arising or growing out of the moneys so furnished by the Belt Company as aforesaid; or at the option of your orators they are entitled to credit upon the pretended statement presented by the Trust Company with the amount of moneys so furnished by the Belt Company as aforesaid, with interest thereon from the dates when said moneys were so furnished.

(*b*) The Trust Company in connection with the affairs of the Townsite Company charged and collected a commission of 10 per cent on moneys handled or land sold for it and these charges made between July, 1896, and 1901, amounting to Ten Hundred and Eighty-five Dollars ($1,085.00) are unlawful and improper charges by reason of the relations of the companies to each other and should be eliminated from the pretended statement presented by the Trust Company.

306 28. Your orators further show that in the pretended statement submitted by the Trust Company under date of April 20th, 1891, there is a charge against the Belt Company in the sum of Three Thousand Eight Hundred Thirty-five and 50-100 Dollars ($3,835.50) and afterwards under date of November 19, 1891, a credit against the same charge of One Thousand Seven Hundred Eighty-one Dollars ($1,781.00), leaving a net charge against the Belt Company of Two Thousand and Fifty-four and 50-100 Dollars ($2,054.50), purporting to be charged for rent of engines Numbers 51 and 52 from January 20, 1891, to Oct. 31, 1891, 284 days, at $7.00, $1,988.00; also rental of engine No. 51, October 31st to November 19th, 19 days, at $3.50, $66.50; total $2,054.50. This charge of $2,054.50 should be eliminated from the pretended statement and credit allowed thereon as of date November 19, 1891, for the following reasons. In January, 1891, the Belt Company had a large credit balance with the Trust Company in excess of Two Hundred Thousand Dollars ($200,000), upon which it was receiving no interest from the Trust Company and such credit balance extended for many months thereafter. In January, 1891, the Trust Company caused the Belt Company to purchase two engines, being locomotives Nos. 51 and 52, and instead of permitting the Belt Company to pay for the same a

it should have done, the Trust Company gave to the vendors of the locomotives its own note and charged the interest on said note to the Belt Company, and afterwards, in November of the same year, the Trust Company caused entries to be made so as to show that it had purchased said engines in order that it might sell the same to the Kansas City Terminal Construction Company and the Consolidated Company, and thereupon unlawfully and oppressively charged to the Belt Company said sum of $2,054.50, pretending that the same was rental upon said engine at the rate of $3.50 each per day; that said charge of rental covers the period during which the engines were, as shown by the books of the Trust Company and also the books of the Belt Company, the property of the Belt Company. Your orators, therefore, claim that said charge should be eliminated from the pretended statement and that credit with interest should be allowed the Belt Company for said amount from the date when said charge was made.

29. Your orators further show that on or about July 1, 1898, the Trust Company caused the Belt Company to lease from the Second Street Improvement Company parts of lots 12, 13, 14 and 15 in block 10, King & Bouton's Re-survey, in Kansas City, Missouri, comprising a piece of land 25 by 75.4 feet, the rental named in said lease being at the rate of One Hundred Dollars ($100.00) per month, and the Second Street Improvement Company,
307 by the terms of said lease, reserved the privilege of canceling the same upon thirty days' written notice; on the same day the Trust Company caused the Belt Company to lease all of said land to Wells, Fargo Express Company for Twenty-five Dollars ($25.00) per month, the Belt Company reserving the right to cancel said lease upon thirty days' written notice, provided, however, that if such notice should be given within two years from the date of the lease the Belt Company should pay to the Express Company the sum of One Thousand Dollars ($1,000.00). Your orators further show that said land was not necessary for a right of way or for the operation of the Belt Company but the Trust Company caused it to be leased to the Belt Company and by the latter sub-leased to the Express Company for the purpose of aiding the Second Street Improvement Company to the extent of Seventy-five Dollars ($75.00) per month, the Improvement Company being at that time one of the auxiliary companies of the Trust Company and dominated and controlled by it and officered by the officers and employees of the Trust Company.

Your orators further show that the act of the Trust Company in causing the said leases to be made, was wrongful and oppressive and imposed an unnecessary charge of $75.00 per month on the Belt Company; that between the dates of July, 1898, and December, 1899, the Belt Company was caused to pay to the said Improvement Company the sum of Eighteen Hundred Dollars ($1,800.00), and during the same period it collected from the Express Company under said lease the sum of Four Hundred and Fifty Dollars ($450.00), leaving a net expenditure as a result of the making of said lease in

the sum of Thirteen Hundred and Fifty Dollars ($1,350.00), for which, with interest thereon from the date of the payments made, your orators are entitled to credit upon the pretended statement presented by the Trust Company.

In consideration whereof and for as much as your orators are remediless in the premises except in a court of equity, your orators therefore pray the aid of this court;

(*a*) That an accounting be taken of the various transactions and dealings between the Trust Company and the Belt Company; or by the Trust Company for the use and benefit of and as trustee and agent for the Belt Company and that the Trust Company be required to pay the balance found to be due by it, if any, upon such accounting; that in taking such accounting all claims and demands alleged to be held by the Trust Company against the Belt Company in Kansas and Missouri, where the Trust Company used the Belt Company simply as an instrumentality and agency for its own use and
308 benefit, be charged against the Trust Company and it be held liable for all losses incurred or [claim*b*ed] to have been incurred by the Belt Company about the same.

(*b*) That the said notes hereinabove described may be found and decreed by this court to have been executed in the fraudul-nt manner and for the fraudulent purposes above set forth and without consideration; and that said notes may be by this court directed to be surrendered up and canceled, and that each an- all of the stocks, bonds and other securities, including the assigned account above mentioned, fraudulently delivered to the Trust Company by its officers and employes in the manner hereinabove set forth, may be ordered by this court surrendered and delivered up or reassigned to the Belt Company.

(*c*) That each and all of the property purchased with the money of the Belt Company and belonging in equity to it, the legal title to which is held in the name of any of the companies hereinbefore set forth, may be required by the decree of this honorable court to be conveyed to the Belt Company, or to its receivers for it.

And your orators pray for a continuance of the writ of injunction herein against the Guardian Trust Company, its agents, servants and employes, restraining and enjoining them and each of them from selling, transferring or in any wise disposing of the said notes above mentioned and so executed by the Belt Company to the Trust Company; and from selling, transferring or in any wise disposing of the said bonds and stocks and other property hereinabove described, delivered to said Trust Company as collateral security for said notes.

And it may please your honors to grant unto your orators the subpœna of the United States of America issuing out of and under the seal of this honorable court directed to the Guardian Trust Company, the Missouri Elevator & Terminal Company, the Fairmount Amusement Company, the Central Improvement Company and Thomas T. Crittenden, its receiver, the Northern Townsite Company, and the Cambria Steel Company, the defendants herein respectively therein and thereby commanding them on a day certain

therein to be named and under a certain penalty to be and appear before this honorable court then and there to answer (but not under oath, an answer under oath being hereby expressly waived), all and singular the premises, and to stand and perform and abide by such orders, directions or decrees as may be made in the premises,
309 and as shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray.

SAMUEL W. MOORE,
THOMAS R. MARKS,
Solicitors for Complainants.

H. B. HURD,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

E. F. Swinney, being first duly sworn, says that he is one of the Receivers of the Kansas City Suburban Belt Railroad Company, the complainants in the foregoing amended supplemental ancillary bill; that he has read the said bill of complaint and knows the contents thereof and that the allegations therein cont-ined are true so far as they relate to his own acts and the acts of his co-receiver; that so far as they relate to the acts of others, he believes them to be true.

E. F. SWINNEY.

Subscribed and sworn to before me this 22nd day of March, 1905.

SIDNEY SILVERMAN,
Notary Public, Jackson County, Missouri.

My commission expires August 5, 1905.

Afterwards, to-wit, on the 7th day of April, 1905, the following Order was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Critenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

310 Upon application of the complainants in the ancillary bill herein, Stuart R. Knot and Edward F. Swinney as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, it is ordered that the said complainants have leave to file their amended and supplemental ancillary bill of complaint, and that when filed the same stand referred to Honorable Shannon C. Douglass, Special Master, with authority to settle the issues and complete the taking of testimony and make his findings of fact and conclusions of law thereon with all convenient speed.

(Signed) JNO. F. PHILIPS,
District Judge.

O. K.,
J. C. ROSENBERGER,
H. S. MECARTNEY,
For Guardian Trust Co.

Afterwards, to-wit, on the 1st day of May, 1905, the following Stipulation was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, Defendant.

Bill.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Intervening Petition.

It is agreed between the parties to the intervening petition of the Kansas City Southern Railway Company that it may file its amended intervening petition setting up, in addition to the matters now contained in its intervening petition on file, its claim against the Guardian Trust Company for alleged breach of trust as trustee in the mortgage made by the Union Terminal Railroad Company alleged to be accruing to it as the owner of all the bonds issued by the Union Terminal Railroad Company; and the Guardian Trust Company consents that the issues so made shall be referred to Shannon C. Douglass, Special Master and waives any objection it might make to said intervening petition on the ground of multifariousness or other formal matters; and the Guardian Trust Company further agrees to answer the said intervening petition within fifteen days from filing petition.

GUARDIAN TRUST COMPANY,
By J. C. ROSENBERGER &
H. S. MECARTNEY,
Solicitors.
S. W. MOORE AND
THOMAS R. MARKS,
Solicitors for The Kansas City Southern Ry. Co.

FRANK HAGERMAN,
For Cambria Co.

311 Afterwards, to-wit, on the 1st day of May, 1905, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

2468.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUB. BELT R. R. Co. et al., Defendants; THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Intervenor.

In accordance with the stipulation of the parties herein filed it is ordered that the intervenor The Kansas City Southern Railway Company have leave to file its amended intervening petition and that the issues made therein stand referred to Hon. Shannon C. Douglass to take the testimony and report his findings of fact and conclusions of law thereon with all convenient speed; that the defendants to said amended intervening petition shall have fifteen days from this date within which to file answer.

(Signed) SMITH McPHERSON, *Judge.*

O. K.

J. C. ROSENBERGER,
H. S. MECARTNEY,
For Guardian Trust Co.
FRANK HAGERMAN,
For Cambria Co.

Afterwards, to-wit, on the 1st day of May, 1905, The Kansas City Southern Railway Company filed its amended intervening petition herein.

Said amended intervening petition is in the words and figures following:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants; The Kansas City Southern Railway Company, Intervenor.

312 *Intervening Petition of The Kansas City Southern Railway Company.*

To the Judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

The Intervenor, The Kansas City Southern Railway Company, respectfully shows:

1. The intervenor is a corporation duly organized and existing under the laws of the State of Missouri as a railway corporation, having been duly incorporated according to law in March, 1900.

2. That the Kansas City Suburban Belt Railway Company, one of the defendants herein, being a railroad corporation duly organized and existing under the laws of the State of Missouri and being about to construct and equip a line of railroad in Jackson County, Missouri, did, on or about May 1, 1890, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein) as trustee, in which said mortgage or deed of trust it is recited that the said mortgage or deed of trust shall be a first mortgage and paramount lien upon said railroad and upon all the property and rights of property of the railroad company of every name, nature and description then held or that might be thereafter acquired including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to said trustee to secure an issue of the first mortgage bonds of said railroad company in the principal sum of One Million Dollars ($1,000,000.00) all and singular *and* double track standard gauge railroad of the company (meaning thereby the Kansas City Suburban Belt Railroad Company) constructed and to be constructed from a point at the intersection of Second and Broadway streets in Kansas City in Jackson County, Missouri; thence in an easterly direction on and along said Second street to its point of intersection with Harrison street in said city; thence in a northeasterly direction to a point near Randolph avenue in said city; thence east for a distance of about one and one-half miles; thence in a south-

easterly and southerly direction to the southern limits of said city; thence in a general southwesterly direction to a point at or near the mouth of Brush Creek in said county of Jackson, being about twelve (12) miles of double track railroad, about ten (10) miles of which are within the corporate limits of Kansas City; also all the lands, tenements, easements and hereditaments acquired or appropriated or which shall be thereafter acquired or appropriated for the
313 purpose of a right-of-way for said railroad or for its tracks or switches; also all railroad tracks, railways and rights-of-way, depot grounds, station grounds and other grounds, bridges, viaducts, culverts and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shop and other shops, water tanks, turntables, superstructures, erections, fixtures, rolling stock, furniture, fuels, tools, implements, machinery and appliances and other facilities for maintaining and operating said railroad, as well such as are then owned or held by the company as also such as the company might thereafter construct or acquire for use in connection with its said railroad; also all the terminals, terminal rights, privileges, contracts, leases, connections and appliances which the company then owned and held and which it might thereafter own and hold for use in connection with its said railroad; also all of certain described lots, tracts and parcels of land situated in Kansas City in the County of Jackson, State of Missouri, more specifically described in said mortgage or deed of trust; also all and singular the rents, tolls, income, issues and profits of the said railroad, premises and property; and also all the estate, right, title and interest, legal and equitable and present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties and franchises of the company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof as well those thereafter to be acquired as those then held.

That default was made in the payments required by the terms of said mortgage or deed of trust and, on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage or deed of trust in the Circuit Court of the United States for Western Division of the Western District of Missouri; that the defendant, Guardian Trust Company, was a party to said proceedings.

Your intervenor further states that the Consolidated Terminal Railway Company, hereinafter referred to as the Consolidated Company, being a railroad corporation duly organized and existing under the laws of the State of Missouri, and being engaged in having its line of railway constructed, completed and equipped in Jackson County, Missouri, did for said purposes, on or about February 1, 1892, make, execute and deliver its deed of trust or mortgage to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein) and the Provident Life & Trust Company of Philadelphia as
314 Trustees, in which said mortgage or deed of trust it is recited that the said mortgage or deed of Trust, shall be a first mortgage or paramount lien upon said railroad and upon all the prop

erty and rights of property of the Railroad Company of every name, nature and description then held or that might thereafter be acquired, including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to said trustee, to secure an issue of the first mortgage bonds of the said Railroad Company in the principal sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00), and bearing interest at the rate of five per cent (5 per cent) per annum, all and singular the standard gauge railroad of the company, constructed and to be constructed from a point on the line of the Kansas City Suburban Belt Railroad, at or near the intersection of Grand avenue and Second street in Kansas City, Jackson County, Missouri; thence in a general westerly direction to a point on the state line between the State of Missouri and the State of Kansas, near the South bank of the Missouri river, being about two miles of standard guage railroad, and lying wholly within the said County of Jackson, and State of Missouri, and wholly within the corporate limits of Kansas City; also all the lands, tenements, easements and hereditaments acquired or appropriated for the purpose of a right of way for said railroad or for its side tracks or switches; also all railroad tracks, railways, ways and rights of way, depot grounds, station grounds and other grounds, bridges, viaducts, culverts and other structures, depots, station houses, engines houses, car houses, fuel houses, warehouses, machine shops and other shops, water tanks, turntables, superstructures, erections, fixtures, rolling stock, furniture, fuel, tools, implements, machinery and appliances and other facilities for maintaining and operating said railroad, as well *as* such as were then owned or held by the company, as also such as the company may thereafter construct or acquire and own for use in connection with its said railroad; also all the terminals, terminal rights, privileges, contracts, leases, connections and appliances which the company then owned and held, and which it may thereafter own and hold for use in connection with its said railroad;

Also all and singular the rents, tolls, income, issues and profits of the said railroad, premises and property; also all the estate, right, title and interest, legal and equitable of the then present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties and franchises of the company connected with or pertaining to
315 the said railroad or the construction, acquisition, maintenance or use thereof, as well those thereafter to be acquired as those then held.

Your intervenors further show that afterwards, to-wit, on or about the 25th day of July, 1902, said Consolidated Company entered into articles of consolidation as authorized by and in accordance with the provisions of the statutes of the State of Missouri in such case made and provided; *that* the Kansas City Suburban Belt Railroad Company, a railroad corporation then and there duly organized and existing under the laws of the State of Missouri, whose line of railroad connected with and formed a continuation of that of the Consolidated Company thereby forming a continuous

line of railroad running in the same general direction; that thereby there was formed and organized The Kansas City Suburban Belt Railroad Company hereafter referred to as the Belt Company and being one of the defendants herein.

That default was made in the payments required by the terms of said mortgage or deed of trust given by the Consolidated Company, and, on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage or deed of trust in the Circuit Court of the United States for the Western Division of the Western District of Missouri; that the defendant, Guardian Trust Company, was a party to said proceedings.

The Intervenor further states that the Kansas City & Independence Air Line, one of the defendants herein, being a railroad corporation duly organized and existing under the laws of the State of Missouri and being about to construct and equip a line of railroad in Jackson County, Missouri, did, on or about March 1, 1892, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein), as trustee, in which said mortgage or deed of trust it is recited that the said mortgage or deed of trust shall be a first mortgage and paramount lien upon the railroad of said company and upon all its property and rights of property of every name, nature, and description then held or that might thereafter be acquired, including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to said trustee to secure an issue of the first mortgage bonds of said railroad company in the principal sum of Three Hundred Thousand Dollars ($300,000.00), all and singular the standard gauge railroad of the company (meaning the Kansas City & Independence Air Line), constructed
316 and to be constructed from a point on the line of the Kansas City Suburban Belt railroad at or near the southeast corner of Section Twenty-five (25), Township Fifty (50), Range Thirty-three (33) West, in Jackson, Missouri; thence in a general easterly direction to the city of Independence in said county of Jackson, in the State of Missouri, being about six (6) miles of standard gauge railroad and lying wholly within the said County of Jackson and State of Missouri; also all the lands, tenements, easements and hereditaments acquired or appropriated, for the purpose of a right-of-way for said railroad or for its side tracks or switches; also all railroad tracks, railways, ways and rights-of-way, depot grounds, station grounds and other grounds, bridges, viaducts, culverts and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shops and other shops, water tanks, turn tables, superstructures, erections, fixtures, rolling stock, furniture, fuel, tools, implements, machinery and appliances and other facilities for maintaining and operating said railroad, as well such as the company then owned or held as also such as the company thereafter may construct or acquire and own for use in connection with its said railroad; also all the terminals, terminal rights, privileges, contracts, leases, connec-

tions and appliances which the company then owned and held and which it might thereafter own and hold for use in connection with its said railroad; also all and singular the rents, tolls, income, issues and profits of the said railroad, premises and property; and also all the estate, right, title and interest, legal and equitable and present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties said railroad or the construction, acquisition, maintenance or use thereof as well those thereafter to be acquired as those then held; that default was made in the payments required by said mortgage or deed of trust and on September 6, 1900, proceedings were instituted for the foreclosure of the said mortgage or deed of trust in the Circuit Court of the United States within and for the Western Division of the Western District of Missouri; that the defendant Guardian Trust Company was a party to said proceedings.

That such proceedings were had in the foreclosure suits above mentioned that the said causes were consolidated, and upon the 6th day of November, 1901, there was entered by said court a final decree of foreclosure and sale adjudging and decreeing that default had been made in the payment of the principal and interest upon the bonds secured by the mirtgages aforesaid and that the railroads,
properties and franchises embraced in each of said mortgages
317 should be sold as in and by the said decree provided, reference
being hereby made thereto and to the record in said causes; that pursuant to said decree a commissioner was appointed to make said sale and the said commissioner did on December 31, 1901, at the place in the said decree specified duly sell at public auction to the intervenor, The Kansas City Southern Railway Company, it being the highest and best bidder at said sales, all and singular the railroads, property and franchises in said decree mentioned and directed to be sold and in said mortgages described as heretofore set forth, due notice of the time and place of said sales having been published pursuant to said decree, and the said decree was complied with in all things relating to said sales, that said commissioner did duly make and file his report of said sales on December 31, 1901, in the above entitled causes and court, which said report and sales were, after notice given, duly confirmed and made absolute, and the said commissioner did thereafter as directed by said court and on or about January 4, 1902, duly convey by commissioner's deed all and singular the railroads, franchises and property of every kind and description theretofore belonging to the said railroad companies and set forth and described in said mortgages including the property held by the said companies respectively at the date of said mortgages and also the property thereafter acquired by them and each of them to your intervenor, The Kansas City Southern Railway Company, which is now the lawful owner thereof.

3. Your intervenor further shows that the Union Terminal Railroad Company, one of the defendants herein, being a railroad corporation duly organized and existing under the laws of the State of Kansas, and being about to construct and equip a line of railroad in Wyandotte County, in the State of Kansas, did, on or about February

1, 1893, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein) and the Provident Life & Trust Company, of Philadelphia, as trustees, in which said mortgage or deed of trust it was recited that said mortgage or deed of trust should be a lien upon the railroad of said company and upon all the property and rights of property of the said company of every name, nature and description then held or that might thereafter be acquired including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed *or* trust there was conveyed to the said trustees all and singular the standard gauge railroad of the said Union Terminal Company constructed and to be constructed from a point in the city of
318 Argentine in the County of Wyandotte in the State of Kansas, to a point on the north side of the Kansas river opposite the said city of Argentine; thence in a northwesterly direction by the most convenient and practical route, to a point at or near the Missouri river; thence along and down the valley of the Missouri and up the valley of the Kansas river to the place of beginning, so as to substantially encircle the city of Kansas, Kansas, in said County of Wyandotte; also such branch or branches and spur or spurs as may be necessary to enable it to connect with the Kansas City Suburban Belt Railroad Company's railway at the state line between Missouri and Kansas where the said railway intersects said state line on or near the south bank of the Missouri river; the main line of the railway of the Union Terminal Railroad Company being about twenty-two miles in length and lying wholly within the said county of Wyandotte and State of Kansas; also all the lands, tenements, easements and hereditaments acquired or appropriated, for the purpose of a right-of-way for said railroad or for its side tracks or switches; also all railroad tracks, railways, ways and rights-of-way, depot grounds, station grounds and other grounds, bridges, viaducts, culverts, and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shops and other shops, water tank, ties, rails, furniture, fuel, tools, implements, machinery, supplies and appliances, and other facilities for maintaining and operating said railroad as well such as were then owned or held by the company as also such as the company might thereafter construct or acquire and own for use in connection with its said railroad, and also the terminal, terminal rights, privileges, contracts, leases and connections and appliances which the company then owned and held and which it should thereafter own and hold for use in connection with its said railroad; also all and singular the rents, tolls, income, issues and profits of the said railroad, premises and property; and also all the estate, legal and equitable and present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties and franchises of the company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof, as well those thereafter to be acquired as those then held; that default was made in the payments required by the terms of said mort-

gage or deed of trust and on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage and deed of trust in the Circuit Court of the United States for the District of Kansas, First Division; the defendant Guardian Trust Company was a party to said proceedings; that such proceedings were had in said foreclosure suit that upon the 6th day of November, 1901, there was entered by the said court a decree of foreclosure and sale,
319 adjudging and decreeing that default had been made in the payment of the principal and interest upon the bonds secured by the mortgage aforesaid and that the railroad properties and franchises embraced in said mortgage should be sold as in and by the said decree provided, reference being hereby made thereto and to the record in said cause; that pursuant to said decree a commissioner was appointed by the court to make said sale, and the said commissioner did, on December 31, 1901, at the place in the said decree specified, duly sell at public auction to the intervenor, The Kansas City Southern Railwya Company, it being the highest and best bidder at such sale, all and singular the railroad property and franchises in said decree mentioned and directed to be sold, including all property held by the said railroad company at the time of the execution of said mortgage, as well as property thereafter acquired and held as provided in said mortgage or deed of trust, due notice of the time and place of said sale having been published pursuant to said decree, and the said decree was complied with in all things relating to said sale; that said commissioner did duly make and file his report of said sale on December 31, 1901, in the above entitled cause and court, which said report and sale were, after notice given, duly confirmed and made absolute; and the said commissioner did thereupon and on the 4th day of January, 1902, as directed by said court, duly convey by commissioner's deed all and singular the railroad, franchises and property of every kind and description theretofore belonging to said company at the time of the execution of said mortgage or deed of trust, and also all property therein described thereafter acquired by said company to your intervenor, The Kansas City Southern Railway Company, which is now the lawful owner thereof.

4. Your intervenor further states that the Kansas City, Pittsburg & Gulf Railroad Company, being a railroad corporation duly organized and existing under the laws of the State of Missouri, and being engaged in the construction of a line of railroad from a point near Kansas City, Missouri, southwardly to the Gulf of Mexico, did, on or about April 1, 1893, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein), and the State Trust Company of the City of New York, as trustees, in and by which said mortgage or deed of trust there is conveyed to the trustees therein named all and singular the line of railroad constructed or thereafter constructed or acquired from Kansas City in the State of Missouri, southerly through the counties of Jackson, Cass, Bates and Vernon, and the northwest corner of

Barton County in the State of Missouri to the western line
320 of Barton County in said State of Missouri, and so on to the City of Mena in the State of Arkansas; and all and singular the railroad, ways and rights-of-way, road beds, depot grounds and other lands and all tracks, bridges, viaducts, culverts, fences, depots, stations, station houses, engine houses, car houses, freight houses, wood houses, locomotive shops and other shops and all other structures and buildings whatsoever then held or owned or which should be thereafter in any wise acquired, held or owned by the said railroad company for use in the construction, maintenance or operation of its line of railroad or any extension, continuation, branch railroad or lines *or* railroad which it might thereafter purchase, construct or acquire in connection with its main line of railroad; also all locomotives, tenders and passenger, baggage, freight, cattle and other cars, and all other rolling stock and equipment whatsoever, and all machinery, tools and implements and all fuel, supplies and materials then or thereafter held, owned or acquired by said railroad company for constructing, maintaining, operating and repairing its said railroad or any extension or branch thereof; also all rights, privileges, powers, immunities and exemptions and all corporate and other franchises then owned, held and enjoyed by the said railroad company with respect to said main line or any part thereof or which should be thereafter owned, acquired, held or enjoyed by or conferred upon said railroad company connected with or relating to the said main line of railroad, its extensions, continuations and branches; also all leases, traffic contracts and arrangements of every kind and character whatsoever which said railroad company had or might thereafter enter into with any other railroad company forming part of the said line; also all and singular any tenements, hereditaments and appurtenances to said railroad or lines of railroad and each and every part thereof acquired and to be acquired, constructed and to be constructed then or thereafter belonging or in any wise appertaining; and all the reversion and reversions, remainder and remainders, estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity which the said railroad company then had or was entitled to or which the said railroad company, its successors or assigns should thereafter acquire or become entitled to concerning the said railroad or any extension, continuation or branch thereof or their rights, franchises and each and every part and parcel thereof with the appurtenances. Said mortgage or deed of trust was executed and delivered to said trustees to secure an issue of the first mortgage bonds of said railroad company in the principal sum of twenty-three million dollars ($23,000,000.00); that default was made and in the payments required by the terms of said mortgage or deed of trust and
on April 28, 1899, proceedings were instituted in the Circuit
321 Court of the United States for the Western Division of the Western District of Missouri for the foreclosure of said mortgage or deed of trust; the defendant Guardian Trust Company was a party to said proceedings; that such proceedings were had in said action that on the 5th day of February, 1900, there was entered by

said court a decree of foreclosure and sale adjudging and decreeing that default had been made in the payments of the principal and interest upon the bonds secured by the mortgage or deed of trust aforesaid, and that the railroads, properties and franchises embraced in said mortgage should be sold as in and by the said decree provided, reference being hereby made thereto and the record in said cause; that pursuant to said decree a special master was appointed to make said sale and the said special master did, on March 19, 1900, at the place in said decree specified duly sell to a committee acting for your intervenor, the said committee being the highest and best bidder at said sale, all and singular the railroads, property and franchises in said decree mentioned, including the properties owned and acquired at the time of the execution of said mortgage or deed of trust as well as those thereafter acquired for use in connection with its said railroad, and directed to be sold, due notice of the time and place of said sale having been published pursuant to said decree and sale, and said decree was complied with in all things relating to said sale; that your intervenor by leave and order of court became the substitute bidder in the place of said committee; that said special master did duly make and file his report of said sale on March 20, 1900, in the above entitled cause, which said report and sale were, after notice given, duly confirmed and made absolute, and the said special master did thereupon, as directed by said court, duly convey by master's deed all and singular the railroad, franchises and property of every kind and description belonging to the said railroad company, including not only the properties described in said mortgage or deed of trust as then owned and held by the said railroad company but also the properties thereafter acquired for use in connection with the operation of said railroad, to your intervenor, The Kansas City Southern Railway Company, which is now the lawful owner thereof.

The mortgages or deeds of trust mentioned in the foregoing paragraphs are all duly and properly acknowledged and duly and properly recorded in the various counties in which the properties mentioned therein were respectively located at or about the dates of said mortgages or deeds of trust respectively.

5. The intervenor further shows that, about the year 1887, the defendant Guardian Trust Company (hereinafter called the Trust Company) conceived and entered upon the plan and pur-
322 pose to cause to be constructed a number of railroads in and about Kansas City in the State of Missouri, and Kansas City in the state of Kansas, and leading from or to said city; it was a part of the said plan and purpose of the Trust Company to cause said railroads to be built, constructed and operated by various corporations to be organized by the Trust Company and to elect certain of the officers, agents and representatives of the said Trust Company as the officers and directors of the said several railroad companies so as at all times to absolutely dominate and control the corporate action of the said railroad companies through their common directors and officers; it was a further part of the plans and purposes of the Trust Company to utilize and employ some one or more

of the said railroad companies to act for and on behalf of the Trust Company in building and operating railroads and in the issue of bonds and stocks so as to gather unto the Trust Company all the profits and other advantages accruing in the premises to foist upon the said railroad companies so utilized any and all losses, burdens or other liabilities which might result in the course of their operation; in carrying out its said plans and purposes the Trust Company assumed the position and duty of trustee and agent in constructing and operating said railroad and in managing and disposing of the bonds, stocks, funds and other assets of the said railroad companies and is held to the liability of trustee or agent for the use and benefit of the parties who might and did become concerned or interested therein; and that consequently the relation of the Trust Company to each and all of the said railroad companies and especially those hereafter named so far as the said Trust Company might employ the same, or either of them, as agents and instrumentalities to further its own plans and purposes, was that of a principal bound and charged with the duty to indemnify and protect such railroad company so employed and utilized in any particular transaction against any and all losses, burdens and liability arising in the premises; moreover the Trust Company was either the sole trustee in the mortgages above mentioned, or when joined as co-trustee with the Provident Life and Trust Company or the State Trust Company was the active trustee in the charge and management of the trust created by the several mortgages or deed of trust above described, and as such trustee owed an active duty at all times, during the continuance of such relation, to care for and in every way protect the interests of the bondholders secured by said mortgages, as well as to care for and protect the interests of the mortgagors themselves; the Trust Company in pursuance of the plans and purposes so conceived and entered upon by it, did
323 acquire the control of the Kansas City Suburban Railroad Company, hereinafter called the Suburban Company, in the year 1889, and caused it to issue the bonds secured by the mortgage aforesaid and to issue capital stock in a large amount and to cause said company to construct and thereafter to operate a railroad in Jackson County, Missouri, as described in the mortgage or deed of trust, of said company heretofore set forth; the Trust Company, in pursuance of the same plan, did in 1891, cause to be incorporated the Consolidated Terminal Railroad Company (hereinafter called the Consolidated Company), and did cause said Consolidated Company to issue bonds and a mortgage or deed of trust to secure the same, and to issue its capital stock in a large amount, and to construct a railroad in Kansas City, Jackson County, Missouri, connecting with the railroad of the Suburban Company, the two roads forming a continuous line of railroad from the state line between the states of Kansas and Missouri at a point in the eastern portion of Jackson County known as Belt Junction; that in December, 1891, the Trust Company caused to be incorporated under the laws of the State of Kansas the Union Terminal Railroad Company (hereinafter called the Union Company) and did cause it to issue

and execute the bonds and mortgages or deed of trust above referred to and issue capital stock in a large amount, and did further cause it to construct a railroad beginning at the state line between the states of Kansas and Missouri and extending southwesterly along the left bank of the Kaw, or Kansas river to a point at or near the town of Argentine, Wyandotte County, Kansas; in January, 1891, the Trust Company caused to be incorporated under the laws of the State of Missouri, the Kansas City & Independence Air Line (hereinafter referred to as the Air Line), and did cause the Air Line to issue and execute the bonds and mortgage above referred to and issue stock in a large amount and to construct and operate a railroad in Jackson County, Missouri, extending from a point on the line of the Suburban Company known as Air Line Junction to the City of Independence in the State of Missouri. Shortly after the issue of the bonds and stocks of the Consolidated Company the Trust Company caused it to consolidate with the Suburban Company, forming a new company called the Kansas City Suburban Belt Railroad Company (hereinafter referred to as the Belt Company); that the Trust Company caused the Union Company to execute a lease of all its property, rights and franchises to the Belt Company, and thereunder the Belt Company operated the line of the Union Company and its own line and continued so to operate the same until the instituton of the foreclosure proceeding above referred to; the Trust Company, by virtue of its ownership and
324 control of the capital stock of the Belt Company, Air Line and Union Company, did at all times, cause its officers and directors to be elected as the officers and directors of said lines and did thereby dominate and control all the affairs and business of said lines and caused them, and each of them, to do and perform all such corporate acts and things as the Trust Company from time to time deemed to be beneficial to its own interests; that the Trust Company in the year 1893, caused to be incorporated the Kansas City, Pittsburg & Gulf Railroad Company, hereinafter called the Gulf Company, and caused it to issue and execute the bonds and mortgage or deed of trust above referred to and issue stock in a large amount. The Trust Company also caused the Gulf Company to construct and operate a railroad extending generally from a point near Kansas City, Jackson County, Missouri, to the Gulf of Mexico and did cause the Gulf Company to enter into contracts with the Belt Company for the use of the latter's terminals at Kansas City; the Trust Company also caused its officers and directors to be elected officers and directors of the Gulf Company and at all times by that means did dominate and control the affairs of the Gulf Company and did cause it to perform such corporate acts and things as the Trust Company deemed to be for its benefit and advantage; that by reason of such domination and control the Trust Company at all times had a complete and intimate knowledge of all the affairs and transactions of all the companies above referred to in all their details, including the transactions hereinafter specifically mentioned.

6. Your intervenor further shows that in the year 1895, the Trust Company caused to be incorporated under the laws of the

State of Missouri the Central Improvement Company (hereinafter called the Central Company), the directors and officers of which were at all times made up from the directors and officers of the Trust Comapny, and the Central Company was at all times in all of its transactions dominated and controlled by the Trust Company, the purposes of the incorporation of the said Central Company were to hold the legal right to real estate that might be needed and acquired for right-of-way or other purposes necessary for and in connection with the operation of the various railroad companies so dominated and controlled by the Trust Company, in some instances the purpose being that upon the purchase of property by one of the said railway companies the title should be taken in the name of the Central Company in order that it might be enabled to give back a mortgage or deed of trust to secure a portion of the purchase money, which said mortgage or deed of trust would be a first lien and not subject to the first mortgage or deed of trust
325 lien upon the property of the railway companies respetcively.

In pursuance of this plan large amounts of money were furnished to the Central Company by the Belt Company, by the Air Line and by the Gulf Company for the purchase of right-of-way and terminal properties necessary for the use and operation of the said railways respectively; and purchases were accordingly made of properties for the use and operation of said companies, a list of which properties so purchased is hereto attached marked "Exhibit A"; this statement shows the price paid for each particular piece of property and for which particular railroad company the said property was acquired and by which company the purchase price was paid; that the titles to said property so acquired were, for convenience merely, placed in the name of the said Central Company; in some instances the money so furnished to pay for such properties was furnished directly by the Belt Company or other companies for whose benefit the purchase was made to the vendors and in other instances the money was furnished direct to the Central Company, which issued to the company so furnishing such funds its capital stock representing approximately the amount of money so furnished. That in this way there were issued by the Central Improvement Company fourteen hundred and seven (1,407) shares, of which eight hundred and seventeen shares (817) are now held by the Belt Company, three hundred and thirty-four (334) shares are now held by the Union Terminal Company, twenty-two (22) shares are now held by the Air Line and two hundred and thirty-four (234) shares are now held by the Gulf Company, such companies having furnished from time to time for the purchase of property for the use and benefit of such companies the following amounts:

Belt Line	$129,571.30
Air Line	16,104.41
Gulf Company	23,673.89
	$169,349.60

that no money was ever received by the Central Company, except the money so furnished as aforesaid and it did not have at any time any assets or property except property so purchased as aforesaid; that the said fourteen hundred and seven (1,407) shares of stock were the only shares of stock ever lawfully issued by the Central Company; and by reason of the premises the said Central Company is, and was at all times, a mere trustee holding the legal title to the various properties, in trust, for the said railways, for whose use and benefit said lands were purchased as aforesaid; immediately upon the making of such purchases and the vesting of title in the Central Company the particular railroad company for which
326 such purchase was made became the equitable owner and entitled to a conveyance thereof; the said properties so purchased for the said railroad companies and to which the said railroad companies respectively were entitled to a conveyance were necessary for the use of such railroad company in connection with and in the operation of its railroad and came within the after acquired property clause of the mortgage placed upon said road, so that the equitable liens of said mortgages respectively attached to and became a charge upon the said properties in favor of their bondholders respectively. That sales of some of said properties have been made to the Central Company and by its receiver acting under order of this court and the proceeds thereof are now in the possession of said receiver. By the foreclosure proceedings above mentioned and decrees of sale had thereunder the intervenor acquired the equitable title to all of said properties so held by the Central Company, as aforesaid, and became and is now entitled to a conveyance of the same and to the proceeds of sales thereof now held by the said receiver, but the Trust Company denies the right of the intervenor to said property or to the stock of the Central Company, and pretends to hold the said stock of the Central Company as collateral security to an alleged indebtedness from the Belt Company to it, as hereinafter more specifically set forth.

7. Your intervenor further shows that prior to February 1, 1900, the Belt Company purchased and owned a large quantity of steel rails for use in the construction and repair of its railroad and in connection therewith; there were in the possession of the Belt Company on February 1, 1900, and prior thereto, approximately six hundred (600) tons, more or less, of said steel rails so owned by the Belt Company and approximately twenty tons of fastenings for use in connection therewith; by virtue of the after acquired property clause above referred to in the mortgage of the Belt Company, the said steel rails and fastenings became charged with a lien to secure the payment of the bonds so issued by the Belt Company, as aforesaid; upon the foreclosure of the said mortgage of the Belt Company and the sale had thereunder the equitable title to said rails passed to and vested in the intervenor, The Kansas City Southern Railway Company, and it became and is now the equitable owner thereof; the Trust Company claims to have acquored said steel rails and fastenings on or about February 1, 1900, as collateral security to an alleged indebtedness from the Belt Company to it and

the Trust Company denies the right and claim of your intervenor to said steel rails and fastenings, although it received the same with actual notice of the mortgage lien thereon; the value of said steel rails and fastenings was and is thirty-five dollars ($35.00) per ton and the Trust Company should be required in equity to deliver said property to your intervenor, or if the said property has been sold by the Trust Company then it should be required to account for and pay to your intervenor the proceeds or full value thereof.

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8. Your intervenor further states that the railroad of the Union Company was a connecting railroad with the line of the Belt Company, the two railroads forming a continuous line of railroad and the Belt Company was, therefore, authorized by law to aid the Union Company in the construction of its road and to acquire the stock of the Union Company in the lawful execution of the corporate purposes of the Belt Company; prior to June 13, 1900, the Belt Company did acquire five thousand (5,000) shares of the capital stock of the Union Company and held said stock for the uses and purposes of its railroad as by law duly authorized to do; by virtue of the after acquired property clause in the mortgage executed by the Belt Company as above set forth, the lien of said mortgage in equity attached to said five thousand (5,000) shares of Union stock when so acquired by the Belt Company and inured to the benefit of the bondholders of the Belt Company as the Trust Company well knew. The Trust Company acquired possession of said five thousand (5,000) shares of Union Terminal stock so covered by said mortgage lien as aforesaid, and claims to hold the same as collateral security for an alleged indebtedness from the Belt Company to it, and denies the right of your intervenor to said stock or to the proceeds thereof. On or about June 14, 1900, the Trust Company claims to have sold said five thousand (5,000) shares of Union stock at and for the sum of twenty-five thousand dollars ($25,000.00) which sum was the fair value thereof at that time. By virtue of the said mortgage of the Belt Company and the foreclosure proceedings and sale thereunder your intervenor became entitled in equity to said five thousand (5,000) shares of Union stock, or twenty-five thousand dollars ($25,000.00), the value or proceeds thereof, together with interest thereon at six per cent per annum from said June 14th, 1900, which the Trust Company unlawfully withholds from the intervenor.

The Air Line owned and operated a railroad connecting with the railroad of the Belt Co., as hereinbefore stated, and the two formed a continuous line of railroad, and the Belt Company thereby, by virtue of the statutes of the State of Missouri, became entitled to aid the Air Line in the construction of its road and to purchase and hold the capital stock of the Air Line; prior to June 11, 1900, the Belt Co. had acquired and owned 4,944 shares of the capital stock of the Air Line; the Belt Co., also at the same time had acquired as aforesaid and held 14,997 shares of the Union stock

in addition to the five thousand shares above mentioned;
328 that the said Union stock and the said Air Line stock were acquired by the Trust Company claiming to hold the same as collateral security to an alleged indebtedness from the Belt Co. to it, but the said stocks had been acquired by the Belt Company prior thereto and were covered by the after acquired property clause in the mortgage of the Belt Company, as the Trust Company well knew, to secure the bonds of the Belt Company; and upon the foreclosure of said mortgage of the Belt Company and the sale thereunder to your intervenor the latter acquired the equitable title to said stock or to the value or proceeds thereof; the Trust Company claims that it did, on or about June 11, 1900, sell said 14,997 shares of Union stock and 4,994 shares of the Air Line stock at the sum or price of $9,996.65; and it holds the said stocks or the proceeds thereof and denies the right of your intervenor thereto; that your intervenor in equity is entitled to said stock or, if the same has been sold by the Trust Company, to have the Trust Company account to it for the value or the proceeds thereof together with interest thereon from June 11, 1900, at six per cent.

9. Your intervenor states that in the year 1896, the Trust Company caused to be incorporated a railroad corporation under the laws of the State of Missouri, called the Kansas City & Northern Connecting Railroad Company (hereinafter called the Connecting Company) for the purpose of constructing a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with the railroads at that point running eastwardly to Quincy, Illinois, and northwardly to Council Bluffs, Iowa. The Trust Company, after the incorporation of said railway company, caused it to execute its bonds, secured by mortgage or deed of trust, in a large amount and to issue its capital stock in a large amount, and thereupon caused the Connecting Company and the Belt Company to enter into a contract, by the terms of which the Belt Company undertook to acquire the right-of-way and to construct the railroad of the Connecting Company, and as a consideration thereof, the Connecting Company agreed to execute issue and deliver to the Belt Company the bonds and stocks of the Connecting Company, that the proposed line of the Connecting Company formed a direct connection with the line of the Belt Company and the two lines formed a continuous line of railroad; in pursuance of said contract the Belt Company began the construction of the railroad of the Connecting Company and the acquisition of its right-of-way, and received as a consideration for so doing, a large amount of the first mortgage bonds and of the capital stock of the Connecting Company and held and owned a large amount in value of said bonds and stocks, for use in connection with the operation of its railroad on and prior to
329 July 20, 1899; that at various dates the Trust Company took and converted to its own use eleven hundred and thirty (1,130) of the first mortgage bonds of the Connecting Company which at that time belonged to the Belt Company and were of

the value of eight hundred forty-five thousand, four hundred and fifteen dollars ($845,415.00); that at the same time the Trust Company took and converted to its own use, sixteen (16) of the second mortgage bonds of the Connecting Co. which were at the time owned by the Belt Company, of the value of seven thousand, two hundred dollars ($7,200.00); that at the same time the Trust Company took and converted to its own use six thousand two hundred and fifty (6,250) shares of the capital stock of the Connecting Company, which were the property of the Belt Company, of the value of thirty-seven thousand five hundred dollars ($37,500.00). On or about July 20, 1899, the Trust Company took from the Belt Company four hundred and fourteen (414) first mortgage bonds of the Connecting Company and three thousand nine hundred and twenty (3,920) shares of the stock of the Connecting Company, which were at the time the property of the Belt Company, and claimed to hold the same as collateral security for an alleged indebtedness from the Belt Company to it. All of said bonds and stocks came under the after acquired property clause of the mortgage or deed of trust executed by the Belt Company and were charged with an equitable lien to secure the bonds of the Belt Company, as the Trust Company at all times well knew. By the foreclosure proceedings and sale to your intervenor as above referred to the equitable title to said stocks and bonds or to the proceeds thereof, when they had been sold by the Trust Company, vested in your interv-nor which is now in equity the owner thereof. On or about September 30, 1899, the Trust Company claims to have sold said 3,920 shares of Northern Connecting stock and to have received therefor the sum of Nineteen Thousand, Eight Hundred Eighty-five and 71-100 dollars ($19,885.71); the Trust Company denies the right of your intervenor to said bonds and stocks, or the value or proceeds thereof, but claims that it has since the acquisition thereof sold all of said first mortgage bonds, including those above referred to as collateral and to have received therefrom the proceeds thereof in the sum of Nine Hundred Ninety-five Thousand Four Hundred and Fifteen Dollars, ($995,415.00) and your Intervenor is entitled in equity and good conscience to have the proceeds of all of said stocks and bonds above mentioned, accounted for and paid to it.

10. Your intervenor further shows that in the month of —, 1896, the Trust Company caused the Belt Company to enter
330 into a terminal contract with the Gulf Company, by the terms of which the Belt Company gave to the Gulf Company an entrance into Kansas City and certain valuable terminal rights and facilities; and the Gulf Company on its part undertook and agreed to pay to the Belt Company certain sums of money as rental for the rights and privileges granted to it in said contract; both parties entered upon the performance of said contract and continued so to do until April 1, 1899, when receivers for the Gulf Company were appointed by the Circuit Court of Jackson County, Missouri. At the time of the appointment of said

receivers there was due to the Belt Company from the Gulf Company under and by virtue of the terms of said terminal contract, a large sum claimed by the Trust Company to be in excess of One Hundred Thirty-three Thousand Dollars ($133,000.00). That said terminal contract, by virtue of the provisions of the after acquired property clause in the mortgage of the Belt Company heretofore set forth became charged in equity with a mortgage lien to secure the bonds issued by said company, and the rents, issues and profits at that time due the Belt Company under said contract also became charged in equity with the mortgage lien of the Belt Company to secure said bonds; that by virtue of the said foreclosure proceedings and sale thereunder to your intervenor the latter acquired all equitable right and title to said contract and to the rentals due thereon as the Trust Company at all times well knew. The Belt Company, on or about February 1, 1900, undertook to transfer and assign said account to the Trust Company as collateral security to secure an alleged indebtedness from the Belt Company to it and the Trust Company claims to be the assignee of said account, and refuses to cancel or re-assign said account to your intervenor as in equity and good conscience it should be required to do.

11. Your intervenor further states that, in connection with the contract between the Belt Company and the connecting company aforesaid, and as a part of the obligation of the Belt Company under said contract to procure the right of way for the railroad of the connecting company, the Belt Company purchased and acquired certain lands along the line of said railroad in addition to the right of way and took the title thereto in a corporation organized under the laws of the State of Missouri called the Northern Townsite Company (hereinafter referred to as the Townsite Company) which corporation was organized by the Trust Company and officered by the Trust Company. In purchasing land for said right of way it became frequently necessary, in the economical handling of the matter, to purchase larger tracts out of which the right of way would be carved, and also to purchase lands
331 for townsites, and the title to the lands of this character that were purchased was taken in the name of the Townsite Company. All of the money used in purchasing said lands, amounting to the sum of Forty-six Thousand Four Hundred Sixty Three and 75-100 Dollars ($46,463.75) was furnished and provided by the Belt Company, except the sum of $46720.07, which was furnished and provided by the Trust Company. That the capital stock of the Townsite Company, to the extent of 439 shares, was by it issued to the Belt Company to represent the moneys contributed by it in the purchase of said lands; that the purchase of said lands was incidental to the construction of the railroad of the connecting line; and the title to said lands (except such as may be held to have been purchased with moneys furnished by the Trust Company) in equity belonged to the Belt Company and were covered by the after acquired property clause in the mortgage of the Belt Company as aforesaid; that by virtue of

the said foreclosure proceedings and the sale thereunder to your intervenor, the latter became vested with the title to said lands so owned in equity by the Belt Company and became entitled to the capital stock so issued by the Townsite Company to the Belt Company; that the Trust Company denies the right of your intervenor to said lands, or any part thereof, and to said capital stock, and claims to hold the said capital stock as collateral security to an alleged indebtedness from the Belt Company to it. By virtue of the premises your intervenor is entitled in equity and good conscience to a decree requiring the Trust Company to turn over to your intervenor all of the said capital stock representing moneys advanced by the Belt Company and to the cancellation of any and all of the capital stock of said Townsite Company issued without consideration, or to a conveyance to the Belt Company of all the properties and assets of the Townsite Company upon repayment to the Trust Company by your intervenor of the said sum of Six Thousand Seven Hundred and Twenty-Eight Dollars and Seven Cents ($6.728.07), so advanced by the Trust Company to the Townsite Company.

12. Your intervenor further shows that, as above stated, the Trust Company at all times fully controlled and dominated all the corporate acts and doings of the Belt Company; that the Trust Company at all times caused its own officers and directors to be the officers and directors of the Belt Company, and was in a position to require, and did require, the said officers and directors of the Belt Company to do and perform the will and behest of the Trust Company in each and every act and deed. The Trust Com-
332 pany, while possessed with this power of domination and control, did not exercise the same for the interest or benefit of the Belt Company or its stockholders or bondholders whose bonds were secured by mortgage on the property of the Belt Company; nor did the Trust Company in any degree or in any way carry out the duties imposed upon it as trustee in said mortgage, but on the contrary the Trust Company at all times controlled the acts and doings of the Belt Company in the interest and for the benefit of the Trust Company and exercised its powers and duties as trustee in said mortgage in its own interest and in violation of its trust.

On April 1, 1899, the Gulf Company, being then insolvent, defaulted in the payment of a semi-annual installment of interest then due and on the same day all its railroads and properties were placed in the hands of receivers appointed by the Circuit Court of Jackson County, Missouri; and on April 28, 1899, upon bill filed by the State Trust Company all the railroads and property of the Gulf Company were placed in the hands of receivers appointed by the United States Circuit Court for the Western Division of the Western District of Missouri, the suit and proceedings in the state court being then dismissed. Prior to said default the Trust Company, whose officers and directors were also the officers and directors of the Gulf Company as well as of the Belt Company,

knew that a default would occur and that receivers would be appointed; and the Trust Company also knew that if the Gulf Company became bankrupt or passed out of its possession and control the other auxiliary companies, to-wit, the Belt Company, the Air Line, the Union Terminal and the Consolidated Terminal, would soon likewise pass out of its control and domination; and the Trust Company, in violation of its duty as trustee in said mortgages and with a view of appropriating to itself whatever of value there was remaining in the possession of the said companies, contrived the plan of requiring said companies to turn over to it all of the personal property owned by said companies, of every nature and description, as and for security for alleged indebtedness from the Belt Company to it. In pursuance of this plan the Trust Company, on March 31, 1899, caused the Belt Company to turn over to it Ten Thousand Five Hundred (10,500) shares of the capital stock of the Union Company to secure an alleged indebtedness; and on July 20, 1899, the Trust Company caused the Belt Company to turn over to it, as collateral security to secure said alleged indebtedness, four thousand nine hundred ninety-eight (4,998) additional shares of stock of the Union Terminal Company, four thousand nine hundred and ninety-three (4,993) shares of the stock of the Kansas City & Independence Air Line, eleven hundred
333 twenty (1,120) shares of stock of the Central Improvement Company, four hundred and thirty-nine (439) shares of the stock of the Northern Townsite Company, four hundred and twenty-five (425) shares of the stock of the Missouri Elevator & Terminal Company, twenty-five (25) shares of the stock of the Fairmont Amusement Company, thirteen thousand nine hundred and twenty (13,920) shares of the stock of the Kansas City & Northern Connecting Company, sixty seven and nine-tenths (67.9) second mortgage bonds of the Kansas City & Northern Connecting Railroad Company, and also the right of the Belt Company to receive eighteen hundred and fifteen (1,815) additional shares of the Stock of the Northern Connecting Railroad Company; also two hundred and seven and five tenths (207.5) of the second mortgage bonds of the Kansas City & Northern Connecting Railroad Company. On September 30, 1899, the Trust Company caused the Belt Company to sell to it all of the stock of the Kansas City & Northern Connecting held by the Belt Company at the price of one and three-sevenths Dollars ($1 3-7) per share to apply upon the alleged indebtedness from the Belt Company to the Trust Company. On February 5, 1900, a decree of foreclosure and sale was rendered in the foreclosure proceedings in the United States Circuit Court for the Western Division of the Western District of Missouri in the case of State Trust Company against the Gulf Company; the Trust Company knew some time prior to the rendition of said decree that said decree would be rendered and accordingly on February 1, 1900, the Trust Company caused the Belt Company to pretend to hold a meeting of its directors and to specifically turn over all of the afore-mentioned stocks and bonds

to the Trust Company to secure said alleged indebtedness, and also to assign and transfer to the Trust Company by bill of sale as collateral security six hundred (600) tons, more or less, of sixty pound (60-lb.) steel rails owned by the Belt Company and stored in its yards at East Kansas City; and to assign and transfer to the Trust Company an account owned by the Belt Company against the Gulf Company in the sum of One Hundred Thirty-Three Thousand and fifty-eight and 4-100 Dollars ($133,058.04) as collateral security for the said alleged indebtedness. This transaction completely stripped the Belt Company and the other companies of all portable personal property and there was nothing left which could be appropriated by the Trust Company under the guise of taking additional security.

Your intervenor further states that the said acts of the Trust Company in causing the Belt Company to turn over said stocks, bonds, property and account to the Trust Company were unlawful and void and were solely due to the unlawful domination and
334 control exercised by the Trust Company over the officers and directors of the Belt Company as aforesaid; that the matters and things so done and transacted were not known to or approved by any independent board of directors or to the persons in interest owning the stocks and bonds of the Belt Company.

Your intervenor further states that the Trust Company by reason of its control of the Belt Company had intimate and exact knowledge of all the affairs and accounts, assets and liabilities of the Belt Company; although it was trustee in the mortgage of the Belt Company, and thus bound to a high degree of fidelity to the interests of the Belt Company and its bondholders, yet it used its knowledge of the affairs of the Belt Company to its own advantage in endeavoring and undertaking to protect what it claimed its own indebtedness rather than the other indebtedness of the Belt Company, both floating indebtedness and also that secured by the mortgage aforesaid, all of which was contrary to equity and good conscience and in violation of its duties as trustee; the Trust Company by virtue of its position as trustee in said mortgage and its relation to the bondholders and to the mortgagor is estopped to assert that it took said security to secure its own alleged indebtedness, but is deemed and held in equity to have received said collateral security above specifically described as trustee under the said mortgage of the Belt Company Line for the benefit of the outstanding bonds secured thereby. The equities, if any there be, in favor of the Trust Company are inferior and subordinate to the superior equity of your intervenor to the collateral security above described by virtue of the mortgage of the Belt Company and the purchase at foreclosure sale thereunder by your intervenor.

13. Your intervenor further shows that the Union Terminal Railroad Company duly executed its mortgage or deed of trust dated February 1, 1893, to the defendant Guardian Trust Company and to the Provident Life & Trust Company of Philadelphia as trustees, to secure the bonds of the Union Company, in the sum of two million dollars ($2,000,000.00); at the time of the execution of said

mortgage or deed of trust the Union Company had not constructed its railroad and was only the owner of a franchise for the construction and operation of a railroad along the left bank of the Kaw River from a point at or near Argentine, Kansas, to a point in Kansas City on the state line between the states of Kansas and Missouri; and the purpose of the issue of the bonds mentioned in the said mortgage or deed of trust was to provide funds with which to construct the railroad of said company as was expressly provided in said mortgage or deed of trust, and at all times known to the Trust
335 Company. After the execution of said mortgage or deed of trust the bonds of the Union Company in the sum of two million dollars ($2,000,000.00) were duly issued and placed in the custody of the Trust Company and it then became the duty of the Trust Company under the express terms of said mortgage, as well as by law, to see that as the bonds of the Union Company were sold the proceeds thereof used in the construction, completion and equipment of the railroad of the Union Company, so that as bonds should be sold the amount of value of the proceeds thereof should be added to the property of the Union Company in approximately an equal amount so that as the bonded indebtedness of the company should increase, the property of the company covered by said mortgage as security for said indebtedness should also increase at the same rate, and in that manner the outstanding bonded indebtedness of the company should be at all times amply secured but the trust company, unmindful of its duties as aforesaid, did from time to time sell the said bonds of the Union Company to innocent purchasers for value and did not unlawfully and improperly divert the proceeds of said sales from the purposes for which they were intended as aforesaid, and did unlawfully and improperly use the said proceeds to diminish from time to time the alleged indebtedness from the Belt Company to it, which in no wise increased or augmented the value of the property of the Union Company covered by said mortgage. Of the said issue of two million dollars ($2,000,000.00) par value of bonds of the Union Company the Trust Company thus diverted thirteen hundred and fifty (1350) bonds of the par value of one million three hundred and fifty thousand dollars ($1,350,000 00) and of the actual value of ($1,215,000.00) from the uses and purposes for which the bonds were issued, as the Trust Company at all times well knew and wrongfully and unlawfully neglected and refused to use the proceeds thereof in adding to the value of the physical property of the railroad company; and the Trust Company did wrongfully, in breach of its duty as trustee, from time to time sell and put afloat the said bonds of the Union Company in said amount after the completion and equipment of the Union Company and when there was no occasion or necessity for a sale or disposition of said bonds for the construction, completion or equipment of the said railroad; that the conduct of the Trust Company in this behalf was fraudulent as against the said bondholders of the Union Company, the proceeds of whose bonds were not used by the Trust Company to increase or augment the property covered

by the said mortgage, and constituted a breach of trust on the part of the Trust Company.

Your intervenor is the owner of all the said outstanding
336 bonds of the Union Company by purchase from bona fide holders for value thereof; that the property and franchise of the Union Company were sold at foreclosure sale, as hereinbefore stated, at the price of $1,500,000, which was in excess of the full value thereof; after crediting the proceeds of said sale upon the said bonds so held by your intervenor there remained and still remains due to your intervenor the sum of seven hundred seventy-three thousand two hundred forty-six dollars ($773,246.00) and interest thereon from January 1, 1902, at 5 per cent; that if the Trust Company had not wrongfully diverted the proceeds of said bonds from the use and purposes for which they were intended as above set forth the said mortgaged property would have been worth and would have sold for sufficient to have paid said bonds in full. Your intervenor was not advised of the foregoing acts of the Trust Company in diverting the proceeds of said bonds, until the facts in relation thereto were developed recently in the taking of testimony in support of the ancillary bill in this cause.

Wherefore your intervenor prays judgment against the Trust Company for the amount of said deficiency and interest.

14. Your intervenor further states that, on September 6, 1900, the Cambria Steel Company, a corporation organized and existing under the laws of the State of Pennsylvania, exhibited its creditor's bill in this case based upon a judgment and unsatisfied execution against the Belt Company. It is claimed by the said Cambria Company that the collateral security now held by the Trust Company being a part of the collateral security above described, is not covered by the mortgage executed by the Belt Line, but that said collateral security so held by the Trust Company may be subjected to the payment of the judgment of the Cambria Company; but your intervenor states that the claims of the Cambria Company under the said creditor's bill are subordinate and inferior to the claims of your intervenor as aforesaid. Your intervenor further shows that, on the — day of November, 1901, the Belt Company and its receivers filed their ancillary bill against the Cambria Company and the parties defendant herein, claiming that the alleged indebtedness asserted by the Trust Company against the Belt Company was fictitions and that so such indebtedness in fact existed; and further claiming that said indebtedness as well as the notes heretofore executed by the Belt Company to evidence the same, should be cancelled, and that the said collateral security held by the Trust Company should thereupon be returned to the said Belt Company and its [-ceivers.] Your intervenor shows that the claims of the
337 Belt Company and its receivers, for the reasons hereinbefore set forth, are inferior and subordinate to the claims of your intervenor. An injunction has been issued in this cause by this court restraining the Trust Company from disposing of said collateral until the final order and decree of this court as to all of said collateral security, except as to ninety-nine (99) first mortgage

bonds of the Connecting Company which have heretofore been sold and the proceeds thereof, amounting to forty thousand dollars ($40,000.00) are held in lieu of said bonds to await the final judgment and decree of the court.

Wherefore your intervenor prays:

a. For the judgment, order and decree of this court requiring the Central Improvement Company and its receiver to convey to your intervenor all the real estate of other property standing in its name and to turn over to your intervenor all the moneys held by the Central Improvement Company, or receiver, or owing to it, or them, arising from the sale or the proceeds of said property;

b. That the defendant, Guardian Trust Company, be required to account for and pay to your intervenor the value of the steel rails and fastenings mentioned in paragraph seven (7), together with interest thereon;

c. That the defendant, Guardian Trust Company, be required to account for and pay to the intervenor the value of the five thousand (5,000) shares of Union Terminal stock, together with the value of four thousand nine hundred and ninety-four (4,994) shares of the capital stock of the Air Line and also the value of the fourteen thousand nine hundred and ninety-seven (14,997) shares of the capital stock of the Terminal Company, together with interest thereon.

d. That the defendant, Guardian Trust Company, be required to account for and pay to your intervenor the value of the bonds and stock of the Kansas City and Northern Connecting Railroad Company mentioned in the preceding paragraph nine.

e. That the defendant, Guardian Trust Company, be required to assign to your intervenor the account of the Belt Company against the Gulf Company mentioned in the foregoing paragraph ten.

f. That the defendant, Guardian Trust Company, be required to release to your intervenor all of the capital stock of the Northern Townsite Company and that said Northern Townsite Company and its receivers be required to convey to your intervenor all of the property held by said Northern Townsite Company and its re-
338 ceivers, together with all the moneys in their possession or owing to them as the proceeds of the property formerly held by said Townsite Company upon repayment to the Trust Company for such sum as the court may find was contributed by said Trust Company for the purchase of property taken in the name of the Townsite Company.

g. That the defendant Guardian Trust Company be required to account for and pay to the intervenor the amount of the proceeds of the bonds of the Union Company diverted by it from the purposes for which said bonds were issued, as set forth in paragraph thirteen.

h. And for such other relief as may be equitable and just.

SAMUEL W. MOORE,
THOMAS R. MARKS,
Solicitors for Intervenor.

STATE OF MISSOURI,
County of Jackson, ss:

H. B. Johnson, of lawful age, being duly sworn upon his oath says, that he is the auditor of The Kansas City Southern Railway Company, and makes this affidavit for and on its behalf; that he has read the foregoing intervening petition and knows the contents thereof; and that the matters and facts therein stated are true as he verily believes.

H. B. JOHNSON.

Subscribed and sworn to before me this 28 day of April, 1905.
[SEAL.] CLARENCE R. HALL,
Notary Public in and for Jackson County, Missouri.

My commission expires Oct. 10, 1908.

Afterwards, to-wit, on the 15th day of May, 1905, the following order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Bill.

STUART R. KNOTT, et al., Receivers for the Kansas City Suburban Belt Railroad Company et al., Complainants,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Ancillary Bill.

339 KANSAS CITY SOUTHERN RAILWAY COMPANY, Intervenor,
vs.
GUARDIAN TRUST COMPANY, Respondent.

Intervening Petition.

Now on this day it is ordered that the time within which the Guardian Trust Company shall answer the amended intervening petition of the Kansas City Southern Railway Company is hereby enlarged to May 20th, 1905.

(Signed) SMITH McPHERSON, *Judge.*

Approved:
S. W. MOORE,
T. R. MARKS,
Solicitors for the Kansas City Southern Railway Company, Intervenor.

Afterwards, to-wit, on the 20th day of May, 1905, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants; Kansas City Southern Railway Company, Intervenor.

Now comes Guardian Trust Company and files its answer to the amended intervening petition of The Kansas City Southern Railway Company and pursuant to stipulation on file, leave is given to file the same and it is ordered that same stand referred to Shannon C. Douglas, Esq., Special Master herein.

(Signed) SMITH McPHERSON, *Judge*

Afterwards, to-wit, on the 20th day of May, 1905, the Answer of Guardian Trust Company to the Amended Intervening Petition of the Kansas City Southern Railway Company was filed. Said Answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants; The Kansas City Southern Railway Company, Intervenor.

340 *The Answer of Guardian Trust Company to the Amended Intervening Petition of the Kansas City Southern Railway Company.*

The Guardian Trust Company, one of the defendants in the above entitled cause, and one of the respondents to the amended interven-

ing petition of the Kansas City Southern Railway Company, for its separate answer to said amended intervening petition, answering, says:

1. This respondent admits that the said intervenor is a corporation, duly organized and existing under the laws of the State of Missouri, as a railway corporation, and that it was incorporated, according to law in March, 1900.

2. This respondent admits that on or about May 1, 1890, The Kansas City Suburban Belt Railroad Company, hereinafter called the Suburban Company, a railroad corporation duly organized under the laws of the State of Missouri, executed and delivered its deed of trust to this respondent, as trustee, for the purpose of securing an issue of the first mortgage bonds of said railroad company in the principal sum of one million ($1,000,000.00) dollars; and this respondent admits that the provisions of said trust deed are substantially as set forth in said intervening petition, except that this respondent denies that it is recited in said mortgage that the same shall be a paramount lien upon all the property of the railroad company of every name, nature and description then held or that might thereafter be acquired. That default was made in the payments required by the terms of said mortgage or trust deed and that on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage or trust deed, as is alleged in said amended intervening petition, and that this respondent was a party to said proceedings.

This respondent admits that on or about February 1, 1892, the Consolidated Terminal Railroad Company, a Missouri corporation, did make, execute and deliver its deed of trust to this respondent and to the Provident Life and Trust Company, of Philadelphia, as trustees, to secure an issue of the first mortgage bonds of said railroad company in the principal sum of seven hundred fifty thousand ($750,000.00) dollars; and this respondent admits that the provisions of said trust deed are substantially as set forth in said amended intervening petition, except that this respondent denies that it is recited in said mortgage that the same shall be a paramount lien upon all the property and rights of property of the railroad company of every name, nature and description then held or that might hereafter be acquired.

341 This respondent admits that default was made in the terms of said mortgage or trust deed, and that on September 6, 1900, proceedings were intsituted for the foreclosure of said mortgage or trust deed as is alleged in said amended intervening petition, and that this respondent was a party to said proceedings.

This respondent admits that on or about July 25, 1892, said Consolidated Terminal Railway Company and said The Kansas City Suburban Belt Railroad Company entered into articles of consolidation in accordance with the provisions of the statutes of the State of Missouri in such case made and provided, and that said two companies thereby became consolidated and formed a new and separate corporation under the name, Kansas City Suburban Belt Railroad Company, hereinafter referred to as the Belt Company.

This respondent admits that the Kansas City and Independence Air Line, being a railroad corporation duly organized under the laws of the State of Missouri, did, on or about March 1, 1892, execute its deed of trust to this respondent as trustee to secure an issue of the first mortgage bonds of said last named railroad company in the principal sum of three hundred thousand ($300,000.00) dollars, and that the provisions of said trust deed are substantially as set forth in said intervening petition, except that this respondent denies that it is recited in said mortgage that the same shall be a paramount lien upon all the property and rights of property of the railroad company of every name, nature and description then held or that might thereafter be acquired. That default was made in the payments required by said last named mortgage, and that on September 6, 1900, proceedings were instituted for the foreclosure of said last named mortgage in the Circuit Court of the United States for the Western Division of the Western District of Missouri, and that this respondent was a party to said proceedings.

This respondent admits that the foreclosure suits, above mentioned, were consolidated, and that upon the sixth of November, 1901, a final decree of foreclosure and sale was entered in said consolidated suit and the property therein involved decreed to be sold; that pursuant to said decree a sale was made and that the Kansas City Southern Railway Company was the purchaser at said sale, but this respondent says that said mortgage was foreclosed and said suits were commenced and prosecuted and said sale made pursuant to and in accordance with the plan and scheme hereinafter described and under the circumstances hereinafter stated.

342 3. This respondent admits that the Union Terminal Railroad Company, being a railroad corporation organized under the laws of the State of Kansas, did on or about February 1, 1893, execute and deliver its deed of trust to this respondent and to the Provident Life and Trust Company, of Philadelphia, as trustees, and that the provisions of said mortgage or deed of trust are substantially as set forth in said intervening petition, except that this respondent denies that it is recited in said mortgage that the same shall be a paramount lien upon all the property and rights of property of the railroad company of every name, nature and description then held or that might thereafter be acquired. That default was made in the payment required by the terms of said mortgage and trust deed and that on September 6, 1900, proceedings were instituted for the foreclosure of said last named mortgage in the Circuit Court of the United States for the District of Kansas in the First Division; that such proceedings were had in said suit that upon the sixth day of November, 1901, a decree of foreclosure and sale was entered therein and the property and franchise embraced in said mortgage were decreed to be sold; that a sale was had pursuant to said decree, at which sale the Kansas City Southern Railway Company became the purchaser, but this respondent says that said mortgage was foreclosed and said suit was commenced and prosecuted and said sale made pursuant to and in accordance with the plan and

scheme hereinafter described and under the circumstances hereinafter stated.

4. This respondent admits that the Kansas City, Pittsburg and Gulf Railroad Company, being a railroad corporation organized and existing under the laws of the State of Missouri, did, on or about April 1, 1893, execute and deliver its deed of trust to this respondent and the State Trust Company of the City of New York, as trustees, to secure an issue of the first mortgage bonds of said last named railroad company, in the principal sum of twenty-three million ($23,000,000.00) dollars; that the provisions in said last named trust deed are substantially as set forth in said intervening petition; that default was made in the payments required by the terms of said last named mortgage or trust deed, and that on April 28, 1899, proceedings were instituted in the Circuit Court of the United States for the Western Division of the Western District of Missouri, for the foreclosure of said last named mortgage, and that such proceedings were had in that suit that on the fifth day of February, 1900, a decree of foreclosure and sale was entered therein, decreeing that the railroad's properties and franchises embraced in said mortgage should be sold; that pursuant to said decree said railroad's
343 properties and franchises were thereafter, on March 19, 1900, sold to said intervenor, but this respondent says that said property was foreclosed and said suit was commenced and prosecuted and said sale made pursuant to and in accordance with the plan and scheme hereinafter described and under the circumstances hereinafter stated.

This respondent admits that the several mortgages hereinabove referred to were all duly and properly acknowledged and recorded in the various counties in which the properties mentioned therein were respectively located at or about the dates of said mortgages respectively.

5. This respondent denies that about the year 1887, or at any other time it conceived and entered upon the plan and purpose to cause to be constructed railroads in and about Kansas City; it denies that it was part of said plan and purpose to cause said railroads to be built, constructed or operated by corporations to be organized by respondent and to elect certain officers, agents and representatives of respondent as the officers and directors of said railroad companies so as to dominate and control the action of said railroad companies. It denies that it was a part of its plans and purpose to utilize one or more of said railroad companies to act on behalf of respondent in building and operating railroads and in the issue of bonds and stocks, or either of them so as to gather unto the Trust Company the profits and other advantages accruing therefrom and to foist upon the railroad companies the losses or liabilities resulting therefrom. It denies that either in building said roads, or in the sale of stocks and bonds of said railroad companies it employed said railroad companies, or any of them, as its agents to further its own plans and purpose, and therefore denies that it was a principal, bound and charged with the duty to indemnify and protect said railroad companies against losses and liability arising in

the premises; but admits that it was in some cases sole trustee in the mortgages above mentioned; but denies that in any case it was active trustee therein. It denies that it, in pursuance of said plans and purposes, or for any other reason, or in any other circumstances acquired the control of the Kansas City Suburban Railroad Company (hereinafter called the Suburban Company) in the year 1889, or at any other time. Denies that it caused said Suburban Company to issue bonds, secured by mortgage. Denies that it caused said Suburban Company to issue capital stock in a large amount, or in any amount, and denies that it caused said company to construct and operate a railroad. It denies that in 1891, or at any other time it caused to be incorporated the Consolidated Terminal Railroad Company (hereinafter called the Consolidated Company); denies
344 that it caused said Consolidated Company to issue bonds and a mortgage or deed of trust to secure the same. Denies that it caused said company to issue capital stock and to construct a railroad or either of them.

It denies that in December, 1891, or at any other time, it caused to be incorporated the Union Terminal Railroad Company (hereinafter called the Terminal Company), or that it caused said company to issue and execute bonds and mortgage securing the same and capital stock, or any of them, as is alleged in said intervening petition.

It denies that it caused said company to construct a railroad.

It denies that it caused to be incorporated the Kansas City and Independence Air Line (hereinafter referred to as the Air Line). It denies that it caused the Air Line to execute and issue bonds and mortgage and to issue stock and construct a railroad, as alleged in said petition, or either of them. On the contrary, this respondent says that each and all of the said corporations were organized in the manner and under the circumstances set forth in the answer of this respondent, filed in this cause, to the bill called "Amended and Supplemental Ancillary Bill of Complaint," filed by Stuart R. Knott and Edward F. Swinney, as receivers of the Kansas City Suburban Belt Railroad Company, which said answer is hereby referred to and made a part of the answer to said amended intervening petition.

This respondent denies that it at any time caused the said Consolidated Company to consolidate with the Suburban Company, forming a new company called "Kansas City Suburban Belt Railroad Company" (hereinafter referred to as the Belt Company) but this respondent says that said companies did, of their own accord and volition effect said consolidation on or about July 25, 1892, and that the Consolidated Company so formed was called "Kansas City Suburban Belt Railroad Company."

Respondent denies that it caused the Terminal Company to execute a lease of all its property, rights and franchises, or any part thereof, to the Belt Company, and that thereunder the Belt Company operated the line of the Terminal Company and its own line. On the contrary, this respondent alleges that said lease was made without the interference of this respondent and wholly at the volition of the parties to said lease.

This respondent denies that by virtue of its ownership and control of the capital stock of the Belt Company, Air Line and Terminal Company, it did at all times, or at any time cause its officers
345 and directors to be elected as the officers and directors of said lines, or any of them. It denies that it dominated and controlled the affairs and business of said lines, or caused them or either of them to perform such corporate acts and things as this respondent deemed beneficial for its own interest. On the contrary this respondent says that the directors and officers of said companies were elected by the stockholders of said respective companies in the free exercise of their own judgment, in the same manner as the directors and officers of any other company are elected; that in some instances a part of the officers and directors of said several corporations were also at the time officers and directors of this respondent, but that in such instances such officers and directors had no personal interest in procuring for this respondent any undue advantage over the other companies, and did not procure any such advantage.

This respondent denies that in the year 1893, or at any other time, it caused to be incorporated the Kansas City, Pittsburg and Gulf Railroad Company (hereinafter called the Gulf Company), or caused it to issue and execute bonds, mortgages and stock, or any of them, as it alleged in said amended intervening petition. It denies that it caused the Gulf Company to construct a railroad from Kansas City to the Gulf of Mexico or any [*any*] part thereof. It denies that it caused the Gulf Company to enter into contracts with the Belt Company for the use of the latter's terminals at Kansas City. On the contrary it says that said contract between the Belt Company and said Gulf Company was freely made and entered into by the parties thereto, without any interference on the part of this respondent, and that said contract was made in the manner and under the circumstances stated in said answer to said ancillary bill.

This respondent denies that it caused its officers and directors to be elected officers and directors of the Gulf Company, and by that means, or by any other means dominated and controlled the affairs of the Gulf Company and caused it to perform such corporate acts as this respondent deemed to be for its benefit and advantage. On the contrary it says that said Gulf Company was managed and controlled by directors and officers, freely and voluntarily elected by the stockholders thereof in the usual and ordinary manner.

This respondent denies that it had complete and intimate knowledge of all the affairs and transactions of all the said companies, as is alleged in said amended intervening petition.

6. Respondent denies that in the year 1895, or at any other time it caused to be incorporated the Central Improvement Com-
346 pany. It denies that the directors and officers of said Central Company were at all times made up from the directors and officers of this respondent, or that this respondent in all or any of the transactions of said Central Company dominated and controlled the said Central Company. On the contrary, this respondent says that the directors and officers of said Central Company were freely elected by the stockholders of said company and that while some

of the directors and officers of the Central Company were also officers and directors of this respondent, yet they had no personal interest in procuring any benefit or advantage for this respondent at the expense of the Central Company, and did not procure any such advantage.

This respondent admits that the Central Improvement Company was organized, but it says that it was organized at the instance and by the procurement of the Belt Company and the Gulf Company, for the purpose of securing and acquiring the title to various tracts of land in and about Kansas City, but it is true that the Belt Company furnished some of the money paid for said land bought by the Central Company. It is also true that the Gulf Company advanced some money for the same purpose, but whether or not the list of said properties so purchased by the Central Company is correctly shown on "Exhibit A" attached to said intervening petitions, this respondent is not advised and therefore neither admits nor denies the same. This respondent, however, denies that the titles to said real estate, so purchased, were for mere convenience placed in the name of the Central Company; but says that said Central Company was duly organized for the purpose of acquiring said lands, and that it did acquire title to the same and whatever interest said Belt Company, Air Line or said Gulf Company have, or had, in said lands is represented by the stock in said Central Company which was issued to them when said moneys were advanced.

This respondent denies that said Belt Company or said Gulf Company, or any other company or person advancing money to said Central Company became the equitable owner of the land which was purchased by the money so advanced; but on the contrary says that the interest of the company, or the person so advancing money is represented by the stock issued by the Central Company.

This respondent further shows that the said Belt Company, Air Line Company and Gulf Company, or their assigns, hold substantially all of the stock of said Central Company, and in that sense they are the beneficial owners of the property of said Central Improvement Company, subject, however, to any liens
347 thereon for unpaid portions of the purchase price thereof or for other valid liens; but this respondent has not now, and never has had, any interest in the property of the Central Improvement Company, except that it holds a mortgage on a certain piece of property owned by said Central Improvement Company to secure certain promissory notes, aggregating the principal sum of $5,000.00, which mortgage was a subsisting lien upon the property at the time the Central Company bought it, and which mortgage was subsequently purchased and is now held by this respondent.

This respondent denies that the properties so purchased by the Central Company were necessary for the use of said respective railroad companies in connection with the operation of their respective roads, and it denies that such property came within the "After Acquired" property clause of said mortgages, or either of them. It denies that the equitable liens of said mortgages, or either of them attached to and became a charge upon said properties in favor of

the bond holders. It is not advised as to whether any of said properties have been sold by the receiver of said Central Company.

This respondent denies that by the foreclosure proceedings, above mentioned and decrees of sale thereunder, the intervenor acquired the equitable title to all of said properties, or any part thereof so held by the Central Company, and it denies that said intervenor became and is now entitled to the conveyance of the same and to the proceeds of the sale thereof. On the contrary, this respondent says that no part of said property was covered by said mortgages, or any of them; that said property was not in any way appurtenant or necessary to the operation of said railroads, or any of them and that in and by the said foreclosure proceedings said intervenor obtained no title to said lands or any part of the same, and that said monies were advanced and said lands purchased after the consolidation aforesaid.

7. This respondent denies that on or about February 1, 1900, the Belt Company had purchased and then had in its possession, approximately 600 tons of steel rails and fastenings. On the contrary, this respondent says that there was less than 361 tons of said rails and fastenings.

This respondent denies that by virtue of the "After Acquired" property clause in the mortgage of the Belt Company, said rails and fastenings became charged with a lien to secure the payment of the bonds; and denies that upon the foreclosure of said
348 mortgage and the sale thereunder that the equitable title of said rails passed to and vested in the intervenor, or that it became the equitable owner thereof. On the contrary, respondent says that said intervenor obtained no title whatever, either legal or equitable to said rails by means of said foreclosure proceedings and sale.

This respondent further says that said mortgage did not by its terms cover said rails, and further that said rails were purchased after the consolidation of the said Consolidated Company and the Suburban Company, forming the new company called the Belt Company and long after the execution of said mortgage, and further that said rails were not appurtenant to the operation of said railroad.

This respondent admits that it formerly held said rails as collateral security to the indebtedness hereinafter referred to from the Belt Company to this respondent, but it denies that the value of said rails and fastenings was of the value stated in said petition, and that such rails and fastenings were subsequently sold by this respondent for the sum of approximately eleven thousand ($11,000.00) dollars, and that respondent has credited the net proceeds thereof on its accounts against said Belt Company; that notwithstanding said company had assigned said rails and fastenings to this respondent as collateral security, said company afterwards refused to deliver the same to respondent, and respondent was compelled to bring a suit of replevin therefor in the Circuit Court of Jackson County, Missouri, and said suit was subsequently determined in favor of this respondent; and that such judgment (which was en-

tered on the — day of ——), is res judicata and cannot be here inquired into.

8. This respondent admits that the railroad of the Terminal Company was a connecting railroad with the line of the Belt Company and that the Belt Company was authorized to aid in the construction of the line of the Terminal Company. It admits that the Belt Company acquired 5,000 shares of the capital stock of the Terminal Company; but denies that by virtue of the "After Acquired" property clause in the Belt Company mortgage that the lien of the mortgage in equity or in any other manner attached to the 5,000 shares of the Terminal stock so acquired by the Belt Company, or that said lien inured to the benefit of the bondholders of the Belt Company.

Respondent admits that it acquired possession of said 5,000 shares of Terminal stock as collateral security, but denies that it was collateral security to an alleged indebtedness, but on the con-
349 trary says it was a just and bona fide indebtedness of said Belt Company to this respondent.

Respondent admits that about June 14, 1900, it sold said 5,000 shares of stock for $25,000.00, which sum was the fair and full value thereof at that time. Respondent denies that by virtue of said mortgage of the Belt Company and the foreclosure and sale thereunder, that the intervenor became entitled in equity to said 5,000 shares of stock, or the proceeds thereof, or any part thereof. On the contrary, this respondent says that said mortgage did not by its terms cover said stock; that said stock was not in any manner appurtenant to the operation of said railroad; that said stock was acquired after the consolidation, as aforesaid, and that the said intervenor, by said foreclosure proceedings acquired no title or interest whatever in and to said stock, or the proceeds thereof.

Respondent admits that the Air Line owned and operated a railroad connecting with the railroad of the Belt Line, and that the two formed a continuous line of railroad, and that the Belt Company become and was entitled to aid the Air Line in the construction of its road and to purchase and hold the stock of the Air Line.

Respondent admits that prior to June 11, 1900, the Belt Company acquired and owned 4,994 shares of the capital stock of the Air Line, and also 14997 shares of the Terminal Company's stock, in addition to the 5000 shares above mentioned. It denies that it acquired said stock as collateral security to an alleged indebtedness from the Belt Line, to it, but on the contrary says that the respondent held said stock as collateral security to a bona fide indebtedness owing from the Belt Company to this respondent. This respondent denies that said stocks, or any part thereof, were covered by the "After Acquired" property clause in the mortgage of the Belt Company and denies that upon the foreclosure of said mortgage and sale thereunder that the intervenor acquired the equitable title to said stock or to the value or proceeds thereof. On the contrary this respondent says that no part of said stocks *were* covered by the terms of said mortgage; that said stocks were in no way appurtenant or necessary to the operation of said railroad and the

said stocks were all acquired after the consolidation aforesaid and therefore that said intervenor acquired no right, title or interest to said stocks, or any part thereof by means of said foreclosure proceedings.

This respondent admits that on or about June 11, 1900, it sold said 14,997 shares of Terminal stock and 4994 shares of Air Line stock for the sum of $9,996.65, which sum was the full and
350 fair value of said stocks at the time, but denies that said intervenor is entitled to any accounting for the value or proceeds of such sale.

9. This respondent denies that in the year 1896, or at any other time, it caused to be incorporated the Kansas City Northern Connecting Railroad Company (hereafter called the Connecting Company) for the purpose alleged in the intervening petition, or for any other purpose. It admits that said Connecting Company was organized for the purpose of constructing a railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with the railroads at that point running to Quincy, Illinois, and to Council Bluffs, Iowa.

Respondent denies that it caused said Connecting Company to execute bonds, mortgage and stock, or any of them, as alleged in said intervening petition, and denies that it caused said Connecting Company to enter into a contract, under which the Belt Company undertook to acquire the right-of-way and construct the railroad for said Connecting Company, and under which said Connecting Company agreed to give the Belt Company its bonds and stocks.

This respondent admits that such a contract was made between said companies, but it was made freely and of their own accord and without the interference of this respondent.

This respondent admits that pursuant to such contract the Belt Company began the construction of a railroad for the Connecting Company and the acquisition of its right-of-way and received as a consideration for so doing a large amount of the first mortgage bonds and of the capital stock of the Connecting Company, and that the Belt Company so held said stock and bonds on and prior to July 20, 1899.

This respondent denies that at various dates, or at any date it took and converted to its own use any bonds or stocks belonging to said Belt Company.

Respondent denies that about July 20, 1899, it took from the Belt Company mortgage bonds and stocks in the Connecting Company belonging to the Belt Company as collateral security for an alleged indebtedness from the Belt Company, to respondent, but on the contrary says that it did take said bonds and stock as collateral security to a bona fide indebtedness due to it from the Belt Company.

Respondent denies that said bonds or stocks, or any of them, came under the "After Acquired" property clause of the mortgage made by the Belt Company and denies that they, or any of them were charged with an equitable lien to secure the bonds of the
351 Belt Company. It denies that by means of the foreclosure proceedings and sale to the intervenor that the equitable title

to said stocks and bonds, or the proceeds thereof, vested in equity in the intervenor. On the contrary this respondent says that said mortgage did not by its terms cover said bonds and stocks, or any part thereof; that said bonds and stocks were not necessary or appurtenant to the operation of said railroad; that all of said stocks and bonds were acquired after the consolidation, as aforesaid, and that said intervenor acquired no right, title or interest of any kind whatsoever in and to said stocks and bonds by means of said foreclosure proceedings.

This respondent admits that on or about September 30, 1899, it sold 13,920 (not 3920) shares of Northern Connecting Company's stock, which it at one time had held as collateral, as aforesaid, for the sum of $19,885.70, which sum was the full and fair value of said stock, at the time. That prior to said sale, this respondent had accepted said stock as part payment on its said indebtedness at the same price for which respondent afterwards sold said stock.

10. This respondent denies that in 1896, or at any other time, it caused the Belt Company to enter into a Terminal contract with the Gulf Company, by the terms of which the Belt Company gave to the Gulf Company an entrance into Kansas City and valuable terminal rights and facilities, and whereby the Gulf Company undertook and agreed to pay to the Belt Company certain rentals for such rights as were granted to the Gulf Company in said contract. On the contrary, this respondent says that said contract was entered into by said parties freely and as the act of said companies represented by their independent and adult officers and board of directors.

This respondent admits that said parties operated under said contract until April 1, 1899, when receivers for the Gulf Company were appointed; that at said last named time there was due to the Belt Company from the Gulf Company under said contract about the sum of $133,000.00.

This respondent denies that said terminal contract, by virtue of the provisions of the "After Acquired" property clause in the said mortgage of the Belt Company became charged in equity with a mortgage lien to secure the bonds issued by said Belt Company, and denies that the rents, issues and profits, or any part thereof at that time due the Belt Company under said contract became charged in equity with such lien. It denies that by virtue of said foreclosure proceedings and sale thereunder to the intervenor that the latter acquired all equitable right and title, or any right and title to said contract and rentals due thereon.

352 Respondent admits that the Belt Company, on or about February 1, 1900, did transfer and assign to it the said account against the said Gulf Company as collateral security to a bona fide indebtedness from the Belt Company to this respondent.

This respondent says that said intervenor acquired no right, title or interest whatever to said contract, or the rentals thereunder by virtue of said foreclosure proceedings, because said contract and rentals thereunder are not covered by the terms of said mortgage, and because it is in no way appurtenant to the operation of

said railroad; and because said contract was made and said rentals accrued after the said consolidation as aforesaid.

11. This respondent denies that the Northern Townsite Company (hereinafter referred to as Townsite Company) was either organized or officered by the Trust Company. On the contrary, this respondent says that said Townsite Company was organized by its own stockholders for the purpose of acquiring and dealing in certain lands along the line of the railroad of the Connecting Company.

This respondent admits that all the money used by the Townsite Company in purchasing its lands was furnished by the Belt Company and by this respondent, but it denies that the sum of $46,463.75 was furnished and provided by the Belt Company and this respondent but on the contrary says that a much smaller amount was furnished.

Further answering, it says that the total amount of money furnished by the Belt Company for the purchase of said lands in which the Townsite Company had or claimed to have any interest was $6,286.57, and that the Belt Company received therefor 439 shares of the capital stock of the said Townsite Company, at the par value of $100.00 each, and that the total amount of money furnished by this respondent for the same purpose was $6720.07, and that it received 489 shares of the capital stock of said Townsite Company.

This respondent denies that in equity the said lands represented by the money furnished by the Belt Company belong to the Belt Company and were covered by the "After Acquired" property clause in the said mortgage. It denies that by virtue of said foreclosure proceedings and sale thereunder to the intervenor that the intervenor became vested with the title to said lands, or any part threof, and denies that said intervenor thereby became entitled to the capital stock so issued by the said Townsite Company, to the Belt Company, or any part thereof.

353 This respondent denies that it holds the capital stock so issued to the Belt Company as collateral security to an alleged indebtedness from the Belt Company to it, but on the contrary says that it holds said stock as collateral security to a bona fide indebtedness from the Belt Company to this respondent. This respondent says that said intervenor is not entitled, either at law or in equity, to any interest or title in said lands, or said stock, because the same are not covered by the term of said mortgage, because they are not appurtenant to the operation of said railroad and because they were acquired after the consolidation, as aforesaid.

12. This respondent denies that it at any time dominated and controlled the acts of the Belt Company, or that it caused its officers and directors to be the officers and directors of the Belt Company. Denies that it required the officers and directors of the Belt Company to perform the will and behest of this respondent in any respect, but on the contrary alleges that the officers and directors of said Belt Company at all times exercised their independent judgment and acted in good faith for the best interests of the said Belt Company.

This respondent further says that in all respects and at all times it

fully and in good faith performed the duty imposed upon it as trustee in said mortgage, and that at no time did it control the acts and doings of the Belt Company in its own interest.

This respondent admits that about April 1, 1899, the Gulf Company was insolvent; that it defaulted in payment of interest and that it was placed in the hands of receivers, as alleged in said petition, but it denies that it knew that a default would occur prior to the time default was made, and denies that it knew that if the Gulf Company became bankrupt that the so-called auxiliary companies would pass out of its control and denies that said so-called auxiliary companies were ever in its control. It denies that in violation of its duty as trustee of said mortgages and with a view to appropriate to itself whatever value there was remaining in possession of said auxiliary companies it contrived the plan to require said companies to turn over to it all or any part of the personal property of said companies as and for security for an alleged indebtedness from the Belt Company to it, but on the contrary it alleges that at all times it acted in good faith and that in procuring the collateral security, as hereinafter stated, it acted in good faith towards the Belt Company and its creditors.

This respondent denies that on March 31, 1899, and July 20, 1899, or at any other time, it caused the Belt Company to
354 turn over to it collateral, as alleged in said intervening petition, but respondent says that said Belt Company did turn over to this respondent as collateral security to a bona fide debt then owing to this respondent from said Belt Company, collateral security as is shown in the said answer to said amended ancillary bill.

This respondent denies that on September 30, 1899, or at any time it caused the Belt Company to sell to it all or any part of the stock of the Kansas City and Northern Connecting Company held by the Belt Company, at the price of one and three-sevenths dollars per share or at any other price to apply upon an alleged indebtedness from the Belt Company to this respondent, but on the contrary this respondent says that said sale of said stock was a fair and open sale at a full fair value of said stock, and that the indebtedness upon which the same was applied was a bona fide indebtedness from the Belt Company to this respondent.

Respondent admits that a foreclosure decree was entered on February 5, 1900, in the case of State Trust Company against the Gulf Company.

Respondent denies that it knew prior to the rendition of said decree that the same would be rendered.

It denies that on February 1, 1900, or at any time it caused the Belt Company to pretend to hold a meeting of its directors and to specifically turn over all of the stocks and bonds, as alleged in said amended intervening petition, or any part thereof, to secure an alleged indebtedness, and to assign and transfer to respondent the said steel rails, and to assign and transfer to respondent the account owned by the Belt Company, against the Gulf Company as aforesaid, as collateral security for an alleged indebtedness. On the contrary, this respondent says that the meeting of said board of directors of

said Belt Company was held at their own volition, and without an interference or direction from this respondent, and that the action of the said board of directors in turning over said collateral security was the free act of the directors of said Belt Company.

Respondent denies that the action of the Belt Company in turning over said stocks, bonds and property to it as collateral was void and denies that such action was due to the pretended unlawful combination and control exercised by respondent over the officers and directors of the Belt Company, but on the contrary says that said action was the voluntary act of said officers and directors in the exercise of their independent judgment.

355 This respondent denies that by reason of its control of the Belt Company it had knowledge of the affairs and situation of the Belt Company, but it admits that it did, by reason of its connection with said Belt Company, have considerable knowledge of the affairs and situation of the Belt Company, and denies that it used its knowledge of the affairs of the Belt Company to its own advantage rather than for the purpose of the other indebtedness of said Belt Company, but on the contrary it says that it acted in good faith in protecting its own interests and in doing so did not violate any duty which it owed as trustee or to the bondholders, or any other creditors of said Belt Company.

This respondent denies that on account of its position as trustee in said mortgage that it is estopped to assert that it took said security to secure its own indebtedness, and denies that it is deemed in equity to have received said collateral as trustee under said mortgage of the Belt Company. On the contrary it says that said mortgage for the reasons hereinbefore stated, did not cover said securities and property or any part thereof.

Further this respondent says that most of said transactions were had and done more than ten years prior to the filing of said intervening petition, and that each and all of said transactions were had and done more than five years prior to the filing of said petition, and the intervenor ought not to be permitted after so long a time to come into a court of equity and question the same; that whatever pretended rights, equities and causes of action accrued to the intervenor, by reason of said transactions, accrued to it more than five years before the institution of this suit, and respondent hereby pleads, to each and all of said transactions, the statutes of limitation of the State of Missouri, to-wit, sections 4271, 4272 and 4273, of the Revised Statutes of the State of Missouri for the year 1899, which said statutes are now and have been during all the times herein mentioned in full force and effect, and respondent pleads, as to the same, all other statutes of limitation of the State of Missouri. Respondent further say that ever since the organization of the said intervenor and its creation as a corporation it has had full knowledge of all the facts and circumstances in connection with the taking of said collateral security and the sale of stocks and bonds as aforesaid, and the real estate transactions aforesaid, and of all the other matters and things in its said petition complained of, and has made no protest against the same and has taken no steps to enforce any rights

which it has or claims to have in and to said stocks and bonds or the proceeds thereof, or said real estate or any of them; that said
356 intervenor has been guilty of laches in the premises and should not now be permitted to come into a court of equity and assert any claim to said money or property or any part thereof or to question any of said transactions and respondent claims the same benefit from these defenses as if it had formerly pleaded the same in bar of and had demurred to the said intervening petition.

13. This respondent admits that the Union Terminal Railroad Company executed its mortgage dated February 1st, 1893, that respondent was one of the trustees named in said mortgage, and that the same was executed to secure bonds of the Union Company in the sum of Two Million Dollars ($2,000,000.00); that at the time the Union Company had not constructed its railroad, that the purpose of the bond issue was to provide funds to construct said railroad, but as to whether such purpose was expressly provided in said mortgage this defendant neither admits nor denies, but asks that said mortgage, or a certified copy thereof, be produced in evidence.

The respondent denies that bonds in the sum of Two Million Dollars ($2,000,000.00) were issued and placed in the custody of respondent, but on the other hand says that the amount so placed with it was a much less amount, and that the amount of said bonds so delivered to it, the prices at which they were delivered and the circumstances are fully set forth in respondent's said answer to said supplemental and amended ancillary bill.

Respondent denies that either by law or by the express terms of said mortgage it was the duty of respondent to see that as said bonds were sold, proceeds thereof should be used in the construction, completion and equipment of said railroad. On the contrary respondent says that there was no such duty imposed either by the terms of said mortgage or by law.

Respondent denies that it sold any of said bonds and unlawfully diverted the proceeds of said bonds, or any part thereof, from the purposes for which they were intended. It denies that it used said proceeds or any part thereof to diminish the indebtedness due to it from the Belt Company. It denies that it thus diverted 1,350 of said bonds of the par value of $1,350,000.00, or any part thereof, from the uses and purposes for which said bonds were issued. It denies that in breach of duty as trustee or in any manner, or at any time, it sold or put afloat said bonds or any of them after the completion and equipment of the said Union Terminal Company; it denies that any of the transactions conducted by it in
357 respect to said bonds were fraudulent as against bond holders of said Union Company; on the contrary respondent says that said bonds were sold by said Union Company itself for its own purposes, and that in the main the said bonds were acquired by the Belt Company, which had guaranteed the payment of principal and interest of said bonds, and was the owner of all the capital stock of the said Union Company, and operated its line and that afterward the Belt Company, in the usual course of business, sold said bonds for full value to respondent and to others, and respondent avers that

such bonds as were bought by it from either the Belt Company or the said Union Company were bought for full value, and in most cases for far more than their full value.

Respondent neither admits nor denies that the intervenor is the owner of all of said outstanding bonds of said Union Company, and asks that strict proof be made thereof, but states that if it be that the intervenor, is the holder and owner of all of said outstanding bonds of said Union Company, intervenor is not a bona fide holder of the same for value; that said bonds came into the possession of the intervenor in the manner hereinafter stated and not otherwise; respondent admits that the property and franchises of the Union Company were sold at the aforesaid price of $1,500,000.00, but it denies that such price was in excess of the full value thereof; on the contrary respondent says that said price obtained at said foreclosure sale was much less than the real value of said property.

This respondent denies that said intervenor did not learn of the transactions had and done by this respondent in respect to said Union Company bonds until recently, when testimony was taken in support of the ancillary bill in this cause. Further this respondent says that most of said transactions in respect to said Union Company bonds were had and done more than ten years prior to the filing of said intervening petition, and that each and all of said transactions were had and done more than five years prior to the filing of the original bill in this suit and more than five years prior to the filing of said intervening petition, and that if any rights, equities or causes of action accrued to the intervenor as it is pretended, by reason of such transactions, the same accrued to it more than five years before the institution of this suit, and that intervenor ought not now to be permitted after so long a time to question the said transactions, and respondent hereby pleads to each and all of said transactions the statutes of limitations of the States of Missouri, to-wit, Sections 4271, 4272 and 4273, of the Revised Statutes of the year 1899 of said State of Missouri, which statutes are now and were at all
358 times herein mentioned in full force and effect, and pleads as to the same all other statutes of limitations of said state. Respondent further says that ever since the organization of said intervenor it has had full and complete knowledge of all the facts and circumstances in connection with the handling and sale of said Union bonds by this respondent, and has made no protest against the same and has taken no steps to enforce any rights which it had or has or pretends to have in and to said bonds or the proceeds thereof, or by virtue of ownership of said bonds or by reason of any other thing connected with said bonds and the transactions had in respect of the same by this respondent; that said intervenor has been guilty of laches in the premises and should not now be permitted to come into a court of equity and assert any claims against this respondent on account of said transactions or any of them in respect to said Union Company bonds, and respondent craves the same benefit from these defenses as if it had formerly pleaded the same in bar of said intervening petition or had demurred to the same, and respondent states that whatever Union Company bonds were acquired

by the said intervenor were acquired by it through the reorganization committee hereinafter mentioned in consummation of the reorganization plan hereinafter mentioned, which plan is fully set out in a certain pamphlet, put forth and promulgated by the said committee, a true copy of which is attached to and made part of the supplemental answer of this respondent and its receiver to the said bills of complaint in said foreclosure suits exhibited in this court by the said Provident Life and Trust Company, and for brevity respondent prays leave to refer to the same; that the said intervenor acquired said Union bonds through the said committee, in pursuance of the said reorganization plan and agreement, and that siad intervenor was caused to be incorporated by the said committee for the purpose among other things of issuing its stocks and bonds in exchange for stocks and bonds of the said Union Company and other companies, as in said plan and agreement set forth, and that said intervenor is the successor company which the said committee proposed by said plan to organize, as in said plan set forth, and respondent states that the owners and holders of said Union Company bonds from which the said committee acquired the same, were, at all times herein mentioned, thoroughly familiar with all the facts and circumstances surrounding the issuance of said bonds and of all of respondent's transactions in reference thereto, and that the said committee at all time-, after it acquired the said Union Company bonds and up to the time it delivered the same to the said intervenor, was at all times familiar with the said transactions and all the facts and circumstances surrounding the same, and that no steps
359 were ever taken by either the said bondholders or the said committee to enforce any rights which they are in said petition now claimed to have had in respect to the said Union bonds or in respect to respondent's transactions in regard thereto.

14. This respondent admits that on September 6th, 1900, the Cambria Steel Company filed its bill in this case, and that the allegations of said bill are substantially as set forth in said intervening petition. That in November, 1901, the Belt Company, by its receivers, filed their ancillary bill herein, and that the allegations therein are substantially as set forth in said intervening petition.

This respondent admits that an injunction has been issued in this cause, restraining respondent from disposing of said collateral until the final order and decree of this court as to all of said collateral, except 1899 first mortgage bonds of the Connecting Company, as is alleged in said intervening petition.

This respondent further answering, says that the indebtedness from said Belt Company to this respondent is evidenced by certain promissory notes, executed by said Belt Company, and by an open account, as set forth and fully stated in the said answer to said amended ancillary bill.

15. This respondent, the Guardian Trust Company, further shows that on or about the 14th day of June, A. D. 1899, William F. Harrity, B. M. Baker, August Heckscher, Edward Wagner, Samuel R. Shipley, Silas W. Pettit and Winthrop Smith entered into an agreement for the reorganization of the Kansas City, Pittsburg & Gulf

Railroad Company, Kansas City Suburban Railroad Company, and the Port Arthur Channel and Dock Company and their so-called subsidiary or auxiliary companies, including said Kansas City Suburban Belt Railroad Company, Union Terminal Railroad Company, Consolidated Terminal Railroad Company, and Kansas City and Independence Air Line Railroad Company; that said persons calling themselves a reorganization committee formed a so-called "plan or reorganization," which was promulgated under date of November 7, 1899, and invited all holders of bonds and stocks of said several companies above named, to deposit the same with said reorganization committee under said plan of re-organization which proposed to organize a new corporation to be known as the Kansas City Southern Railway Company, which should acquire the properties of all said above named corporations, and issue in payment therefor the bonds and stocks of said re-organized or new corporation in the proportions and on the terms and in the manner set out in the said plan
360 of re-organization, which is hereby referred to and ready to be produced upon the hearing of this cause.

16. That after the promulgation of said plan on November 7, 1899, there was deposited with said re-organization committee the proportion of bonds and stock required by said plan to make the same operative; and on the 20th day of December, 1899, said plan was declared operative; that thereafter said committee caused to be organized and incorporated the Kansas City Southern Railway Company under the statutes of the State of Missouri for the purpose of acquiring title to the properties of said corporations named in the foregoing paragraph, and the stocks and bonds of said new corporation were thereafter exchanged for the stocks and bonds of said several corporations in the proportion and manner set out in said re-organization plan; that by means of said exchange said Kansas City Southern Railway Company came to be the owner of practically all the bonds and stocks of said corporations above mentioned, and particularly of the said Kansas City Suburban Belt Railroad Company, and said corporation caused to be elected directors and officers of said Belt Railroad Company, who conducted the same and managed and operated it in the interests of and as a component part of the railroad system of said Kansas City Southern Railway Company.

17. This respondent further shows that the organization of said Kansas City Southern Railway Company and exchange of its stocks and bonds above alleged for the stocks and bonds of said Belt Railroad Company, and the other steps taken in pursuance of said reorganization plan, effected a consolidation of said Kansas City Southern Railway Company and said Kansas City Suburban Belt Railroad Company under the statutes of the State of Missouri; or a consolidation de facto, and that said Kansas City Southern Company is estopped to deny such consolidation, or to claim that the same was not legally complete; and that said Kansas City Southern Railway Company thereby became and is liable for all the debts incurred by said Belt Railroad Company to the same extent as said last mentioned company, including the debts of this respondent heretofore mentioned and alleged in this answer.

18. Further answering this respondent shows that said re-organization committee, when working out said plan of re-organization expressly represented to this respondent that, in consideration of the debt due and owing from said Belt Company to this respondent, said committee would provide for the payment of all debts and obligations due to this respondent from all of said corporations proposed to be included in said re-organization plan, and particularly
361 said Belt Railroad Company, and expressly promised this respondent that said committee would pay or cause to be paid all debts of every character due to this respondent from said several corporations proposed to be consolidated, and particularly from said Belt Railroad Company; and that the said new and re-organized company would pay such debts; that certain members of said re-organization committee, constituting a so-called purchasing committee, purchased at the foreclosure sale of said Kansas City, Pittsburg and Gulf Railroad Company, all its assets, right-of-way, rolling stock, etc., and thereafter assigned said bid to said Kansas City Southern Railway Company which said company entered into a contract with said re-organization committee, wherein and whereby it assumed and agreed to complete and carry out all the obligations undertaken and assumed by said re-organization committee; that under and by reason of said agreement and contract said Kansas City Southern became liable and agreed to pay all the obligations of said Belt Railroad Company to this respondent, and is still so liable.

19. That said Kansas City Southern was at the time of the foreclosure and sale of the Belt Company's assets the holder and owner of practically all the bonds and stock of said Belt Company; that, in order to obtain and control the stock of said Belt Company, said Kansas City Southern Railway Company exchanged its stock in the proportions and in the manner specified in said plan of re-organization, which is hereby referred to, for the stock of said Belt Company, and thereupon proceeded to secure a foreclosure of said bonds of said Belt Company; that said scheme of re-organization and exchange of stocks aforesaid resulted in the stockholders of the Belt Railroad Company securing a large amount of stock of said Kansas City Southern Railway Company, which was at that time and is yet very valuable, and was at that time and is yet of much greater market value than the total claims of this respondent against said Belt Railroad Company; that said scheme legally implied the payment by said Southern Company of all the claims of this respondent against said Belt Company.

20. This respondent therefore alleges and shows that if said scheme of re-organization and exchange of securities was intended by said re-organization committee and by said Kansas City Southern Railway Company and its officers to deprive this respondent of all security and opportunity of collecting its said claims against the Belt Railroad Company, while preserving and securing to the stockholders of said company said advantage and valuable interests through said scheme of transfer of stocks that said foreclosure of said properties of said Belt Company, would have been a fraudulent scheme, and in that case should be held void and in-
362 valid, so far as this relator is concerned, and the property thereby transferred to said Kansas City Southern Railway

Company should be held subject to the debts and claims of this respondent and subject to their payment, even if it should be held by the court that a legal consolidation or actual or de facto consolidation, was not brought about as hereinabove alleged, whereby said Kansas City Southern Railway Company became legally obligated to pay the claims of this respondent against said Belt Railroad Company.

21. All of which matters and things hereinbefore stated this respondent is ready to aver, maintain and prove as this Honorable Court may direct. Wherefore respondent prays that the so-called intervening petition of the said Kansas City Southern Railway Company may be dismissed as without equity, and for its costs in this behalf most wrongfully expended.

HARRY S. MECARTNEY AND
JULES C. ROSENBERGER,
Solicitors for Guardian Trust Company.

Afterwards, to-wit, on the 1st day of June, 1905, the Answer of the Guardian Trust Company to the Amended and Supplemental Ancillary Bill of Complaint filed.

Said answer was in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Bill.

2468.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainant-,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

363 *Answer of the Guardian Trust Company to the Amended and Supplemental Ancillary Bill of Complaint.*

Now comes the defendant, Guardian Trust Company, and now and at all times hereafter saving and reserving to itself all benefit

and advantage of exceptions which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for its separate answer thereto, or to so much thereof as and such portions thereof, as this defendant is advised it is necessary or essential for it to answer unto, answering and pleading says:

1. That it is true as alleged in the said amended and supplemental ancillary bill that on November 30th, 1900, Francis M. Black was appointed receiver for the Guardian Trust Company in a certain cause wherein W. W. Bierce et al. were complainants and said trust company was defendant, then pending in this court, and that since the filing of said bill the receiver for the Guardian Trust Company has been discharged and the said Trust Company is now in the possession of its corporate property and is managing its own business.

2. This defendant admits that Wash Adams, Esq., was heretofore appointed receiver for the Missouri Elevator and Terminal Company, but states that the property and assets of said Missouri Elevator and Terminal Company have since been taken out of the hands of said Wash Adams, receiver, and said receiver has been discharged, and this defendant admits that at the time of the filing of the original ancillary bill Wash Adams was the duly qualified and acting receiver of the Central Improvement Company and that since said bill was filed the said Adams has resigned and Thomas T. Crittenhen has been appointed as his successor and is now the duly qualified and acting receiver of said Central Improvement Company.

3. This defendant admits that the Cambria Steel Company heretofore filed its original bill of complaint in this court against the Kansas City Suburban Belt Railroad Company and the several other defendants above named in which said original bill said Steel Company set up a judgment which it had on the same day obtained against the said Belt Railroad Company and that in said bill of complaint the said Steel Company seeks to subject certain alleged rights, claims and alleged property and assets, alleged to belong to the said Belt Railroad Company and some of the other defendants to the payment of its said judgment.

364 4. This defendant admits that on the same day that the said bill of complaint was filed by the said Cambria Steel Company four certain bills of complaint were filed in this court by the Provident Life and Trust Company of Philadelphia, two of said bills being filed against the Kansas City Suburban Belt Railroad Company, as the sole defendant, another of said bills being filed against the Union Terminal Railroad Company, a Kansas corporation, and the said Belt Railroad Company as defendants, and the other of said bills being filed against the Kansas City & Independence Air Line, a Missouri corporation, and the said Belt Railroad Company. Each of said bills sought to foreclose a first mortgage upon a certain Railroad described in the said bills of complaint, respectively, and which said several described pieces of railroad property had for a long time been operated by the said Belt Company as a continuous and allied system, and this defendant admits that the said

Belt Railroad Company was the owner practically all of the capital stock of said several railroad companies; admits that upon the same day that said bills of complaint were filed an application was made for the appointment of a receiver for all of the property of said Belt Railroad Company and of the said Air Line Company and of the said Union Terminal Company, and that on the same day, to-wit, on September 6, 1900, by an order entered of record in *in* said causes, Stuart R. Knott and Edward F. Swinney, complainants in said amended ancillary bill were appointed receivers of said Belt Railroad Company and of said Air Line Company and of said Union Terminal Railroad Company and that thereupon the said Knott and Swinney, as such receivers, took possession of all the property and franchises of said Belt Railroad Company and of the said Air Line Company and Union Terminal Company, and that as such receivers they did operate the said railroads until the same were sold under the decrees of this court, rendered in said foreclosure suits, which suits had been consolidated, and that at such sales the Kansas City Southern Railway Company became the purchaser of all of said railroad properties and said railroad properties under the said decrees of foreclosure were conveyed to the said Kansas City Southern Railway Company, which has ever since owned and operated the same.

5. For convenience the Kansas City Suburban Belt Railroad Company as it existed prior to its consolidation hereinafter mentioned, with the Consolidated Terminal Railroad Company is hereinafter referred to as the Suburban Company and after said consolidation as the Belt Company, the Union Terminal Railroad Company, as the Union Company; the Kansas City and Independence Air Line, as the Air Line; the Consolidated Terminal Company, as the Consoli-
365 dated Company; the Missouri Elevator and Terminal Company, as the Elevator Company; the Central Improvement Company, as the Improvement Company; the Fairmount Amusement Company, as the Amusement Company; the Northern Townsite Company, as the Townsite Company; the Kansas City & Northern Connecting Railroad Company, as the Northern Company.

6. Further answering this defendant states that it was incorporated under the laws of the State of Missouri in the year 1889, and not in the year 1883, as alleged in the said amended ancillary bill; that this defendant was originally incorporated under the name of "Missouri, Kansas and Texas Trust Company," but afterwards changed its name in the manner provided by statute to "Guardian Trust Company."

7. This defendant states that it is true that in the month of January, 1887, a corporation was formed under the laws of the state of Missouri, known as the Kansas City Suburban Belt Railroad Company for the purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas. This defendant says that it is untrue, and hence it denies that it caused the said Suburban Company to be incorporated but on the contrary avers that the said Suburban Company was organized and incorporated some two years before this defendant company was created, and

this defendant had nothing to do with the organization of the said Belt Company.

8. It is also untrue that the servants, employes, officers or directors of this defendant in any way became or were the officers or directors of the Suburban Company, nor did they or any of them become such until several years after the latter company's incorporation and it is untrue that this defendant at all times or at any time dominated and controlled the said Belt Company, or the Suburban Company.

9. This defendant denies that it, by reason of its alleged domination, or for any reason whatever, or in any way caused the Suburban Company to issue and deliver to this defendant all of its capital stock, and denies that this defendant caused the said Suburban Company to execute its bonds in the sum of one million dollars, or any other amount, and denies that this defendant caused said bonds to be delivered to it, and denies that this defendant proceeded to sell or otherwise dispose of said bonds and stock, and to apply the proceeds thereof, except as hereinafter stated. And this defendant denies that it has ever refused or failed to fully account to the said Belt Company for any property, choses in action, moneys or other
366 things of the said Suburban Company or Belt Company, which may have come into its hands at any time and by any means, but state that the contrary is true; that this defendant has frequently, from time to time fully accounted to the Belt Company and said Suburban Company for all moneys, property, effects and assets which may, in any way, have come into its hands of this defendant, belonging to the said Belt Company or to said Suburban Company.

10. This defendant further answering the said ancillary bill concerning its connection with the said Suburban Company, states and shows to the court as follows: The said Suburban Company was incorporated in January, 1887; that it soon after said date authorized the issuance of $1,500,000.00 of its capital stock; that said Suburban Company for the first two years of its existence had done considerable preliminary work in the way of procuring franchises to use certain streets in Kansas City, along which to build its railroad from a point near Second and Broadway streets in Kansas City, Missouri, in an easterly direction to a point near Cecil Station on the Missouri, Pacific Railroad in what is known as the East Bottoms, being a distance of about four and one half miles, and had also done considerable work in making surveys and locating its said line, and in the way of constructing a portion of its roadbed, but it had been unable to make any arrangements whereby it could dispose of its securities or otherwise raise money with which to build and complete its road or any considerable portion of it. Being in that condition it did, about April or May, 1889, apply to A. E. Stilwell, who was then one of the vice presidents of this defendant, and who then did not have and never prior thereto had had any connection with or interest whatever in the said Suburban Company, but who had an extended and favorable acquaintance with men of capital, and was recognized as having skill in soliciting and procuring capitalists to subscribe to and invest in such enterprises. And the said Suburban Company at said time requested him, that he, said Stilwell, use his efforts to procure

the money with which to build and complete the said portion of its road from Second and Broadway streets to Cecil Station.

11. That negotiations were then had between the said Stilwell and the said Suburban Company, which resulted in a contract between the said Company and the said Stilwell, whereby the said Company agreed to issue and deliver to the said Stilwell $450,000.00 of its first mortgage bonds, out of a total issue, as then contemplated of $500,000.00 and $900,000.00 of its capital stock if the said Stilwell would build or cause to be built the said portion of the said railroad. That said contract was duly authorized by the Board of Directors
367 of the Suburban Company at a meeting lawfully called, and by its stockholders at a meeting duly called and convened on May 31st, 1889. That at the time of the making of said contract, none of the directors or stockholders of the Suburban Company, except E. L. Martin had any connection with or interest in this defendant company, and none of the directors, officers and stockholders of this defendant company, except E. L. Martin, had any interest in or connection with said Suburban Company. That said contract was made at arms' length between said parties, free from any domination, direction or control whatever on the part of this defendant, and that a large majority of the board of directors of the said Suburban Company continued to be composed of persons wholly disconnected with this defendant, until the said portion of said railroad was completed and paid for in accordance with the terms of said contract. That the said Stilwell thereupon procured subscribers to the stock of and the incorporation of a construction company, known as the Kansas City Terminal Construction Company, under the laws of the State of Missouri, which did the work of carrying out the said contract which the said Suburban Company had made with him, the said Stilwell.

12. That, in order to comply with the said construction contract on its part, and to build additional portions of its road, the said Suburban Company duly authorized the issue of $1,000,000.00 of bonds and authorized the execution of a mortgage upon all of its property then owned or subsequently to be acquired, to secure the payment of said bonds, and that this defendant was one of the trustees named in said mortgage; but defendant denies that said Suburban Company in and by said mortgage conveyed all of the property then held or which should thereafter be acquired by it. That upon the performance of the said contract for the construction of the said portion of said road between Second and Broadway streets and Cecil station, the Suburban Company caused to be issued and certified by this defendant as trustee $500,000.00 of its first mortgage bonds, all of which the said Suburban Company used in paying the said construction company for its work in building the said portion of said road, and in compensating some of its officers and directors for services rendered and money advanced and expended by them theretofore; but this defendant had nothing to do with or any connection with the said $500,000.00 of bonds except to certify them as trustee, at the request of the Suburban Company, and to deliver them on its direction. That at the same

time the said Suburban Company issued and delivered to the said construction company and to its said officers and promoters,
368 for their said labor and services 7,000 shares of its capital stock, which capital stock then had no value, but this defendant had nothing to do, either directly or indirectly with the disposition of said $500,000.00 in bonds, or the said 7,000 shares of stock.

13. That when the said Kansas Terminal Construction Company received said shares of stock, under its said contract, as aforesaid, it then held and owned a majority of the outstanding stock of the Suburban Company, and it, the said construction company, distributed the said stock to its own stockholders by way of dividends or as a distribution of its assets, whereby the stockholders of the said construction company became stockholders, and the holders of a large majority of the outstanding stock of the Suburban Company, and thereafter, as such stockholders, they elected directors of the Suburban Company of their own choice, which choice fell upon persons who were mainly either directors, officers or employes of this defendant, but it is untrue, as alleged in the said amended ancillary bill, that this defendant had anything to do with causing its officers, directors or employes to be elected as the officers or directors of the said Suburban Company, but the stockholders of the said Suburban Company chose their own directors, and this defendant held but little, if any, stock of the Suburban Company, and had but little, if any, voice in the choice of such directors. It was in this way, as above stated, that the persons who were directors and officers of this defendant came to be directors and officers of the Suburban Company and not otherwise.

14. After the Suburban Company had thus disposed of five hundred thousand dollars of its bonds and 7,000 shares of its stock, it had remaining in its treasury undisposed of five hundred thousand dollars in bonds, and 8,000 shares of stock, with which to build an extension of its road from said Cecil Station to Brush Creek, in Jackson County, Missouri. The Suburban Company desired to build and did build this extension itself, without the intervention of a contractor, and the Suburban Company requested the defendant to sell and dispose of the said $500,000.00 of bonds remaining in its treasury and so much of the said stock as might be necessary in order to raise the money for the purpose of building the said extension. That said stock was wholly without any value, and could not be sold for anything, and that on account of the incomplete condition of the property and the uncertainty of its outcome this defendant was unable at that time to sell and dispose of said bonds without great sacrifice, and having faith in the enterprise and in its future value, this defendant bought the said five hundred thousand dollars of bonds from the said Suburban Company at and for an agreed price of ninety-three
369 per cent of their face value, or $930.00 for each $1,000 bond, with the understanding and agreement, however, that this defendant was to have a discount from said price of three per cent on the face of said bonds. The reason of this was that the Suburban Company was perfectly willing to dispose of its bonds at 93 per cent and give to any one who would sell them a commission therefor of 3

per cent, and to give a large amount of stock in addition thereto as a bonus, to any purchaser, because said stock was then without value, and inasmuch as this defendant could not find purchasers for the bonds, it was agreed that this defendant might itself take the bonds at the price named, of 93 per cent with the said discount of 3 per cent.

15. That this defendant thereupon, for the purpose of enabling the Suburban Company to proceed promptly with its work, did take said $500,000.00 in bonds at said price, with 2,200 shares of the capital stock of said Suburban Company as a bonus, and paid the said Suburban Company $465,000.00 therefor.

16. That defendant fully paid and accounted to the said Suburban Company for the total purchase price of said $500,000.00 of bonds and 2,200 shares of stock. That the price paid therefor by this defendant was a full and fair price, and far more than could have been obtained from other sources at that time. This defendant carried these bonds for several years, before it was able to sell them, and then sold them at various times and in various amounts and quantities, at about the same price that it had paid for them. The facts as above stated constitute all of the business transaction- by and between the said Suburban Company and this defendant, in respect of said stock and bonds prior to and up to the time that the said Suburban Company consolidated with the Consolidated Terminal Railway Company of Kansas City, as stated in the said amended ancillary bill.

17. That all of said transactions above referred to occurred more than ten years prior to the filing of the said amended ancillary bill; that all of the facts and transactions above referred to were public, open and were known to, acquiesced in and ratified and approved by all of the officers, directors and stockholders of the said Belt Company, more than ten years ago. Wherefore this defendant pleads the statute of limitations of the State of Missouri, hereinafter set out in bar of this suit, and says that the complainants should not now be allowed to inquire into transactions closed and approved so long ago.

18. That about the time or soon after the consolidation above mentioned, the Suburban Company increased its capital
370 stock to $2,250,000.00; that several years afterward and after the consolidation above mentioned and after a large portion of the railroad of said Suburban Company and Belt Company had been completed and was in operation and had begun to show that it had or soon would have some value as a money earner, this defendant from time to time bought from the Suburban Company and Belt Company certain of its shares of stock for the purpose of supplying the Suburban Company, afterward the Belt Company with needed money, and also from time to time sold for and on account of the said Belt Company and Suburban Company certain other shares of its capital stock; that the prices at which defendant bought said stock of the said companies and the prices at which defendant sold said stock for the account of the said companies were fair and reasonable and all that the stock was worth, and that the commission charged by this defendant for its services in selling such securi-

ties was a fair and reasonable commission; that all sales made by this defendant for the account of the Belt Company or Suburban Company were immediately reported to the Belt Company or Suburban Company and the proceeds accounted for, and that immediate payment was made by this defendant to the Belt or Suburban Company for all stock bought by defendant from the said companies, and that all and singular said transactions were known to, acquiesced in and ratified by the officers, directors and stockholders of the Suburban Comp-ny and the Belt Company from time to time as the transactions were had and done; that said transactions took place or were settled more than five years before this litigation was commenced and defendant plears the statute of limitation of Missouri as to same.

18½. This defendant further answering denies that it caused a corporation known as the Consolidated Terminal Railway of Kansas City, to be formed for the purposes alleged in said ancillary bill, or for any purpose whatever and avers that this defendant had nothing to do with the formation or organization of the said Consolidated Terminal Railway Company of Kansas City.

19. This defendant denies that it had anything to do with electing or causing to be elected its officers, servants or employes as the officers and directors of the said Consolidated Company, and denies that this defendant at all times or at any time dominated or controlled the Consolidated Company; denies that this defendant caused the Consolidated Company to issue and deliver to it its entire capital stock, or any part of it, or its bonds aggregating the sum of $750,000.00 or any other amount, and denies that defendant at any time proceeded to sell or dispose of the bonds and stock of the
371 said Consolidated Company, and to apply the proceeds thereof in any manner or to any extent, except as hereinafter stated. And this defendant denies that it ever failed or refused to fully and fairly account to the Consolidated Company or the Belt Company for any of the property, assets or choses in action of the Consolidated Company which came into the hands of defendant, but states the contrary to be true, that defendant at all times when requested, and without request, fully and fairly accounted to the Consolidated Company and afterward to the Belt Company for everything that defendant received in which the Consolidated Company had any interest.

20. This defendant further answering states that the facts concerning the affairs of the said Consolidated Company, so far as this defendant knows or had any concern or connection therewith are as follows: After the Suburban Company had caused its said one million dollars of bonds to be exhausted in building and equipping its road from Second and Broadway to Brush Creek, it was without means to build any other extensions or additions, to its road, and whilst it is true that it had the lawful power, under its charter, to build and construct an extension of its road from Second and Broadway westward to the state line between Kansas and Missouri, yet it did not have the financial ability to do so, and inasmuch as its mortgage previously given covered all property therein described which it then had or might afterwards acquire, it could not in its

own name issue any new mortgage on any extension which would be a first lien thereon. For these reasons and because the Suburban Company saw it was necessary to extend its road to and connect it with the packing houses and other large shipping industries in the West Bottoms in said Kansas City, it found it necessary to extend its road from Second and Broadway to the State Line between Missouri and Kansas, and in order to do this the Suburban Company, itself, through its officers and agents, caused the said Consolidated Terminal Railway Company of Kansas City to be formed and incorporated, and caused it to issue $750,000 of stock and $750.000 of first mortgage bonds, and to give a mortgage which was a first lien upon all of its property therein described then owned or afterwards to be acquired, to secure said bonds, and made the defendant Trust Company one of the Trustees under said mortgage, and caused the officers and employes of the Suburban Company to be chosen as the Directors and Officers of the Consolidated Company. That the said Consolidated Company was simply an artificial arm of the Suburban Company itself, created for its own purposes, and to build extensions and additions to its road. That the Suburban Company was wholly without means to defray the expenses of building said exten-
372 sion or any part thereof and that its only means of raising the necessary money therefor was to dispose of the stock and bonds which it had caused the Consolidated Company to authorize and issue and at the instance and request of the Suburban Company, this defendant undertook to act as the agent of the Belt Company in procuring the necessary franchises and rights-of-way and in placing the said bonds and stock of said Consolidated Terminal Railway Company and in advancing money to defray the expenses of the said extension of said road to the State Line.

21. That the stock which the Consoliated Company was authorized to issue was, of course, without any value at that time, and the said company and the Suburban Company authorized this defendant to give the said stock to purchasers of the bonds as a bonus, at the ratio of 8 shares of stock with each bond, and the said companies promised to pay to this defendant, in consideration of its services in selling and disposing of the said bonds and stocks and acting as such financial agent for the Belt and Consolidated companies in respect to such bonds and stocks, a sum equal to twelve per cent of such of said $750,000 of bonds as this defendant might sell, three-fifths of which amount was to be paid in cash out of the proceeds of such sales, and the other two-fifths was to be paid in stocks and bonds of the said Consolidated company, at the same valuation at which others of said bonds and stock could be disposed of by this defendant to other people, which was fair and reasonable commission and one which the said company could well afford to pay under the circumstances in order to raise the money it needed.

22. That pursuant to the agreements above set for the defendant, at the request of the Consolidated Company, sold the bonds of the Consolidated Company and that with each of said bonds 8 shares of stock of the said Consolidated Company went as a bonus, in accordance with the agreement aforesaid. Part of said bonds were sold by

this defendant for the account of the Consolidated Company and part of said bonds were bought by the Trust Company from the said Consolidated Company, in accordance with the agreement aforesaid, but that the Trust Company received with the bonds bought by it from the Consolidated Company far less than eight shares of stock with each bond which were given as a bonus by the Consolidated Company to all others who bought bonds of said company; that this defendant from time to time paid to and paid out for the Consolidated Company all of the proceeds of the sales of said bonds and stock less such charges for services, commissions and expenditures as were made by this defendant, and the said Consolidated Company accepted and received the benefit thereof; that all sums of
373 money charged by this defendant to the Consolidated Company were immediately reported by the Trust Company to the Consolidated Company and approved by the Consolidated Company and that all such charges appear not only on the books of this defendant but also on the books of said Consolidated Company, and that this defendant has fuly, promptly and faithfully accounted for all and singular its transactions with the Consolidated Company; that all of — charges made by this defendant to the said Consolidated Company were fair and reasonable, and that all of the transactions had between this defendant, the Consolidated Company and the Belt Company in respect to the said bonds and stock of the said Consolidated Company, as well as in connection with any and all other business matters between them, were fully known to, approved by, acquiesced in and ratified by all of the officers, directors and stockholders of the said Consolidated Company and of its successor, the Belt Company, more than five years prior to the institution of this suit, and complainants ought not after so long a time be permitted to question the same and respondent pleads as to the same — statute of limitations of the State of Missouri, hereinafter set out in bar of the complainant's suit.

23. This defendant further answering states that it is true that as alleged in said amended ancillary bill, on or about the 25th day of July, 1892, the said Consolidated Company and the said Suburban Company entered into Articles of Consolidation, under the Statutes of the State of Missouri, whereby the said two companies became one consolidated corporation which was thereafter known as "Kansas City Suburban Belt Railroad Company," and called in the amended ancillary bill and herein the "Belt Company."

24. This defendant denies that at the time of the consolidation of said two companies, or at any other time, this defendant caused its officers and employes to be elected to the positions of officers and directors of the said Belt Company, but state that the stockholders of the said two companies after their consolidation elected their own officers and directors, without any interference or influence on the part of this defendant. It is true, however, that certain persons who were connected with this defendant were chosen as some of the directors and officers of the said Belt Company, but this defendant denies that it at any time, or in any manner, as alleged in the ancillary bill, dominated or controlled the actions of the Belt Company.

25. This defendant, further answering admits, as stated in the amended ancillary bill of complaint, that it was found ad-
374 visable about the 30th day of December, 1891, to have a corporation formed under the laws of the State of Kansas, for the purpose of building and holding the title to a further extension of the said Suburban Company's railroad system from the state line westward and southward to Argentine, in the State of Kansas, but denies that it caused the said Union Company to be organized for that purpose or any other purpose, but states the fact to be that the said Union Company was caused to be organized for that purpose by the Suburban Company.

26. And this defendant denies that it caused its officers and employes to be elected as the officers and directors of the said Union Company, but states that the Suburban Company which was the sole owner of the capital stock of the Union Company, caused the officers and directors of the said Union Company to be elected, without any interference or domination whatever on the part of this defendant.

27. This defendant denies that it caused all of the stock, or any of the stock of the said Union Company to be issued to the said Belt or Suburban Companies and denies that it caused the said Union Company to execute its first mortgage bonds in the amount of $2,000,000 or any other amount, but admits that the said Union Company did authorize the issuance of $2,000,000 of bonds, and executed its first mortgage to secure the same, and made this defendant one of the trustees in said mortgage. The said Union Company, though in fact an independent corporate entity, was really organized by the Suburban Company for its use and benefit and for the purpose of building the said extension to said Belt Company's railroad. This defendant denies that the said bonds were issued and delivered to it for the use and benefit of the Suburban Company except as hereinafter stated.

28. This defendant denies that it ever failed or refused, when requested, to fully and fairly account to the said Union Company, the Suburban Company or the Belt Company for any and all disposition made by it of any of the bonds, stock or property of either of said companies, but states that upon the contrary it has fully and frequently accounted to the said companies for all property, choses in action, money or assets of whatever nature which came into its hands in which either of said companies had any interest.

29. That the said Union Company, the Belt Company and the said Suburban Company were under the necessity of disposing of the said bonds and stock of the said Union Company for the purpose of raising the money with which to acquire and construct the
375 said extension into the state of Kansas, as they had no other means of raising the money for that purpose. That at the special instance and request of the said Union Company and of the Suburban Company, and later the Belt Company, the defendant undertook and agreed to act as financial agent for them in and about the matter of disposing of said stocks and bonds of the Union Company, and financing said enterprise, and to render such services and advance such moneys as might be necessary to procure the necessary

franchises therefor, and to establish and put in operation warehouses, factores and other like industries along the line of the said railroad, and the said Suburban Company, Belt company and the said Union Company agreed to pay this defendant a reasonable compensation for its services, advancements and responsibilities in that behalf.

30. That is was impossible to find purchasers for said bonds at a greater price than 82 per cent of their face value, and only then provided considerable quantities of the stock of the said Union Company should go with the bonds as a bonus, but said stock, as a matter of fact, at that time, and for several years after, was without any value. That this defendant immediately after the organization of the said Union Company, in pursuance of the request and agreement above stated, proceeded to finanace the said Union Company and to sell its said bonds and stock, or to buy them when other purchasers could not be found in time to supply the needed money, and to render important and valuable services in connection with the securing of franchises for the building of the road, and advance from time to time, such money as might be needed therefor, and this defendant continued to act as such financial agent and to render such services until the said extension of such road by means of the Union Company was completed, which extended over a period of several years.

31. That it was understood and agreed between this defendant company and the said Union Company, Suburban Company, and later the Belt Company, that in case this defendant could not find purchasers for said bonds fast enough to supply money needed for the construction of said road, that this defendant might itself buy such of said bonds as it was willing to buy, at the same price that like bonds were being sold to other persons, and might deduct from the price thereof a sum equal to what would be a fair commission for selling the bonds to others, that is to say, the defendant, in case it bought any of said bonds, was to account to the Union Company or the Suburban Company for the price of said bonds,
376 in the same manner and upon the same terms as it was to account to them for bonds sold to other people.

32. That this defendant, pursuant to the agreement aforesaid, sold for and on account of the Belt Company, bonds of the Union Company of the par value of upwards of $440,000 and accounted to the Suburban Company, the Belt Company and the Union Company for the proceeds of all such sales, and that being unable to sell and dispose of the bonds of the Union Company to others fast enough to provide the money as it was needed by the Suburban Company, later the Belt Company, this defendant, under the agreement and arrangement above stated, from time to time purchased of the Belt Company bonds of the Union Company of the par value of $1,496,000 and that immediate payment was made by this defendant to the Belt Company of the price of all bonds bought by this defendant of the Belt Company; that of the bonds bought by this defendant from the Belt Company it bought 350 bonds of the par value of $1,000 each at par and 350 of said bonds of the par value of $1,000 at $950 each, which was far more than the bonds

were worth, and which was greatly in excess of the price at which other persons were willing to buy said bonds; that on October 21, 1892, this defendant accepted from the Belt Company and Union Company 60 of said Union Company's bonds at $82 and 1,500 shares of Union Company's stock in part payment for its services in and about the matters aforesaid; that whenever any charge was made by this defendant to the Belt or Suburban Company for services or commission or any other thing such charge was immediately stated and rendered to the Belt or Suburban Company, and all such charges were approved and agreed to by the Belt Company; that this defendant fully, promptly and faithfully accounted to the Belt and Suburban Company in respect to all and singular its transactions with the Belt or Suburban Company in relation to the securities of the said Union Company, and the said Suburban Belt Company and the said Union Company received the benefit of said transactions; that all of the charges made by this defendant for its services in the premises were reasonable and fair, and all of the transactions had between this defendants and the Union Company, the Suburban Company and the Belt Company in relation to the said bonds and stock of the said Union Company, as well as in connection with any and all of the business between them were fully known to, approved by, acquiesced in and ratified by all of the officers, directors and stockholders of the said Union Company, Suburban Company and the said Belt Company, and all of said transactions were had and done more than five years prior to the institution of this suit, and complainant ought not to be permitted after so long a time to
377 question the same, and this defendant as to all and singular the said matters complained of pleads the statute of limitations of the State of Missouri hereinafter set out.

33. This defendant further answering denies that it, on the 23rd day of January, 1891, or at any other time caused a corporation known as the Kansas City & Independence Air Line to be incorporated or formed. Said Air Line was incorporated, however, for the purpose of building a line of railroad connecting with the line of the said Suburban Company, and running to the City of Independence, Missouri, and the capital stock of said company was, after being increased, fixed at $500,000. This defendant denies that it at any time caused its officers and employes to be elected as the directors and officers of the said Air Line, and denies that it caused said Air Line to issue its first mortgage bonds to the amount of $300,000, or any other amount, but states that the Air Line did issue its first mortgage bonds to that amount, and secured the same by a first mortgage upon all of its corporate property, and made this defendant one of its trustees under said mortgage. This defendant denies that it at any time dominated or controlled the said Air Line; denies that this defendant caused the said Suburban *or* Belt Companies to acquire all, or any, of the bonds or stocks of the Air Line, and denies that it caused the Suburban Company to deliver the said bonds and stock to it, the said defendant, and denies that this defendant proceeded to dis-

pose of the same and to apply the proceeds thereof, for the corporate purposes of the Suburban *or* Belt Companies, or for any other purpose except as hereinafter stated; denies that this defendant has ever refused upon request to account to said Belt Company or Suburban Company for the disposition made by it of any of said bonds, or stock or the proceeds realized therefrom, but, upon the contrary, states the fact to be that this defendant has frequently, fully and truly accounted to the Suburban Company, the Belt Company and to the Air Line Company for the disposition of all of the property, assets or choses in action of either of said companies which in any way came into the hands or under the control of this defendant.

34. This defendant, further answering states that the facts concerning the Air Line Company and its connection with it and with the Belt Company are as follows: That on the 23rd day of January, 1891, at the suggestion and by the procurement of the Suburban Company, the Air Line Company was incorporated with a capital stock of $150,000, and with eleven directors, a majority of whom were directors of the said Suburban Company, for the purpose of building a railroad from a point on the line of the Sub-
378 urban Company's road, to the city of Independence, Missouri, a distance of some six or eight miles, for the use and benefit of the said Suburban Company. That the said Air Line Company soon after increased its capital stock to $500,000 and issued its first mortgage bonds, as aforesaid, to the amount of $300,000; that the said Air Line afterwards entered into a contract with a construction company known as the Kansas City Terminal Construction Company, for the building and completion of its said road, whereby it promised to pay to the said construction company, in consideration of the construction of said road, $250,000 of its first mortgage bonds, and 2,000 shares of its capital stock. That said road was built by said construction company under said contract.

35. That at the special instance and request of the Air Line and said Suburban Company the defendant rendered valuable services in procuring franchies for the use of public highways by said Air Line, and in acting as the financial agent for the said Air Line, and in from time to time advancing it money and selling certain of its bonds and stocks for its account, and purchasing certain other of its bonds and stocks in order to furnish the money for its requirements; that said bonds were not reasonably worth to exceed 80 per cent of their face value and the said stock had no market or other value at all.

36. That the said Air Line settled with the said Kansas City Terminal Construction Company for building its said line by delivering to said Construction Company certain first mortgage bonds and certain shares of stock which had been issued by the Air Line as aforesaid, but defendant avers that the said Construction Company accepted in full payment for its work, under said construction contract, a less amount of stock and bonds than was specified in the contract as drawn, and that thereupon the said Construction

Company distributed said stocks and bonds among its stockholders; that it is true that this defendant from time to time, in order to furnish the said Construction Company with the necessary funds for the construction of said Air Line, sold for said Construction Company and for its account certain of said bonds and stock and fully accounted for the proceeds of all such sales; that after setting in full with said Construction Company the Air Line still had in its treasury certain of its first mortgage bonds and certain shares of stock, and that at the special instance and request of the Air Line and of the Suburban Company this defendant from time to time sold to others certain of said stocks and bonds in order to supply the said Air Line with money for its requirements, and that this defendant immediately, fully and faithfully accounted to said Air Line for the proceeds of all such sales as and when the
379 said transactions were had and done; that this defendant also at the special instance and request of the Air Line and said Suburban Company from time to time, by reason of the fact that it was unable to sell bonds and stock to others fast enough to supply money that the said Air Line and Suburban Company needed bought from said Air Line certain of said stocks and bonds at the same or greater prices than said bonds and stocks were being sold at to others; that this defendant made immediate payment to the Air Line for all such stocks and bonds bought by it as aforesaid as and when such purchasers were made; denies that it constructed or caused to be constructed the said Air Line, but on the contrary states that said Air Line was constructed by said Construction Company at the procurement of said Suburban Company and of said Air Line and for the purpose of the said Belt Company; denies that it at any time dominated or controlled the said Air Line, but on the contrary states that said Air Line was at all times controlled by its own adult stockholders, officers and directors, nearly all of whom were directors of said Suburban Company, later the Belt Company. This defendant states that whatever was paid it by the said Air Line in compensation for the services of this defendant in acting as the financial agent of said Air Line, and in procuring franchises and for commissions in the sales of said bonds and stock, was paid pursuant to an open, fair agreement and understanding had at the time and that such compensation was fair and reasonable; that this defendant from time to time, as the transactions took place, paid to and paid out for and on account of the said Air Line and said Belt Company all of the proceeds of all of the said bonds and stock so sold by it and also all of the purchase price of all of said bonds and stock so purchased by it, and the said Air Line and the said Belt Company or its predecessor the Suburban Company accepted and received the benefit thereof, and this defendant has fully and truly accounted therefor; that all and singular the transactions had between this defendant and the said Air Line and Belt Company in relation to the stock and bonds and the money of the said Air Line, as well as in connection with all other business between them, were

fully known to, approved by, acquiesced in and ratified by all of the officers, directors and stockholders of the said Air Line and of the said Belt Company both before and after the consolidation herein above mentioned, and more than five years prior to the commencement of this suit, and the complainants should be held estopped from now questioning transactions settled so long
380 ago, and respondent pleads the statute of limitations of the state of Missouri hereinafter set out in bar of the said matters.

37. This defendant, further answering, denies that it at all times up to and about the month of April, 1900, or at any other time, in any way dominated and controlled the affairs of the Suburban Company or its successor the Belt Company by reason of the alleged facts set forth in said amended ancillary bill, or by any other reason or means whatever; denies that it caused its officers, directors and employes to be elected as the officers and directors of the said companies, or in any way induced or influenced the stockholders of said companies to choose such persons as their officers or directors; denies that the officers and directors of said Companies were mere dummies acting as the agents of this defendant, but state that they were chosen by the stockholders of said companies and were acting independently for and on behalf of the said companies at all times. This defendant admits that it attended to the disbursement of a large amount of the moneys which were realized from the sale of the bonds and stocks of the said several companies hereinabove mentioned, but denies that it attended to the disbursement of all of said moneys, and states that whatever disbursements of such moneys were made by this defendant were made at the special instance and request of the said companies and for their use and benefit, and were fairly made and fairly and fully accounted for. This defendant does not know what the total cost of the lines of all of the said railway companies hereinabove named amounted to, and has no means now of ascertaining the same, as all of the books and papers connected therewith are in the possession of the complainants in the said amended ancillary bill, and have been for nearly five years; denies that there was actually delivered to and disposed of by it securities, stocks and bonds of said companies aggregating in value more than $5,000,000 as alleged in the ancillary bill; denies that this defendant or its said receiver have ever at any time refused to account to the said companies or to their receivers for the proceeds derived by this defendant from the sale of any of the said bonds and stocks, or for the disposition made by it of any of the proceeds thereof, but, upon the contrary, states that it has frequently, and at all times duly and fully accounted for all of said stocks and bonds, and for all of the proceeds thereof which came into its hands or over which it had any control; denies that it pretends to claim that it is retaining any money above the actual cost of the said several railroad properties for the purpose of paying for this defendant's commissions and services in the matter of the sale and disposition of said bonds or stock, or any of them, except as hereinbefore
381 stated, and this defendant again states that each and every of said transaction-, and each and all of said charges for com-

missions and services were fair, reasonable, fully accounted for and satisfactory to the Belt Company and acquiesced in, ratified and approved by all of the officers, directors and stockholders many years prior to the institution of this suit.

38. This defendant, further answering, denies that it on or about the 30th day of June, 1896, or at any other time prior or subsequent thereto, either in its own name, or in the name of any of its officers, or in the name of any corporation controlled by it, or in any other manner whatsoever, had entered into any contract whereby it was obligated to construct a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, for the purpose alleged in the amended ancillary bill, or for any other purpose, but states that this defendant was never in any way obligated or bound to build the said railroad from Kansas City to Pattonsburg, or any part thereof, and never assumed any obligation in connection therewith; this defendant denies that it at any time caused the Kansas City & Northern Connecting Railroad Company hereinafter called the Northern Company to be incorporated, and denies that it caused certain of its officers and employes to be elected as officers and directors of the said Northern Company, and denies that this defendant at all times, or at any time, dominated or controlled the affairs of the said Northern Company denies that this defendant set about to discover a way in which it could cause the said railroad to be constructed without incurring any liability itself; denies that it had anything to do with the construction of the said railroad except as the financial agent of the Belt Company, as hereinafter stated; denies that it conceived the idea or purpose of having the Belt Company undertake the construction of the said railroad; denies that it by any means whatever caused or attempted to cause a contract to be entered into between the said Belt Company and the said Northern Company, whereby the Belt Company agreed to construct the said railroad for the Northern Company.

39. This defendant admits that the Belt Company did enter into a contract with the Northern Company whereby the Belt Company agreed to build said railroad for said Northern Company from Kansas City, Missouri, to Pattonsburg, Missouri, and that the "Exhibit A" heretofore filed by this defendant in its answer to the original bill of the Cambria Steel Company in this cause, is a true copy of the said contract between said Belt Company and the said Northern Company; denies that it had anything whatever to do with the making of the said contract, or that it in any way controlled or dominated or in any way influenced either of the parties thereto to enter into the same; denies that the said Northern Company's railroad was constructed in any way for the use and benefit of this defendant; denies that this defendant had any interest whatever in the building of the same; denies that the said Northern Railroad has been of any benefit or value to this defendant; denies that the said Northern Railroad has been of no benefit or advantage to the Belt Company, but, upon the contrary states that it has been of large benefit to said Belt Company, and that it was necessary and useful for the corporate uses and purposes of the said Belt Company and de-

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nies that the said railroad was built for the purposes and ends of this defendant, or that it had any interest whatever in the same.

40. This defendant denies that all of the money paid out by the Belt Company for the construction of the said Northern Railroad passed through the hands of this defendant, but states, however, that much of said money did pass through the hands of this defendant, for the reasons and to the extent hereinafter stated, but not otherwise; it denies that all of the bonds and stock which were to have been delivered to the said Belt Company under the terms of the said contract, passed through the hands of this defendant, but states that some of said bonds and stocks did pass through the hands of this defendant, for the purposes and to the amount hereinafter stated, and not otherwise. This defendant admits that it proceeded to sell and dispose of some of the said bonds and stock as hereinafter stated, but this was at the special instance and request of the Belt Company and as the financial agent of the said Belt Company, and not otherwise.

41. This defendant denies that it ever at any time when requested failed to account to the said Belt Company for the amount realized by it from the sale of any of said Northern Company's bonds and stock; denies that it has stated or pretended that the construction of the said Northern road by said Belt Company resulted in a loss to that company of about $300,000 or any other sum; but this defendant states that it frequently, at all times when requested, and without request, fully accounted to the said Belt Company for the proceeds of all of said bonds and stock which passed through the hands of this defendant and for any and all moneys which came into its hands or under its control, belonging to the said Belt Company, or in which the Belt Company had any interest; denies that it is, or ought to be in any way chargeable with the amount of any loss which may have resulted to the Belt Company, if and did result, on account of
383 its contract to build the said Northern Railroad, denies that this defendant is in any way responsible therefor, or should be held accountable therefor.

42. This defendant, further answering, states that the facts connected with the building of the said Northern road are as follows: The business of the Belt Company was not that of a trunk line, but consisted in switching for trunk lines and for industries situated along its line, and in furnishing terminal facilities for other railroads that might want to enter Kansas City, and had no terminal facilities of their own, hence it was to the advantage and interest of the Belt Company to encourage and assist as many industries as possible to locate along its line, and also to assist and encourage other trunk lines of railroad to enter Kansas City, and to use the terminals of the said Belt Company for the purpose of entering, either by aiding said trunk lines to build in to Kansas City, or by building out to meet them.

43. That in 1896, although all of the several portions of the said Belt Company's railroad system had been constructed, and operated for several years, yet the Belt Company found that it had been and still was unable to earn enough from its business to pay a fair return

on its investment, hence it conceived the idea of building a railroad from Kansas City to Pattonsburg, there to meet the Omaha, Kansas City & Eastern Railroad, and the Omaha & St. Louis Railroad, and at an intervening point to meet the Chicago Rock Island & Pacific Railroad, and thereby to furnish to those three railroads an entrance into Kansas City, which railroads would use the tracks and other terminal facilities of the Belt Company and pay a large and profitable rental therefor, and furnish a large and profitable switching business to the Belt Company. It was also thought by the Belt Company that it could make a large profit in constructing the said Northern railroad on its own account. So it was that the Belt Company caused the Northern Company to be organized, without any suggestion or domination by this defendant whatever, and the Northern Company was organized for the purpose of building a railroad from Kansas City to Pattonsburg, for the use and benefit of the Belt Company, and for the reasons above stated. The Belt Company caused some of its directors, officers, employees and stockholders to be chosen as the directors and officers of the Northern Company and the said company afterward authorized the issuance of first mortgage bonds to the extent of $20,000 per mile of the road to be built and second mortgage income bonds in the amount of $15.000 per mile for each mile of road to be built, and made this defendant one of the trustees under both of the mortgages securing such bonds,
384 and authorized the issuance of — shares of capital stock.

44. The Belt Company had not means whatever with which to carry out its contract for constructing the said railroad, except such as it might be able to realize from the sale of the bonds and stock of the Northern Company, and at the special instance and request of the Belt Company and the Northern Company, this defendant undertook to act as their financial agent in the sale and disposition of such of the bonds and stock of said Northern Company as it could find purchasers for, and at such price as it might be able to obtain. That the said second mortgage income bonds had no market value, and only in one or two exceptional cases was this defendant able to sell any of the said second mortgage income bonds for any money, but found it necessary in selling the first mortgage bonds to deliver to the purchaser some of the second mortgage bonds as a bonus. The capital stock of the Northern Company had no market or other value.

45. That this defendant for and on account of the said Belt Company and Northern Company and at their special instance and request from time to time sold bonds and stock, issued by the said Northern Company, at the highest and best prices which could be obtained therefor; that this defendant was unable to find purchasers for said stock and bonds as fast as the money was needed by the Belt Company and Northern Company to meet their demands in the construction of said Northern railroad, and it was understood and agreed between them and this defendant that this defendant should have as many of said bonds as it was willing to buy at the prices name by them and that this defendant should have the right to deduct from the purchase price thereof in settle-

ment an amount equal to what would be a fair commission in case such bonds had been sold by this defendant to other persons; that in pursuance to said understanding and for the purpose of furnishing and supplying money to the Northern Company and the Belt Company for the building of said connecting road this defendant did buy from the said Belt Company certain of said bonds and stock at prices then and there agreed upon, which prices were fair and reasonable and fully as much if not more than the prices at which the securities of said Northern Company were being sold for to others. This defendant avers that it has fully, faithfully and promptly accounted to the said Belt Company and to the said Northern Company in all and singular and transactions had between them in connection with the bonds and stock of the said Northern Company and in connection with every other matter or thing; that this defendant from time to time paid to and
385 paid out for and on account of the said Northern Company and the said Belt Company all of the proceeds of all the said bonds and stock so sold by it and also all of the purchase price of all of the said bonds and stock so purchased by it, and the said Northern Company and the said Belt Company accepted and received the benefit thereof; that all moneys received by this defendant for its services in the premises and for its commission in selling and disposing of the said bonds and stock and for its services in advancing money to the said Belt Company for the purpose of building the said Northern Company's road were and are fair and reasonable, were fully agreed upon at the time and have long since been settled and closed. and complainants should now be held estopped from questioning the same.

46. That on or about the first day of April, 1900, there was an entire change in the officers and management of the said Belt Company and the persons who were at that time chosen as its officers and directors were in no way connected with or interested in this defendant Trust Company, but were hostile to it, but that nevertheless the said Belt Company received and accepted the proceeds and benefits of the contract for the building of said Northern Company's road, and that since the said change in the management of the Belt Company as well as prior thereto, the Belt Company has claimed the stock and bonds, payable under the said construction contract, as its own property, and the said Belt Company, both prior to and since the said change in its management, has continued to exercise acts of ownership and control over such of said bonds and stock of said Northern Company as remained in the treasury of said Belt Company, as aforesaid, and this defendant says that all and singular the dealings and transactions between it and the said Belt Company in respect to the securities issued by the Northern Company and in relation to any and all other matters complained of in the ancillary bill were fully known to, acquiesced in, approved and ratified by the officers, directors and stockholders of the said Belt Company, and that by reason of the premises complainants are estopped to complain and are estopped from asserting that the said contract for the construction of the Northern road was in fact the contract of

this defendant and not of the Belt Company, and are estopped from claiming that this defendant should in any way be held responsible for any alleged loss that arose, if any, on account of the carrying out of the said contract by the Belt Company, and are estopped to claim that this defendant has not fully and truly accounted for all moneys or property coming into its hands as aforesaid, and this defendant avers that it has fully and fairly accounted to the Belt Company in all of the transactions aforesaid.

386 That an operating contract was entered into between the Belt Company and the Northern Company for the use by the latter of the terminal facilities of the Belt Company and that under said contract large and increasing profits and revenues accrued to the Belt Company; that said contract was ratified and adopted by said Knott and Swinney, receivers of said Belt Company, and complainants herein, and was afterwards adopted by the Kansas City Southern Railway Company, purchaser of the property and franchises of the Belt Company at the foreclosure sale hereinabove mentioned.

47. This defendant, further answering, denies that the Belt Company at any time advanced any money to this defendant, or that the defendant took out of the earnings or assets of the Belt Company any sums of money whatever, which it pretended to expend for and on behalf of the Belt Company, or otherwise; denies that the Belt Company ever advanced or delivered to it any money, at any time or times, except such as it was able, from time to time, to deliver to this defendant, in part payment of the indebtedness which the Belt Company from time to time owed to this defendant. The fact is that the Belt Company never was in a position to advance any money to anybody; it needed all the money it had and frequently more too, for its current requirements, and instead of the Belt Company's advancing any money to this defendant for any purpose whatever, the contrary is true, that this defendant advanced money to the Belt Company on several occasions to keep said Belt Company from bankruptcy and to keep it a going concern. This defendant denies that it was every requested by the Belt Company, or by anyone else, to account for any money alleged to have been so advanced or so taken out of the treasury of the Belt Company by it; that, as a matter of fact; there never was an ground or basis for supposing that this defendant had ever wrongfully gotten any of the Belt Company's money.

48. This defendant, in further answering, denies that it during the times hereinbefore mentioned, or at any time took upon itself the business of paying out practically all of the moneys which were paid out for the benefit of the said Belt Company, but states that this defendant did, from its own funds, frequently, and at various times advance large sums of money to and for the use and benefit of the Belt Company because the said Belt Company had at such times no money itself with which to meet demands that from time to time were pressing, and to make improvements and betterments that were absolutely necessary for its success as a money earning institution.

387 49. This defendant denies that it took upon itself the duty of buying for the Belt Company practically all or any of the property which the said Belt Company needed to acquire in its business of operating said railroad, and denies that it used any money of the Belt Company for any such purpose; denies that it caused other corporations to be formed for the purpose of holding the legal title to any properties purchased for the use and benefit of the Belt Company; denies that it caused the capital stock of any such corporations to be issued to the Belt Company; and then turned over to this defendant, or to be issued to this defendant direct, or otherwise, for any purpose whatever; denies that this defendant caused its own servants, agents and employes to be elected and continued as the officers and directors of any such companies, at any time; denies that this defendant, in the manner alleged in the amended ancillary bill or in any other manner, controlled the affairs of the Belt Company or controlled the actions and affairs of any of the said alleged subsidiary companies; denies that this defendant caused the Missouri Elevator & Terminal Company to be incorporated for the purpose alleged in the amended ancillary bill or for any other purpose.

50. This defendant states that the Elevator Company was organized by the procurement of the Belt Company for the purpose of acquiring and erecting grain elevators along the line of the Belt Company, so as to furnish such facilities as would increase the business and earnings of the Belt Company. That said Elevator Company acquired certain lands in what is known as the East Bottoms of Kansas City, Missouri, and caused to be erected thereon three elevators, one of which has since been destroyed by fire. That this defendant advanced to the said Elevator Company large sums of money for the erection of said elevators, and received from the said Elevator Company three mortgages or deeds of trust, one on each of said elevators, two for $12,000 each, and one for $8,000, which sums were justly due and owing to this defendant. That one of the said elevators was consumed by fire, and the amount of insurance thereon was collected by Wash Adams, the receiver of the Elevator Company and was paid by him to this defendant company and its receiver, and was duly credited upon the note which was secured by the mortgage on that elevator, leaving a balance still due on account of that mortgage of $4,251.50; that on the remaining two mortgages, one for $12,000 and the other for $8,000 nothing has been paid, and the interest on all of them has been long in default, and this defendant still holds said mortgage of said property.

388 51. The said Belt Company, from time to time, advanced some money to the Missouri Elevator & Terminal Company, which went into the construction of the said elevators, and was the owner of 425 shares of the capital stock of the said Elevator Company of the par value of $100 each, which is all of the stock which the said Elevator Company has ever issued. It is true that the said elevator property was purchased and the said elevators built for the use and benefit of the Belt Company, but it is untrue that it was done by this defendant, and inasmuch as the Belt Company is the

owner of all of the outstanding stock of the Elevator Company, it is in this sense true that all of the property of the Elevator Company belongs to the Belt Company, subject, however, to the lien of the mortgages thereon to this defendant, as before stated.

52. This defendant has not and never had any interest in any of the property standing in the name of the said Elevator Company except as the holder of the said mortgages. This defendant denies that it ever failed or refused to account to the Belt Company for all of its transactions in connection with the said Elevator Company's property, and denies that it ever received any funds from the Belt Company, for the purpose of constructing said elevator; denies that it caused the Belt Company to assume *of all* the outstanding debts and liabilities of the said Elevator Company, but states that if the Belt Company did assume such outstanding debts and liabilities, it was a proper thing for it to do, as it is and was by reason of its being the sole stockholder in the said company, the beneficial owner of all of the property of the Elevator Company, subject to the said debts and liabilities, and there is no reason, in law or equity, why the Belt Company should be reimbursed for paying its own debts, or discharging obligations upon its own property if it did discharge any such obligations. This respondent admits that Wash Adams, Esq., was appointed receiver of the Elevator Company, as alleged in the amended ancillary bill, and that he has since been discharged as such receiver.

53. This defendant denies that it caused the Improvement Company to be organized for the purpose of holding the legal title to various pieces of real estate in Kansas City, Missouri, or elsewhere, purchased for the use and benefit of the said Belt Company, and the Kansas City, Pittsburg & Gulf Company, or either of them, or for any other purpose it denies that it dominated the Improvement Company or that it caused its servants and employes to be elected as the officers and directors of the said Improvement Company; it denies that any money whatever was at any time paid *and* by the Belt
389 Company to this defendant, for the purpose of purchasing any pieces of real estate to be held by the said Improvement Company; denies that any shares of stock of the Improvement Company were ever at any time issued to this defendant; denies that this defendant every had any interest in or owned any of the stock of the Improvement Company; denies that any request or demand has ever been made by the Belt Company or anyone else, to or on this defendant for an accounting for any funds alleged to have been advanced to this defendant by the Belt Company for the purpose of buying land for the Improvement Company, or for an accounting for the alleged disposition of any of the stock of the said Improvement Company.

54. It is true that a corporation known as the Central Improvement Company was organized, but this was not done at the instance of respondent, but was done by the procurement of the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company for the purpose of securing and acquiring title to various tracts of land

in and about Kansas City. It is true that the Belt Company furnished some of the money to be paid upon the purchase price of the land bought by the Improvement Company; it is also true that the Kansas City, Pittsburg & Gulf Railroad Company advanced some money for the same purpose. Upon such money being furnished from time to time by the said Railroad Company to the Improvement Company the latter company issued to the Belt Company at different times 1120 shares of its capital stock and also issued certain shares of its stock to the Kansas City, Pittsburg & Gulf Railroad Company on account of the money furnished by it. All or practically all of the outstanding stock of the Improvement Company has been issued to and is now held by the said Belt Company, and the said Kansas City, Pittsburg & Gulf Railroad Company and their assigns; that this defendant has not now and never has had any interest in the property of the Improvement Company except that it holds a mortgage on a certain piece of the property owned by the said Improvement Company to secure certain promissory notes aggregating the sum of $5,000, which mortgage was a subsisting lien upon the property at the time the Improvement Company bought it, and which mortgage was subsequently purchased and is now held by this defendant. This defendant also holds certain stock of the Improvement Company, as collateral security for an indebtedness due this defendant from the said Belt Company. The defendant admits that Wash Adams, Esquire, was appointed receiver of the said Improvement Company; that he afterwards resigned and that T. T. Crittenden was appointed as receiver in his place and stead, and that said T. T. Crittenden now has pos-
390 session and control of its property as alleged in the said amended ancillary bill.

55. This defendant denies that it caused the Fairmount Amusement Company to be organized, or to be dominated or controlled by it, as alleged in the amended ancillary bill, or in any way; denies that the Belt Company ever advanced any money to this defendant for the purpose of purchasing or improving the property of the Amusement Company. This respondent admits that all of the capital stock of the Amusement Company belongs to the Belt Company, subject, however, to the lien of the Trust Company upon it as a pledge for the security of certain indebtedness of the Belt Company to this defendant, as hereinafter shown. This defendant states that it does not know what moneys, if any, the Amusement Company ever expended, if any, and does not know who furnished the money; but this defendant denies that the Belt Company ever supplied this defendant with any money to be used in furthering the ends or purposes of the Amusement Company; denies that this defendant ever took upon itself the duty of disposing of or disbursing any money for the Belt Company for any such purpose; denies that large sums of money or any sums of money were ever paid by the Belt Company to this defendant for that purpose; denies that the Belt Company or any one else has ever asked this defendant for an accounting on account of any such money alleged to have been furnished to this defendant for any such purpose.

56. It is true that the Amusement Company was organized for the purpose of operating what is commonly known as Fairmount Park; that said park was established by the said Air Line and the Belt Company for the purpose of creating passenger traffic for the said Air Line and the Belt Company to and from the said park; that the said park was operated as a place of recreation and amusement, in order to attract residents of Kansas City and vicinity to the same and to cause them to use the line of the said Air Line and the said Belt Company for transportation to and from said park, and that said park at the time it was established, and for more than six years thereafter, had no transportation facilities except those afforded by the said Air Line and the said Belt Company, and that the said Air Line and the said Belt Company derived large revenues and profits from passenger traffic in connection with said park. It is untrue that this defendant at any time caused said Belt Company to advance to it large sums of money for the purpose of fitting up Fairmount Park; it is true, however, that this defendant, itself did advance, at the special instance and request of the Air Line and
391 the Belt Company, from time to time, large sums of money in the fitting up of Fairmount park, and that it charged the same to the said Air Line, and afterwards to the Belt Company when the account of the Air Line was merged in that of and assumed by the Belt Company; but this defendant denies that the Belt Company ever supplied the Trust Company with any money for that purpose; denies that the Belt Company or anyone else ever requested this defendant to account for any money alleged to have been advanced to it by the Belt Company in fitting up said Fairmount Park, but states that no such money was furnished; all of the money which this defendant advanced towards fitting up Fairmount Park was charged, as aforesaid, to the Air Line or to the Belt Company, and due and proper accounts were rendered thereof from month to month as the work progressed, and were duly audited and approved; the originals of such bills and accounts so rendered have been ever since and are now in the possession of the Belt Company and its receivers. That all of the transactions of whatever nature between this defendant and the Air Line or the Belt Company in reference to Fairmount Park were fully accounted for, known to and ratified and approved by all of the officers, directors and stockholders of the Air Line Company and the Belt Company, and the said complainants should be held estopped from now questioning the same.

57. This defendant denies that it caused to be organized what is known as the Northern Townsite Company; denies that it dominated and controlled the affairs of the said Townsite Company; denies that it caused the Belt Company to advance to it upwards of $5,000, or any other sum which was used by this defendant in the purchase of property which was taken in the name of the said Townsite Company; denies that all or substantially all of the money that was used for the purpose of acquiring the property of the Townsite Company was money advanced by the Belt Company; and denies that this defendant instead of issuing to the said Belt Company all of the capital stock of the said Townsite Company,

issued large portions thereof to itself, or to other persons for its use and benefit; or that it otherwise disposed of the same, except as hereinafter stated; denies that the Belt Company or any one else has ever requested it to account for any money alleged to have been received by this defendant from the Belt Company for the purposes of the Townsite Company. It is true that the Townsite Company was organized for the purpose of acquiring real estate along the line of the Northern Company; the facts are that this defendant and the Belt Company supplied all of the money that was used in purchasing lands by the Townsite Company. The Belt
392 Company paid into the treasury of the Townsite Company $6,286.57, and received therefor 439 shares of the capital stock of the said Townsite Company of the par value of $100 each, and this defendant paid into the treasury of the said Townsite Company $6,720.07, and received 489 shares of the capital stock of said Townsite Company, of the par value of $100 each; that said shares so issued to the Belt Company and to this defendant, were issued in proper proportion to the amount of money paid in by each, and that the amount of money paid into the treasury of the said Townsite Company by this defendant and the Belt Company was equivalent to about $14.32 on each share of stock so issued to them respectively. That 24 shares of said stock were issued to each of the following named parties: A. E. Stilwell, C. A. Braley and J. T. Nolthenius, in compensation for their services as directors and officers of the Townsite Company, and that no other stock of the said Townsite Company has been issued to anyone. That the defendant owes the Belt Company nothing on account of the Townsite Company's affairs, and there is nothing to call for any accounting by this defendant to the Belt Company in connection therewith.

58. This defendant denies that it caused the Kansas City, Pittsburg & Gulf Railroad Company to be formed, but admits, however, that the said Kansas City, Pittsburg & Gulf Railroad Company was formed for the purposes stated in the said ancillary bill, and that it issued the bonds to the amount therein stated; that the defaulit therein stated was made, and that the foreclosure proceedings stated therein were had. This defendant denies that either the Belt Company, the Union or Air Line Companies were largely dependent upon the Kansas City, Pittsburg & Gulf Railroad Company, for their earnings; it admits that an operating contract was in existence between the Belt Company and the said Kansas City, Pittsburg & Gulf Railroad Company, but it denies that it was well known to this defendant that if the Kansas City, Pittsburg & Gulf Railroad Company went into the hands of receivers, it would result in the insolvency of the Belt and other companies before named, or that it would necessitate their ultimately being thrown into the hands of receivers, and the mortgages upon their respective properties foreclosed.

59. This defendant denies that it at any time set about to contrive a scheme whereby it might appropriate to itself before the Belt Company should pass beyond its control, any of the property

or assets of the Belt Company; denies that it caused to be exhibited to its own officers and directors who were holding the position of officers or directors of the Belt Company, various claims and demands which it alleged were due and owing by the Belt Company to it; denies that it caused such of its own officers and em-
393 ployes who were holding the positions of officers and directors of the Belt Company to pass upon and approve such claims and demands; denies that this defendant caused its own officers and employes who were holding the positions of officers and directors of the Belt Company to execute to this defendant various pretended promissory notes and other negotiable instruments for the alleged purposes of securing to this defendant the payment of such pretended claims as alleged in the amended ancillary bill; denies that this defendant caused to be delivered and transferred to it various stocks, bonds and accounts and other personal property belonging to the Belt Company as collateral security for the said pretended indebtedness by the means or for the purposes alleged in the amended ancillary bill.

60. This defendant states, however, that the said Belt Company did for value received execute and deliver to this defendant from time to time in part payment of the indebtedness of said Belt Company, to this defendant, certain promissory notes, which notes are more particularly hereinafter set out and described and are now held and owned by this defendant, upon which notes there is now due and owing from the said Belt Company and its receivers an amount aggregating more than one-half million dollars.

61. And this defendant shows to the court that the Belt Company assigned and pledged to the respondent as collateral security for the payment of the said promissory notes and other indebtedness, held by this defendant against the Belt Company, the stock, bonds and property stated in the amended ancillary bill of complaint, except that the item of property stated in the amended ancillary bill as being 600 tons of steel rails was in fact about 344 tons of steel rails and about 17 tons of fastenings.

62. This defendant denies that the said notes were executed or that the said stock, bonds and property were given as collateral security by reason or through any domination or control of this defendant over the Belt Company. It is true that at the time the said notes were given and the said property assigned as collateral security that a majority of the officers and directors of the Belt Company were connected with this defendant, either as its officers, directors or employes, but this respondent denies that any of the officers or directors of the Belt Company were personally interested in securing to this defendant any of the assets of the Belt Company which in equity or good conscience ought not to have been secured and denies that the execution of said promissory
394 notes, or either of them or the delivery of the said collateral security or any part thereof, was fraudulent or void for any reason whatever.

63. On the contrary this defendant states and shows to the court

that the Belt Company was justly indebted to this defendant at and prior to the time of the execution and delivery of the said promissory notes respectively, for moneys from time to time loaned to the said Belt Company, or advanced by this defendant and paid out to and for the use and benefit of the Belt Company, all subsequent to the first day of January, 1898; that each and all of said notes were given for the purpose of evidencing a bona fide indebtedness to the amount specified in said notes. That said notes were executed and delivered, and the said collateral security assigned and pledged in good faith for the purpose of evidencing and securing the payment of debts justly and equitably due and not otherwise. That all of said notes were given for so much money loaned and advanced by this defendant to the Belt Company, subsequent to the first day of January, 1898, as aforesaid.

64. This defendant denies that it kept its officers and directors, or caused its officers and directors to be continued as the officers and directors of the Belt Company during the time stated in the amended ancillary bill, or at any time. It is true, that many of the officers and directors of the Belt Company were also officers and directors of this defendant, but that condition was occasioned by the fact that the stockholders of the Belt Company, who were persons other than this defendant elected certain officers, directors and employes of this defendant as officers and directors of the Belt Company, and it was not occasioned by any domination or control of this defendant, or by any influence whatsoever exerted by or on behalf of this defendant, and there never was, at any time, any officer, director or employe of this defendant, who was also an officer or employe of the Belt Company who desired or wished this defendant in any way to have or acquire any undue advantage whatever of the Belt Company, and there was at all times open and careful accounting had between the Belt Company and this defendant of all transactions in which they had any mutual connection.

65. This defendant denies that the only accounting which has ever been had between it and the Belt Company has been such an accounting as its officers and employes holding the positions of officers and directors of the Belt Company pretended to make and this defendant denies that the only accounting, which
395 has been had between it and the Belt Company, has been such as was made by the officers of said companies in looking over and going through the form of approving the accounts and statements rendered the Belt Company by this defendant, but on the contrary this defendant states that the mutual accountings between [*his*] defendant and the Belt Company were faithfully made and were the result of a thorough and systematic method of bookkeeping, and that from time to time the mutual accounts between the said companies were thoroughly examined and checked by the proper officers of said companies and said accounts duly approved, and if any inaccuracies existed therein same were corrected and adjusted at the time.

66. This defendant states that it kept full, true and correct accounts of all and singular its dealings with the Belt Company and all other companies herein mentioned; that this defendant employed, in conducting its business, what is known as the voucher system of bookkeeping, whereby a voucher is made for each and every transaction wherein any money is disbursed or paid out; that such voucher contains on its face the receipt of the person or corporation to whom any such money is paid; that for every disbursement made by this defendant it has on hand a voucher showing the person to whom the disbursement was made, the amount thereof and on what account, to which is appended the receipt of the person to whom such payment was made; that this defendant at all times herein mentioned had and still has on hand a voucher known as a journal voucher for each [a-d] every charge or credit made against or in favor of any account on its books, such voucher containing full details of the transaction; that all such vouchers are and were at all times carefully and systematically filed by this defendant in numerical order; that a full, true and correct transcript of all such vouchers is contained and set forth in the books of this defendant and that the said books of this defendant have at all times been carefully and correctly kept, and this defendant states that during all or most of the time, during which the transactions complained of in the said bill took place, the Belt Company used and employed the same system of accounting; that in each and every case that this defendant made any charge against the Belt Company or any of the other companies named herein or gave any credit to the Belt Company or any of the other of said companies, immediate notice thereof was given by this defendant to the Belt Company or such other company against whom or in favor of — such charge or credit was made or given; that if this
396 defendant received any money or property for which the said Belt Company or any other of said companies was entitled to credit, such fact with full details of the transaction, were then and there communicated to the said companies respectively, and if the Belt Company and the other companies hereinabove mentioned, found said credit correctly given it immediately entered the same upon their own books respectively, and the same is true of all other companies with which this defendant had any dealings, and if any charge was made by this defendant against the Belt Company or any other company herein named the same was immediately reported to the said Belt Company or to such other company against which the charge was made, and if such charge was found to be correct, such charge was entered upon the books of the Belt Company or on the books of the company against which such charge was made; that such charges and credits were made regularly and in the ordinary course of business and continued over a long period of time; that if this defendant charged anything to the Belt Company for commission or services in any particular transaction and such charge was found to be correct by the officers of the Belt Company, all such charges were entered and

extended upon the books of the Belt Company; that at regular stated intervals the respective auditors of the respective companies, including said Belt Company, checked and verified the balances between the said companies, and if any inaccuracies were found therein the same were immediately adjusted and corrected; that this system of accounting was employed during the whole period in which this defendant had any dealings with the Belt Company or any of the other companies herein mentioned; that it was at all times the aim and intention of this defendant its accounts should be full, true and correct and that any person or corporation with whom it had been dealing should have full and free access to the same, and should have full and free information as to the state of such accounts and that such aim and intention herein was at all times carried out. Respondent denies that such checking and verifying of such accounts was a mere pretense and sham, but on the contrary states that the proper officers and employes of the respondent, and of the Belt Company and of all the other companies in which the Belt Company was interested, at all times during the period in which the said alleged grievances took place, in so doing, acted with an eye single to the protection of their respective companies, to the end that the books and accounts of such respective companies should speak the truth and should at all times correctly show the state of such accounts. That from time to time the said Belt Company through its officers caused to be exhibited to each and all of its stockholders statements of the accounts between the Belt Company and defendant, based on the books of accounts
397 of said Belt Company and of defendant and that said stockholders were satisfied with said book showing and made no objection thereto and complainants should now be held estopped from questioning same.

67. Respondent further denies that at any time prior to the institution of this suit the complainants, in the original bill or the complanants in the said amended ancillary bill ever requested respondent for any accounting as to its dealings with the said Belt Company or that respondent ever refused to make any such accounting; on the contrary respondent states that it repeatedly, prior to the institution of this suit and during the month of June, 1900, at which time there was a complete change of management of the said Belt Company, demanded of the said Belt Company and its receivers and the persons representing them that they and the said Belt Company pay to this Trust Company the amount of its and their indebtedness to this defendant and that this defendant requested the Belt Company and its receivers to make an examination of the books of this defendant in order to again satisfy them that the said indebtedness was justly due to this defendant, and this defendant states that prior to the institution of this suit the Belt Company had its own experts make such examination and that such experts did make such examination, with the result that it found a difference of only one cent between the accounts as shown on the books of this defendant and as shown on the books of the Belt

Company; that the said Belt Company and its receivers have frequently, prior to the institution of this suit, recognized the said indebtedness of this defendant against the Belt Company as valid and just, and have frequently promised to pay the same; that in the month of June, 1900, the Belt Company, which was then managed by persons, none of whom were in any way connected with this defendant, paid on account of some of the said promissory notes, held by this defendant, and executed by the Belt Company, large sums of money, which were duly cerdited thereon, as hereinafter shown, and promised to pay the balance due on said notes and other indebtedness.

68. This defendant states that by reason of the premises complainants herein are not entitled to have any further accounting and this defendant states that it would be a manifest hardship and injustice upon it to be obliged to again account to the complainants or to the said Belt Company; that the dealings for which the complainants ask an accounting cover a period of more than ten years prior to the institution of this suit; that during said period this defendant, at the special instance and request of the said Belt Company and its constituent companies, at divers times received and paid out for the said Belt Company vast sums of money,
398 involving thousands of transactions, and that in such transactions this defendant received and disbursed several millions of dollars, and that in each and all of said transactions this defendant fully accounted at the time; that each and all of said transactions were fully known to and acquiesced in by the officers, directors and stockholders of the Belt Company and its constituent and allied companies, and that to now, after so many years, require this defendant to have all of its accounts opened and re-examined will result in manifest hardship and injustice; that this defendant has at all times denied that complainants were entitled to any further accounting in this suit; that it is not true that this defendant has prepared and submitted any statement of account to said complainant since the filing of the original and ancillary bills herein, and this defendant states having already accounted so fully to the said companies there is no occasion for any further accounting herein; this defendant states that it is true, however, that its auditor has been called by the complainants herein as a witness before the special master to whom the issues herein were referred by this honorable court and that at the request of said complainants this defendant's auditor did, as a part of his testimony before said special master, submit a statement of the ledger account between this defendant and the Belt Company, and this defendant states that said statement is a true and correct statement of said account; this defendant denies that said account is insufficient or untrue; denies that said statement does not properly or fully account for the stocks and bonds and other properties received by this defendant from, for or on account of the Belt Company; denies that any of the charges against the Belt Company in said account are untrue or illegal or unauthorized, and this defendant states that all of such

charges are just and correct both in law and in equity; this defendant denies that the said witness has omitted from said statement any credits to which the Belt Company is entitled; this defendant admits that in the year 1893, it had accounts on its books against the Union Company, the Consolidated Company, the Air Line and the Belt Company, and that in said year all of said accounts were merged by this defendant with its said account in the Belt Company, but this was because the Belt Company had consolidated with said Consolidated Company and had acquired all of the capital stock of the Union Company and the Air Line, and it is true that for this reason all charges made against or on account of said lines were afterwards made by this defendant against the Belt Company and were assumed by the Belt Company.

69. In answer to paragraph 1 of said amended ancillary bill this defendant admits that the Suburban Company was or-
399 ganized under the law of the State of Missouri or or about January 8, 1887, but denies that nothing was done by said company in the way of construction of its road until on or about May 31, 1889, but states that the preliminary surveys of said road had been made and that a franchise had been obtained by it from the city of Kansas City, Missouri, for the use of streets and highways in said city, and this defendant again denies that it caused the said company to issue any securities, stock or bonds, but states that any securities issued by said company were caused to be issued by its own stockholders and officers, and this defendant again denies that it caused the incorporation of the Kansas City Terminal Construction Company, hereinafter called the Construction Company, and this defendant again denies that it caused the said Suburban Company on or about May 31, 1889, or at any other time to enter into any contract with A. E. Stilwell for the construction of said line or any other contract, and again denies that it, this defendant, caused the said Construction Company to build the said railroad from Broadway street in Kansas City, Missouri, along Second street to Harrison street or along any other street or place, but on the contrary this defendant states that said Construction Company had its own stockholders, officers and directors and conducted its own business in its own way, and made its own contracts, as did also said Suburban Company; this defendant states that the said Suburban Company did make and enter into a contract with A. E. Stilwell on or about June 1, 1889, for the construction of said line in consideration of certain stock and bonds to be issued to the said Stilwell or his assigns by the said Belt Company, and afterwards the said Stilwell did transfer to this defendant as trustee for the said Construction Company the said contract, but this defendant denies that said Stilwell transferred said contract, as aforesaid, in consideration of the sum of $10,000 or any other sum, and this defendant states that it did not receive one cent or any valuable thing whatsoever from said Stilwell or any other person in connection with the transfer of said contract, and this defendant denies that upon the transfer of said contract this defendant undertook to comply with

the terms of said contract or any one of them but states that there was no reason why it should do so; and this defendant denies that it had any interest whatsoever in the said contract; this defendant denies that it caused its own stockholders, employes, officers and directors to be elected and appointed officers and directors of the Construction Company and denies that it at any time dominated or controlled the Construction Company, but on the contrary states that said Construction Company was dominated and con-
400 trolled by its own adult stockholders and directors, and that said Construction Company was organized at the instance and by the procurement of the Suburban Company and not otherwise; this defendant denies that the Construction Company was made up of the stockholders, employes, officers and directors of this defendant and such of their friends as they were willing to appoint to come in and enjoy the fruits and profits of said alleged plan as alleged. It is true that certain persons, who were officers of or connected with this defendant, owned some stock in the Construction Company, but this was not caused by this defendant, and this defendant states that in the main the stockholders of the Construction Company were persons who had invested in such stock and who lived in various parts of the United States, and it is true that the Construction Company proceeded with the construction of that portion of the road of the Suburban Company from Broadway to Cecil Junction, but this defendant is not advised as to the cost of such construction; this defendant denies that it had anything to do with the delivery of said road by the Construction Company to the Suburban Company; denies that it caused the Suburban Company to accept the said railroad from the Construction Company in an incomplete condition as a full compliance with the requirements of said construction contract, and this defendant denies that it caused the Suburban Company to direct this defendant to turn over to the Construction Company the stocks and bonds described in said construction contract, but states that all the acts and doings of the Suburban Company and the Construction Company were the free act and deed of said respective companies; this defendant admits that after the said road was turned over to the Belt Company by the Construction Company the Suburban Company did issue to the Construction Company its stock and bonds as hereinabove set forth and this defendant avers that afterward the said securities were distributed by the Construction Company among its own stockholders. This defendant denies that it caused the Suburban Company to accept a partial compliance by the said Construction Company with the terms of said contract with the Suburban Company as and for a full compliance, denies that it caused said securities to be issued and denies that it caused the Suburban Company to at any time enter into any contract, and denies that it at any time dominated and controlled the [*the*] Suburban Company for any purpose or at all.

70. This defendant further states that it has no information sufficient to found a belief upon as to the cost of the road and right-

of-way constructed and acquired by the Construction Company and turned over to the Suburban Company, but this defendant denies that the stocks and bonds turned over by the Suburban
401 Company to the Construction Company were worth reasonably the sum of $480,000.00, but on the contrary states that said securities were worth much less than that sum. Respondent denies that it received from the Suburban Company any of the stocks and bonds turned over to it by the Construction Company, and states that it received no stock or bonds from the Construction Company except those which it had paid for either in cash or in services. This defendant denies that it should, in equity and good conscience, account to the complainants for any of the profits, if any, made by the Construction Company in said transactions; that said transactions took place more than ten years prior to the institution of this suit; that the Suburban Company and its stockholders fully ratified the same, and this defendant pleads the statute of limitations of Missouri, hereinafter set out, as to said transactions.

71. This defendant further states that at the time *of* the Suburban Company accepted said road from the said Construction Company said Suburban Company had issued no stock whatsoever, and that at the time said road was turned over by the said Construction Company to the Suburban Company the only stockholders of the Suburban Company were the stockholders of the said Construction Company, and that if, as alleged, the said Construction contract was not in all respects carried out by the Construction Company, which this defendant denies, that no person was injured thereby except the stockholders of the said Construction Company, who were then the sole stockholders of the said Suburban Company; that at the time said road was turned over to the Suburban Company by the Construction Company, as aforesaid, the entire property of the Suburban Company consisted of a line of railroad extending from Second and Wyandotte streets in Kansas City, Missouri, in an easterly direction to Cecil Junction; that at said time the said road had neither freight nor passenger traffic of any consequence and could not reasonably expect to have such traffic unless it further extended its road or acquired other lines of railroad; that said line of railroad was not extended by the Suburban Company from said Cecil Junction to Brush Creek in Jackson County, Missouri, until a long time afterward; that at said time the Consolidated Terminal Railroad Company and the Union Terminal Railroad Company and the Air Line had not yet been organized nor their lines constructed and that was not done until long afterward, and that at the time said Construction Company delivered said road to the Belt Company as aforesaid the facilities and property so turned over were entirely adequate for the then requirements of the said Suburban Company; that
402 long afterward through the extension of its line and through the acquisition of other lines of railroad the passenger and freight traffic of the said Suburban Company and the said Belt Company increased to such an extent that it became

necessary to acquire and construct switching yards, depots and round houses and other structures and facilities for the carrying on of said business; that among the increased facilities acquired, as aforesaid, were a large and expensive passenger depot at Second and Wyandotte streets in Kansas City, costing about $65,000.00; that said depot was not acquired or constructed until several years after the said Construction Company had turned over said road to the Suburban Company, as aforesaid, and that said round houses, depots and additional terminal grounds became necessary solely through the increased traffic, caused by the extension of said Suburban Company's line and the acquisition by said Suburban Company of other lines penetrating the industrial sections of Kansas City and connecting with other lines of railroad entering Kansas City; that such increased facilities were not necessary in the condition the road was in at the time said Construction contract was entered into nor at the time said road was turned over to the Suburban Company by the Construction Company, as aforesaid, and this defendant states that among the items with which the complainants seek to charge this defendant are the expense of the said Suburban Company and the Belt Company in purchasing said increased terminal yards, freight depots, round houses, etc., all of which would be contrary to equity and good conscience, even if this defendant were in any way bound by the contract between said Construction Company and the said Suburban Company, but this defendant again states that it was under no obligation whatsoever to the Suburban Company or any other company or person under said construction contract, nor on account of the manner in which said contract was carried out, said contract was solely between the said Construction — and the said Suburban Company, and this defendant was in no wise a party thereto, except to disburse the securities of the said Suburban Company at the direction of said Suburban Company to the persons entitled thereto.

72. This defendant further states that at the time said first division of the Suburban Company lines between Second and Wyandotte streets and Cecil Junction were turned over by the Construction Company to the Suburban Company each and all of the stockholders of the Suburban Company knew exactly the condition the said line was in, and knew exactly whether or not all of the right-of-way for said line had been paid for and if not paid for the amount of the deferred payments, and knew exactly the cost
403 of the construction of said line; that all of said matters were fully set forth on the books of the said Construction Company and that at the time said line was turned over by the Construction Company to the Suburban Company the books of the Construction Company were turned over to the Suburban Company and have ever since been in the possession of the Suburban Company and its successor, the Belt Company and the receivers of the Belt Company, and that by reason of the premises the complainants are estopped, after so many years have passed, from now asserting that said road was turned over to the Suburban Company in an incomplete condition, and are now estopped from even charg-

ing that the said Construction Company, much less this defendant, which had nothing to do with the transactions, with the cost and expense of the Suburban Company and the Belt Company and its receivers in and about the purchase of terminal grounds, depots, right-of-way and the other matters complained of in this connection in the said amended ancillary bill.

73. In answer to paragraph B on page 25 of said amended ancillary bill this defendant denies that there remained in the treasury of the Suburban Company, after it had paid the Construction Company, as aforesaid, bonds of the Suburban Company of the par value of $100,00.00 and denies that said bonds of the par value of $100,000.00 were in any manner taken or appropriated by this defendant for its own benefit or anybody's benefit; denies that said bonds were of the reasonable value of $90,000.00 in money; denies that after the delivery by the Suburban Company to the Construction Company of its stock of the par value of $600,000.00 that stock of the par value of $400,000.00 still remained in the treasury of the Suburban Company, and denies that such stock of the par value of $400,000.00 was in any way taken or appropriated by this defendant and denies that said stock was of the reasonable value of $80,000.00 in money, but on the contrary this defendant states that of the first issue of bonds made by the said Suburban Company, to-wit, bonds of the par value of $500,000.00, all of said bonds with the exception of bonds of the par value of $50,000.00 were delivered to the Construction Company, as aforesaid, and that the remaining bonds of the par value of $50,000.00 were distributed by the said Suburban Company, through its officers, directors and stockholders, to the original promoters of the said Suburban Company for services rendered, and that this defendant got none of said bonds, and that of the first issue of stock of the said Suburban Company of the par value of $1,000,000.00,
404 stock of the par value of $600,000.00, but having at that time no actual value was delivered by the Suburban Company to the said Construction Company as a bonus with said bonds and that of the remaining stock of the par value of $400,000.00, this defendant got none except that which it bought and paid for, as shown on the books of this defendant, and as shown on the books of the said Suburban Company and the said Belt Company.

74. In answer to paragraph C on page 26 of said amended bill, this defendant again states that it was under no obligation, legal or equitable, under the terms of said Construction contract, was not a party to the same, had nothing to do with the execution of the same, had nothing to do with the carrying out of the same, and that there is no reason in law or in equity why this defendant should be charged by reason of the said contract; that all of the monies alleged to have been expended as shown by the alleged bill of items on pages 26 and 27 of said amended bill were monies expended by the said Suburban Company later the Belt Company, for its own benefit in constructing and equipping and improving its

own lines and there is no reason in law or in equity why it should not pay its own bills.

75. In answer to paragraph D, on page 28, of said amended bill, this defendant denies that it undertook to procure any right of way for the said Suburban Company, except at the special instance and request of the said Suburban Company; that it is true that this defendant at the request of the Suburban Company, advanced large sums of money to it for various purposes and charged such monies to the said Suburban Company as it had a right to do; that all of such transactions were fully known to and acquiesced in by the said Suburban Company; this defendant denies that it in any instance or at any time caused the Suburban Company or the Belt Company to purchase any right-of-way or execute notes for deferred payments, but that all such transactions were conducted by the Suburban Company or the Belt Company at its own instance and for its own benefit, and that under no circumstances could this defendant by any possibility have benefited thereby; that it is true that this defendant from time to time at the request of the Belt Company paid interest, due from the Belt Company on the obligations of the latter company, and charged such disbursements to the Belt Company, as it had a right to do, and that the said Suburban Company, later the Belt Company, at all times recognized its obligations to reimburse this defendant on account thereof; that it is true that this defendant failed to furnish a depot for the Suburban Company, but there was no reason in law or equity why respondent should furnish a depot or anything else for the Suburban Company; this defendant denies that it was obligated to furnish any depot to the Suburban Company, or to the Belt
405 Company, and denies that the said Construction Company was the agent of the defendant; this defendant admits that for the benefit of the Suburban Company and the Belt Company, and at the request of said Company, it, this defendant advanced a large sum of money to the Belt Company for the construction of a passenger depot at Second and Wyandotte streets, and that it charged the cost thereof to the Suburban Company or to the Belt Company, as it had a right to do, and as the said companies requested it to do, and that each and every charge of each and every item of the expenses of constructing said depot appears not only on the books of this defendant but also *in* the books of the Belt Company, and the said Belt Company, its officers, directors and stockholders have at all times acquiesced in such charges, which charges were fair, reasonable and proper; that in the printed itemized statement attached to said amended bill and marked 'Exhibit I," wherein complainants pretended to set forth the items of expense of the Belt Company for right-of-way, depots and other buildings, and attached to said amended bill marked "Exhibit 1," there are included many items aggregating many thousands of dollars of expense incurred by the said Belt Company in increasing its terminal facilities through the purchase of large tracts of real estate for terminal grounds and switching facilities, and not essential as right-of-way and not requisite to the said Belt Company or the Suburban Company in the en-

joyment of their franchise, and that said real estate includes lands purchased by the said Belt Company for its future requirements and in anticipation of future necessities and that such lands were not purchased on account of the then existing needs of the said railway companies, but on the contrary, on account of an expected increase of traffic which would arise from the acquisition of other lines, extensions, the growth of Kansas City and its tributary country, etc., and that said statement is not true and correct; this defendant admits that the said railway companies paid interest on deferred payments due on such real estate which were a lien on some of the lands so purchased by the said Suburban *or* Belt Companies, but there is no reason in law or in equity why the Suburban Company, later the Belt Company, should not pay interest on their own debts and this defendant is in no wise liable therefor.

76. This defendant in answer to the matters and things averred in paragraph- E to K, inclusive, on pages 29 to 35, inclusive, of said amended bill, again states that it was under no obligation to furnish the said Suburban or Belt Company with any right-of-way or to make any of the payments therein mentioned, and that for the reasons hereinabove set forth, and denies that the complainants
406 are entitled to have any credit upon their indebtedness to this defendant by reason of such payments, and this defendant admits that it did not pay all of the operating expense of the said railway companies, nor for the equipment, maintenance nor extension of their roads, and states that there was no reason in law or in equity why it should do so.

In answer to paragraph L of said amended bill on page 35 thereof this defendant states that it was under no obligations, legal or equitable, to furnish the Suburban or Belt Company with switching yards in Kansas City or elsewhere; denies that the Second Street Improvement Company was one of its auxiliary companies or that this defendant created it; states that the said Second Street Company had its own stockholders, officers and directors, and that while it is true that some of the officers of said Second Street Company were also connected with this defendant, yet this was because the stockholders of the said Second Street Company chose such persons as its officers and not through any act of this defendant; denies that it caused the Second Street Company to lease to the Consolidated Terminal Company the land described in said paragraph L or any land, but says that such lease was entered into between the Second Street Company and the Belt Company of their own free will and accord, and that there is no reason in law or in equity why the said Belt Company should not have paid the rent to the Second Street Company which it agreed to pay, and there is no reason in law or in equity why this defendant should pay the rent due from said Belt Company; but said tract of ground was not necessary to the operation of said Suburban Company, but was purchased by the Belt Company long after the Suburban Company had ceased to exist and long after the Belt Company had acquired the Air Line, the Union Company and the Consolidated Company, and that said tract of land was much larger than the said Belt Company needed

to have at the time it leased the same, and same was leased in view of the future requirements of the said Belt Company.

77. In answer to paragraph M on page 36 of said amended bill, this defendant admits that the said Second Street Company leased certain land to the Suburban Company for depot purposes, but denies that it caused the Second Street Company or the Suburban Company to enter into such lease and denies that it had anything to do with the same, and that there is no reason in law or in equity why this defendant should pay the rental on said land or any other rental which the Suburban Company or Belt Company obligated themselves to pay.

407 78. In answer to paragraph N on page 36 of said amended bill, this defendant admits that in March, 1890, the McClelland-Stumpf and Peltzer Brick Manufacturing Company conveyed to Alfred L. Howe the land therein described, and that said land was part of the depot grounds of the Suburban Company, but this defendant denies that said Howe was its agent or dummy, but on the contrary states that said Howe was the treasurer of said Suburban Company and that said land was purchased by said Howe for the use and benefit of said Suburban Company, and at its request. This defendant admits that said Howe made a cash payment to said Brick Company on account of said land and executed his notes as alleged, secured by deed of trust for the deferred payments; that afterwards, to-wit: June 23, 1890, said Howe, for a nominal consideration, conveyed said real estate, subject to said incumbrance to the Suburban Company. This defendant admits that when the first of said notes became due it paid the same, at the request of the Suburban Company, and charged the amount of such payment to the Suburban Company, and that afterward and prior to the said consolidation between the Suburban Company and the Consolidated Terminal Company the said Suburban Company liquidated and paid the said charge. This defendant admits that the said Brick Company on March 14, 1890, conveyed certain land described in said paragraph N of said amended bill to one W. S. Taylor, but this defendant denies that said Taylor was its agent or dummy, but on the contrary states that said Taylor was an officer of the Suburban Company and bought said land at its request and for its use and benefit. Defendant admits that a cash payment was made by said Taylor on said real estate and that notes and deeds of trust were executed by him to secure the unpaid purchase money, and that afterward said Taylor for a nominal consideration conveyed said real estate to the Suburban Company and this defendant admits that the notes so executed by Taylor and Howe, as aforesaid, aggregated the principal sum of $89,333.33, and that said notes were secured by deed of trust, which was a lien upon the land upon which afterward the said Suburban Company and the Belt Company erected a depot at Second and Wyandotte streets; defendant denies that in October, 1897, the Belt Company was financially embarrassed or insolvent; denies that stock of the Belt Company was depressed in value at said time; this defendant denies that it was desirous of manipulating the accounts of the Belt Company, or that it did so

said time or any other time manipulate the accounts of the Belt Company; this defendant denies that any arrangement was made between any of its officers and one J. De Goeijen, Jr., or
408 between it or any other person or corporation whereby it assumed or agreed to pay the real estate notes, which were a lien on the property of the Belt Company, including said notes aggregating $89,333.33, and this defendant denies that it at any time assumed and agreed to pay the said notes, except upon the condition and under the circumstances hereinafter set forth, but on the contrary states that said notes, including said notes aggregating $89,333.33 were assumed by said De Goeijen; this defendant denies that in April, 1899, or at any other time it had reason to believe or believed that it would lose control of the Belt Company and states that at no time did it have control of the Belt Company; denies that it set about to relieve itself of any obligation to pay the said notes aggregating $89,333.33, but states that it had at no time incurred any such obligation; denies that in April, 1899, that the said De Goeijen was indebted to it in an amount in excess of said notes or in any sum, and denies that said De Goeijen was unable to pay his obligations to this defendant or any other person; denies that it caused the Belt Company to take over any account due the defendant from said De Goeijen; denies that it knew that said De Goeijen was insolvent or that it could not collect its account against him, and states that it had no account against said De Goeijen at said time and states that said De Goeijen was at all times solvent; denies that it caused the Belt Company to make any entries on its books and denies that the Belt Company or complainants are entitled to any credit upon their indebtedness due this defendant on account of said notes for $89,333.33, which sum was charged by this defendant to the Belt Company on October 15, 1897.

79. Defendant states that the facts in regard to said item of $89,333.33, charged by it to the Belt Company on October 15, 1897, are as follows, to-wit: Said De Goeijen, Jr. was a resident of Amsterdam in Holland, and he and his associates also residents of Holland were on or about October 15, 1897, the owners of a large majority of the stock of the said Belt Company and of bonds of the Belt Company; that said De Goeijen was the agent and representative of said Dutch investors was chairman of a permanent executive committee appointed by the stockholders of the Belt Company, which committee had full discretionary powers in the management of the Belt Company affairs, and was largely interested in the Belt and its constituent companies that said Dutch investors, including said De Goeijen, were interested in improving the financial condition of the Belt and its constituent companies.

80. That with this end in view the said De Goeijen, during the year 1897, came to Kansas City, Missouri, from Holland; that at that time the said Belt Company was indebted to various
409 persons to an amount aggregating upward of $100,000.00 on account of purchase money notes executed by the Belt Company in payment for real estate used for terminal and depot purposes and secured by deed of trust, which was a first lien upon said

real estate; that at said time the Belt Company was also indebted to various other persons on account of money borrowed for its current requirements, in the nature of floating debt.

81. That during the year 1897, and prior to October 15, 1897, the Belt Company owned 483 second mortgage bonds of the Kansas City and Northern Connecting Railroad of the par value of $483,000.00 and owned 82 bonds of the Union Terminal Railway Company of the par value of $82,000.00.

82. That by written contract, dated July 1, 1897, the Belt Company sold to said De Goeijen the said 483 Northern bonds at 45 cents on the dollar or $450.00 for each bond or a total amount of $217,350.00, and sold to the said De Goeijen the said 82 Union Terminal bonds at par; that is to say, for $82,000.00, and by said contract the said De Goeijen agreed to pay the said Belt Company for said bonds on or before December 1, 1897.

83. And the said Belt Company on its part agreed that out of the proceeds of said sale it would pay or caused to be paid its said outstanding indebtedness or floating debt, including said real estate mortgage notes.

84. That afterwards respondent, at the request of the Belt Company and said De Goeijen, agreed that it would act as the fiscal agent of the Belt Company in the collection from said De Goeijen of the purchase price of said bonds and would see to it that said purchase price was disbursed in accordance with the said arrangement made between the Belt Company and the said De Goeijen, that is to say, that this defendant would, as fast as the money was received from said De Goeijen and not otherwise, pay off and discharge the said floating debt of the Belt Company, including said real estate mortgage notes; that at the time said arrangement between the Belt Company and De Goeijen was entered into the said 82 Union Terminal bonds and the said 483 second mortgage Northern bonds were not in the possession of the Belt Company, but had been pledged by the Belt Company with various financial institutions as collateral security for the payment of its notes and obligations, and that before said bonds could be obtained by the Belt Company and delivered to said De Goeijen, it was known by all parties to the transaction that it would be necessary for such obligations to be paid, and this defendant was delegated
410 by the said De Goeijen and the said Belt Company to pay off and discharge said obligations out of the proceeds of said securities bought by said De Goeijen.

85. That in accordance with said arrangement between the defendant De Goeijen and the Belt Company, this defendant passed to the credit of the Belt Company on its books on October 15, 1897, the full sum of $217,350.00 on account of said Northern second mortgage bonds, purchased by said De Goeijen, as aforesaid, and also passed to the credit of the said Belt Company the full sum of $82,000.00, being the full purchase price of the 82 Union Terminal bonds, purchased by said De Goeijen at par, as aforesaid.

86. That in pursuance of said arrangement this defendant as soon as it could get the said bonds released by the persons who were

holding the same as collateral security, sent the said bonds to the said De Goeijen, and the said De Goeijen from time to time made payments on account of his said purchase of said bonds, and that this defendant in pursuance to said arrangement applied the said payments so made by De Goeijen to the payment of the said floating indebtedness of the Belt Company.

87. That the said De Goeijen paid the entire purchase price of the said bonds to this defendant with the exception of the sum of $89,333.33, which amount was still unpaid at the time said Knott and the said Swinney were appointed receivers for the said Belt Company.

88. That with the proceeds of said bonds so sold by the Belt Company to said De Goeijen this defendant was able to and did pay off and discharge all of the floating debt of the Belt Company outstanding October 15, 1897, with the exception of said sum of $89,333.33, which sum represented the aggregate amount of said real estate mortgage notes secured on the depot property of the Belt Company, and which notes were then held by the Provident Life and Trust Company of Philadelphia, and which company continued to hold the said notes until the same were paid as hereinafter stated.

89. That from time to time this defendant for and on behalf of the Belt Company requested the said De Goeijen to pay it the said sum of $89,333.33, being the balance due the Belt Company on account of his purchase of the said Northern second mortgage bonds and the said 82 Union Terminal bonds, so that this defendant might pay off and discharge said real estate mortgage notes held by the said Provident Company, but the said De Goeijen failed to pay same to this defendant at any time; that it was at all times
411 distinctly understood and agreed between the Belt Company and the said De Goeijen and this defendant that this defendant should not be required to pay the said real estate mortgage notes held by said Provident Company and aggregating $89,333.33, until and unless the said De Goeijen should pay defendant in full for the said Belt Company for the said bonds purchased by him from it, as aforesaid, and defendant states that said De Goeijen at no time paid to it the full amount of the said purchase price of said bonds, his payments on said bonds lacking exactly the sum of $89,333.33 of being the full purchase price as agreed on as aforesaid, and respondent states that it denies it had any interest in said transactions except to collect the said purchase price from said De Goeijen and to apply the proceeds thereof, in accordance with the said directions of the said Belt Company and said De Goeijen, which respondent did, and that in said transaction respondent acted solely as the agent for the said Belt Company and the said De Goeijen; that it would be unjust and inequitable to charge respondent with the said principal sum of $89,333.33 or any part thereof, for the reason that against the said charge of said amount made by this defendant against the Belt Company on October 15, 1897, this defendant, on the same day gave credit to the Belt Company for the full amount of the purchase price of the said bonds and this defendant at

no time received the said purchase price in full, the deficiency being the exact amount of said real estate mortgage notes, aggregating the principal sum of $89,333.33.

89*a*. And this defendant states that said Belt Company at all times treated the said De Goeijen as its debtor by reason of his failure to either pay the said depot mortgages or to pay the balance due on the purchase price of the said bonds, and from time to time, and at regular intervals, the said Belt Company rendered bills against the said De Goeijen for the said sum of $89,333.33 and for the interest which it the said Belt Company from time to time paid to the said Provident Company on account of said depot mortgages, and that the said Belt Company regularly collected from the said De Goeijen the said interest accruing on the said depot mortgages to the said Provident Company and paid as aforesaid by the Belt Company, and that it was at all times fully understood by the Belt Company, its stockholders, officers and directors that this defendant was in no wise liable to pay the said depot mortgages aggregating said sum of $89,333.33.

412 90. And further answering said charge of said amended ancillary bill in relation to said real estate mortgage notes, this defendant states that even though the said De Goeijen did not pay the full amount of said purchase price of said bonds to the Belt Company through the medium of this defendant, yet the said De Goeijen did in fact pay the same to the receivers of the Belt Company, complainants herein, in the manner hereinafter stated, that is to say: Shortly after the said Kansas City, Pittsburgh and Gulf Railroad Company went into the hands of receivers in the month of April, 1899, certain persons organized themselves into a committee of re-organization, said committee assuming to act for and on behalf of all of the holders of securities of the said Gulf Railroad, who should join and participate with the said committee in the re-organization of said company; that said committee promulgated a plan of re-organization and succeeded in securing the co-operation of practically all of the stockholders and bondholders of said Gulf Railroad Company; that as part and parcel of the said plan of re-organization said committee acquired all of the stocks and bonds of the said Belt Railroad Company and its constituent companies, and that as part and parcel of said plan of re-organization, and pursuant to authority conferred on it by said stockholders and bondholders, the said committee proceeded to adjust certain of the floating indebtedness of the said Gulf Company and of the said Belt Company; that at the time the said Gulf Company went into the hands of receivers it was indebted to the said De Goeijen in the sum of about $300,000.00 borrowed money; that said De Goeijen made claim against the receivers of said Gulf Company for the amount of said indebtedness and also made claim against said committee for the amount thereof; that in the meantime Knott and Swinney, complainants herein, were appointed receivers for the Belt Company, pursuant to the same plan of re-organization and the said receivers of the said Belt Company referred to the said Committee for adjustment the claim of said Belt Company against the said

De Goeijen for the principal sum of $89,333.33, growing out of the failure of said De Goeijen to either pay the balance due on the purchase price of said Union Terminal bonds and Northern bonds or to pay the said real estate mortgage notes, and that thereupon said De Goeijen and the said committee entered into negotiations for a settlement of the mutual controversies pending between the said De Goeijen and the said committee, which was acting on behalf of the said Belt Company and the said Gulf Company and their receivers; that the said committee brought forward as an offset against De Goeijen's claim for $300,000.00 against the Gulf Company, the claim of the Gulf Company and its receivers against
413 De Goeijen for the said principal sum of $89,333.33, and the said claim of said De Goeijen was compromised and settled on that basis, the said committee paying the said De Goeijen the sum of $150,000.00 in full settlement of the mutual demands existing between the said De Goeijen and the said committee, which committee was acting at the time for and in behalf of the Belt Company, the Gulf Company and their receivers, and that the amount so paid to the said De Goeijen was practically the full amount of the said De Goeijen's claim against the Gulf Company less the amount which the said De Goeijen owed the said Belt Company on account of his purchase of the said Union Terminal bonds and the said Northern bonds, and his assumption of said depot mortgages and this defendant states that the said Belt Company and its receivers, having thereby received full payment for the said depot mortgages aggregating $89,333.33, are estopped to say that either the said DeGoeijen or this defendant is indebted to them on account of the said real estate mortgage notes, and this defendant states that it was with the amount of money thus deducted by the said committee from the said De Goeijen's claim that the said receivers of the Belt Company afterward paid the said Provident Life and Trust Company said real estate mortgage notes and not otherwise.

91. In answer to the averments made in paragraph 1 on page 41 of said amended ancillary bill, this defendant denies that it caused the Suburban Company to take up and pay the alleged overdraft of the said Construction Company, to the amount of $313.76 or any other overdraft, and states that at the time said Construction Company delivered said road to the Suburban Company, the Suburban Company, through its stockholders, officers and directors, assumed said overdraft and afterward paid the same as they were bound to do.

92. In answer to paragraph 2 on page 42 of said amended ancillary bill and subdivisions *a* to *n*, inclusive, of said paragraph, this defendant states that it has already hereinabove fully answered the charges and averments made in said paragraph; this defendant again states that due and proper credit was given to the said Suburban Company, Belt Company, Air Line, Consolidated Terminal and Union Terminal Companies for all moneys and property of said companies, coming into its hands; that no sums of money were charged against said companies by this defendant for commissions or other services except such as were agreed upon between this defendant and the said companies, respectively, and that said charges for com-

missions or other services were all and singular just, fair and reasonable, and that for all securities, either stocks or bonds, issued by said companies and coming into the hands of this defendant, it
414 fully, promptly and faithfully accounted to the said companies, respectively, as will appear from the books of account of said companies, in the possession of complainants; and this defendant states that the pretended statements contained in said paragraph 2 of page 42 of said amended bill and in said subdivisions of said paragraph 2 are not a true and correct statement of the monies and securities received by this defendant, and that said statements are grossly misleading and unfair; this defendant denies that it ever received any donations from any of the said companies; denies that it ever appropriated to its own use any money or property of the said companies or either of them coming into its hands and denies that complainants are entitled to have any credit upon their indebtedness to this defendant, by reason of the pretended omissions of any items from the accounts exchanged between this defendant and the said companies, respectively, and this defendant states that the accounts between it and the said companies, respectively, are and were at all times full, true, just and correct, and this defendant makes the same answer in respect to averments made in paragraph 3 of said amended bill on page 46 thereof and in subdivisions *a* to *d*, inclusive, of said paragraph; this defendant denies that none of the charges made by it were ever submitted to, or approved by the parties in interest in said companies, but on the contrary, states that each and all of said charges were submitted to and approved by the parties in interest in said companies; denies that there was anything in the relationship between this defendant and the said companies which deprived this defendant of the right to be paid for its services to said companies, and states that it would be grossly inequitable and unjust to deprive this defendant of its just compensation in and about the premises; this defendant admits that it was not an eleemosynary institution; admits that it was in business for pecuniary profit and gain; admits that it was not organized or conducted for the purpose of gratuitously serving in a multitude of transactions said companies or any of them for the sole convenience and profit of the said companies, but this defendant states that all services rendered by it to said companies were rendered in the ordinary course of business, as similar services were rendered by it to other persons and companies, and that there is no reason in law or in equity why the said Belt Company or its constituent companies should not pay their honest debts; this defendant denies that the said companies were its dummies for the benefit and profit of this defendant, but on the contrary states that said companies were at all times seeking their own legitimate business and profit and that they made only such contracts with this defendant as their
415 officers and agents and stockholders believed would profit said companies, and that all of said officers, agents and stockholders were of full legal age and competent to manage their own affairs, and this defendant makes the same answer in respect to the

averments made in paragraph 4 on page 48 of said amended bill and of subdivisions *a* to *c*, inclusive of said paragraph.

93. In answer to paragraph 5 on page 50 of said amended bill, this defendant admits that it, from time to time, loaned money to the companies therein mentioned, taking the notes of said companies evidencing such loan, and that it charged interest on the said notes in the same manner that it charged interest to other companies or individuals, customers [this of] defendant, who borrowed money from it, and this defendant states that there is no reason in law or in equity why the said companies should have the right to borrow money from this defendant without paying interest, and there is no reason in law or in equity why the said companies should not pay interest on the monies received and borrowed by them; this defendant admits that whenever any of said companies had a balance in their favor in its hands in open account that this defendant allowed such company interest on such daily balances and such daily balances were correct and were properly computed and were verified and checked by the respective auditors of the said companies each and every month, and that this defendant allowed interest to said companies on such daily balances at the rate of 2 per cent per annum, which was as much if not more than was paid by other banking institutions to their customers, under like conditions and this defendant admits that frequently that said companies overdrew their accounts with this defendant and that this defendant charged interest to said companies on such overdrafts just as it did to other customers under like circumstances; this defendant states that it usually charged interest on such overdrafts at the rate of 7 per cent per annum, which was a fair and reasonable charge and was less than was charged by other banking institutions to their customers under like circumstances; this defendant denies that it made any improper or unlawful charges of interest or discount against the said companies or any of them, but on the contrary states that all of such charges for interest or discount were correct, proper and lawful and were only such as were distinctly agreed upon by the parties in interest at the time such charges were made, all of which fully appears on the books of account, not only of this defendant but on the books and records of said companies themselves; this defendant states that no such charges for interest or discount were made except in the ordinary course of business and in accordance with business
416 usages universally in force, and this defendant denies the correctness of the alleged computation of interest or discounts made in the said amended ancillary bill and in the exhibits thereto attached, but states that said alleged computations are incorrect and untrue, and this defendant states that if any compound interest was charged by it against any of the said companies, which this defendant denies, such charges were fully agreed upon at the time same were made, and this defendant denies that complainants are entitled to have any credit upon their indebtedness by reason of the matters and things set up in said paragraph 5 on page 50 of said amended ancillary bill or in any of the subdivisions of said paragraph.

94. In answer to paragraph 6 on page 54 of said amended ancillary bill, this defendant admits that one of the features of its business was to supervise and conduct building operations, and that for this purpose it maintained what is called a building department; this defendant denies that the purpose of said building department was to conduct construction operations for its auxiliary companies and states that it had no auxiliary companies; this defendant admits that at the special instance and request of the said Suburban Company, Belt Company, Consolidated Company, Union Company, Air Line, Elevator Company and Amusement Company it did a large amount of construction work for the said companies, but denies that it made any exorbitant or unreasonable charges for such work; this defendant states that all such work was faithfully and efficiently done; that this defendant maintained a large and expensive staff of employes for the purpose of properly conducting such operations; that by reason of the fact that this defendant, through its said building department, could more efficiently do the work and was better equipped to perform the same, the said companies from time to time employed this defendant to conduct such operations; that this defendant made no charge for the services of its building department except such as were fair and reasonable, and such charges were not more, and in fact were less, than the said companies would have had to pay others for the said services; that there is no reason in law or in equity why the defendant should not receive fair and just compensation for the services rendered by its said building department or a fair profit for the work of said building department; that no charges were made by said building department against the said companies or either of them except such as were fully, fairly and openly agreed upon between this defendant and the said companies; this defendant states that there is no reason in law or in equity why its said building department should have done any work for any of said companies gratuitously, and this
417 defendant denies that complainants are entitled to any credit on their indebtedness to this defendant by reason of any charges made against any of said companies on account of the services of said building department.

95. In answer to paragraph 7 on page 55 of said amended ancillary bill, this defendant denies that it caused the incorporation of the Amusement Company, but again states that said Amusement Company was caused to be organized by the said Belt Company, and the said Air Line, for the purpose of creating passenger traffic for the said companies; this defendant denies that it caused the said companies to spend large sums of money or any sum of money in the acquisition and improvement of Fairmount Park, but states that any money invested for that purpose was invested by the said companies for their own proper benefit and in the ordinary course of business; this defendant states that the establishment and maintenance of said park did result in creating an extraordinary passenger traffic for said Belt Company, Air Line and the said lines received the benefit of such traffic; this defendant states that there is and was no possible way by which it could benefit or profit through the said park;

this defendant states that the books and papers of said Amusement Company and of the said Belt Company and Air Line are now and ever have been in the possession of complainants and the said Belt Company; that therefore this defendant is not advised as to the result of the operation of said park, but this defendant is informed and believes and so charges [*to*] fact to be that the operation of said park, after taking into account the earnings of the said Belt Company and Air Line, by reason of said passenger traffic, resulted in little if any loss to the said Belt Company or Air Line; this defendant states that if it should turn out that the operation of such park did result in a loss that there is no reason in law or in equity why the Belt Company or the said Air Line, for whose sole benefit the said park was established and maintained, should not pay the same, and this defendant states that said companies having received the benefits and advantages of said park are and should be held estopped from complaining of any losses on account thereof.

96. And this defendant in answer to paragraph 8 on page 56 of said amended ancillary bill and subdivisions *a* to *e*, inclusive, of said paragraph, states that it has already fully answered the averments therein made and this defendant again avers that the said Missouri Elevator and Terminal Company was an ancillary company of the said Belt Company; that said Elevator Company was organized at the instance of said Belt Company for the purpose of owning
418 and operating elevators upon the line of said Belt Company and for the purpose of promoting and increasing the freight traffic of said Belt Company through the handling and shipment of grain and for the purpose of increasing the revenue of the said Belt Company; that the mortgage notes held by this defendant, secured upon the property of said Elevator Company, represent exactly so much money expended by this defendant for said Elevator Company in the acquisition and construction of said elevator property; that the said Belt Company is the owner of all and singular the shares of stock outstanding and issued by said Elevator Company and the said Belt Company in order to acquire said stock of its own act and volition, assumed the debts of the said Elevator Company; that the said Belt Company assumed no debts of the said Elevator Company except such as were for money actually spent upon the property of said Elevator Company; that while it is true that this defendant advanced monies for the purpose of maintaining and equipping the said elevators and charged the same to the said Belt Company, it was done at the request of the said Belt Company and for its use and benefit; this defendant denies that any of the said stock of the Elevator Company was issued to it or that it caused any stock of the Elevator Company to be issued to anybody, and denies that it caused any such stock to be issued to the officers and employes of this defendant or to their wives, but again states that all of the outstanding and issued stock of the said Elevator Company was issued to said Belt Company and it or complainants are still the owner of the same, and this defendant further states that it never had any interest in the said Elevator Company or in its property except to be reimbursed for the moneys it had expended on account thereof;

this defendant further states that the said Belt Company derived large revenue from the handling and switching of grain to and from said elevators and the rentals thereof, and having received all the benefit of said elevators should now be held estopped from seeking to unload its loss, if any, upon this defendant; this defendant further states that ever since June, 1893, when the Belt Company became interested in the said Elevator Company, the books of account of the said Elevator Company showing exactly what had been expended on said elevators and the result of their operation have been in the possession of the said Belt Company or the said complainants, who at all times knew the condition of said Elevator Company and its property; that any and all contracts made by the said Belt Company in relation to said Elevator Company or its property or its stock were made by the proper officers, stockholders and directors of the said Belt Company and the said Elevator Company, who at all
419 times knew the exact facts in relation to all of the transactions made in that behalf, were fully known to and ratified by the stockholders, directors and officers of the said Elevator Company and the said Belt Company, and complainants should be held estopped from now seeking to charge this defendant with the result of such transactions.

97. Defendant, answering the averments made in paragraph 9 on page 59 of said amended ancillary [ball], again denies that it caused the incorporation of said Northern Company, but states that the facts in that behalf are as hereinabove set forth, and this defendant states that all of the transactions had by said Belt Company in connection with said Northern Company were voluntarily entered into by the said Belt Company at the instance of its stockholders, officers and directors; that said transactions were entered into by the Belt Company for its own sole benefit and profit, and this defendant should not be charged either in law or in equity with any loss, if any, resulting from such transactions; that if any profit resulted from such transactions the Belt Company received and retained the same and was entitled to the same; and there is no reason in law or in equity why this defendant should pay any of the losses, if any there were; this defendant admits that it paid certain interest coupons due on the bonds of the Northern Company and charged the same to the Belt Company, but states that this was done at the special instance and request and for the benefit of the Belt Company; that at the time this was done the Belt Company had in [i-s] treasury large blocks of the securities, both stocks and bonds, of the said Northern Company, which it had received from said Northern Company in part payment for constructing the said Northern Company's road and that the said Belt Company was at said time endeavoring to dispose of through this defendant the said securities; that it was the desire of the Belt Company and to its interest to obtain as large a price as possible for the said securities of the Northern Company, received by it as aforesaid, and that it would have been disastrous to said Belt Company for it to have allowed a default to occur in the payment of the interest due on bonds of the said Northern Company, and that for the purpose of preventing such default and pre-

venting a depreciation of the value of the securities of the Northern Company so received and held by it the said Belt Company, for a short period, advanced through this defendant certain moneys for the benefit of the Northern and of itself for the payment of interest accruing on the said bonds of the Northern Company; this defendant denies that it caused the Belt Company to pay any such interest on Northern bonds, but states that this was done by the Belt Company for its own purposes as hereinabove set forth; this de-
420 fendant states that it made no payments of any interest on Northern bonds except at the request of the Belt Company and that all charges made against the Belt Company by this defendant in this connection, were made with its full knowledge, approval and consent.

98. In answer to paragraph D on page 63 of said amended ancillary bill, this defendant states that the said Northern Company began operating on or about July 1, 1898; that on July 31, 1898, certain interest became due on the first mortgage bonds which had been issued by the said Northern Company and delivered to the Belt Company in payment of the Belt Company's services in and about the construction of the Northern Company's road; that at the time said interest became due the said Northern Company had just begun to operate its road and was not as yet in financial condition to pay its fixed charges; that the Belt Company, which was the holder and owner of a large amount of the bonds of the Northern Company and which expected to still receive a larger number of bonds by virtue of its construction contract with the Northern Company, and with a view to lightening the burdens of the said Northern Company, and for the purpose of enhancing the value of its securities, requested this defendant, to whom said bonds had been delivered by the Belt Company for disposition, to cancel the interest coupons attached to said Northern bonds, becoming due on July 31, 1898; that pursuant to said request of the Belt Company and not otherwise this defendant did cancel the said 314 coupons mentioned in said amended bill; and that this was done at the solicitation and with the full knowledge of the said Belt Company, which having received all the benefit of said transaction, should be held estopped from now complaining thereof.

99. In answer to paragraph 11 on page 64 of said amended ancillary bill, this defendant states that the facts in that behalf are as follows: On September 25, 1893, the Belt Company was the owner of 200 second mortgage bonds of the par value of $1000.00 each, issued by the said Air Line and secured by second mortgage upon the property of that company; said bonds had been issued by the Air Line to the Belt Company in consideration of the Belt Company guaranteeing the payment, principal and interest, of the said bonds and each of said bonds bore the written guaranty endorsed thereon by the Belt Company of said principal and interest; that said 200 second mortgage bonds constituted the entire issue of second mortgage bonds made by the said Air Line. On said 25th day of September, 1893, a written contract was entered into between the Belt

Company and this defendant, whereby this defendant pur-
421 chased said 200 second mortgage bonds from the Belt Company at and for the price of 75 cents on the dollar or $750.00 for each bond, and thereby this defendant agreed to take and pay for an aggregate of 170 of said bonds within eighteen months from the date of said contract, and to take and pay for such of the remaining 30 of said bonds as should remain unsold under the terms of the mortgage securing same, on or before September 1, 1898, and said contract further provided that in consideration of this defendant taking said bonds at said price the said Belt Company agreed to transfer to this defendant 2500 shares of stock of the Union Terminal Company, then in the treasury of the Belt Company: this defendant further states that as to said 30 bonds numbered from 171 to 200, inclusive, it was provided in the mortgage securing same that same should be reserved in the hands of this defendant as trustee, so that same might be sold if necessary and the proceeds used for the purpose of paying interest on bonds theretofore sold.

100. Defendant states that in pursuance to said contract it received from the said Belt Company 130 of said bonds and gave credit to the Belt Company for said bonds at the price agreed upon, to-wit: $750.00 for each bond, and the said Belt Company did also, pursuant to said contract, deliver to this defendant the said 2500 shares of Union Terminal stock.

101. That at all of said times the Belt Company was the owner of all of the capital stock of the Air Line and was guarantor of the said second mortgage bonds, and afterwards the said Belt Company, finding that the earnings, present and prospective, of the said Air Line were not sufficient to justify the Belt Company in negotiating said second mortgage bonds and thereby increasing the fixed charges of the said Belt Company, which had guaranteed said bonds, the Belt Company cast about for some means whereby it could avoid carrying out its contract to deliver said second mortgage bonds to this defendant, and whereby it, the Belt Company, could retire the said second mortgage bonds; that thereupon the Belt Company failed to make any further deliveries to this defendant of said second mortgage bonds and entered into negotiations with this defendant for a return by this defendant of such second mortgage bonds, as had already been sold and delivered to this defendant by the Belt Company; that thereupon [*its*] was agreed between this defendant and the said Belt Company that this defendant would return to the Belt Company all of the said 130 bonds purchased by this defendant as aforesaid, at the same price at which this defendant had bought the same, to-wit:

75 cents on the dollar, and all of the said bonds were then
422 and there returned to this defendant by the Belt Company, and thereupon the Belt Company returned the said bonds to the treasury of the Air Line in consideration of being released by the Air Line of its said guaranty of the said bonds, and said bonds were accepted on said terms by the Air Line, and thereupon the said entire issue of said second mortgage bonds of the Air Line to the number of 200 were cancelled and released of record; this defendant states that it was distinctly agreed when it returned said bonds to the

Belt Company, as aforesaid; that in consideration of releasing said Belt Company from its said contract to sell said entire issue of the Air Line bonds to this defendant, this defendant should retain the said 2500 shares of Union Terminal stock and this was done; defendant denies that it failed, neglected or refused to purchase and pay for the remaining 70 of said bonds as specified in the said contract, but on the contrary states that the said Belt Company declined to carry out said contract; this defendant denies that said second mortgage bonds could not be sold upon the market, and denies that said bonds were worthless, but on the contrary states that each of said bonds bore the written guaranty of the said Belt Company, making said Belt Company primarily liable thereon, and that at all said times the obligations of the Belt Company were worth 100 cents on the dollar; this defendant denies that it devised any plan or scheme to unload said bonds upon the Belt Company, but on the contrary states that said bonds were resold and returned to the Belt Company at its own solicitation and request, and solely for he reason that the said Belt Company desired to be relieved of its said guaranty of the said bonds, and this defendant states that by reason of the premises and by reason of the agreement entered into between this defendant and the Belt Company at the time, it had a right to retain the said 2500 shares of the Union Terminal stock, and this defendant denies that complainants are entitled to have any credit upon their indebtedness to this defendant by reason of the premises.

102. In answer to paragraph 12 on page 68 of the said amended ancillary bill, this defendant denies that it caused the railroad of the Air Line to be constructed and denies that it used the said Kansas City Terminal Construction Company for that purpose, but on the contrary states that the Belt Company caused said Air Line to be constructed and that said line was constructed by contract between the said Air Line and the said Construction Company, and this defendant denies that it caused the Air Line to enter into said contract, but admits that under the terms of said contract the Construction Company was to receive the stock and bonds of the Air Line
423 in certain amounts fixed in said contract for its services; this defendant denies that it bought the contract between the said Construction Company and the Air Line, whereby the said Construction Company turned over and delivered said railroad to the said Air Line, but on the contrary states that this defendant had nothing to do with said transactions; this defendant denies that said railroad was in an uncompleted condition at the time same was turned over to the Air Line by the Construction Company, but admits that at the time said railroad was so turned over to the Air Line the Air Line assumed all the liabilities and took over all of the assets of the said Construction Company; this defendant states that the facts in this behalf are as follows: This defendant states that for and on behalf of said Air Line and the said Construction Company, and at their request, it rendered valuable services to the said Construction Company in selling for the account of the said Construction Company all of the tracks and bonds received by said Construction Company in payment for its work under said Construction Contract; and

the said Construction Company recognizing its obligation to compensate this defendant for its expenses and services in that behalf, at a meeting of the Board of Directors of said Construction Company duly convened, adopted a resolution that there should be issued by the said Construction Company to this defendant two hundred (200) shares of the full paid capital stock of the said Construction Company in compensation for its services aforesaid and said two hundred (200) shares of capital stock were issued to this defendant in accordance with said resolution; and this defendant denies that it subscribed for the capital stock of the said Construction Company or any part thereof except as above stated; and this defendant denies that it ever became liable to the said Construction Company on account of such subscription; and this defendant denies that any subscription by it to the capital stock of the said Construction Company was taken over by the said Air Line as one of the assets of the said Construction Company at the time the said Air Line assumed the liabilities and took over the assets of the said Construction Company or at any other time. Defendant is not advised as to whether or not the said two hundred (200) shares of stock of the said Construction Company received by this defendant were the same shares as were subscribed for by A. E. Stilwell, trustee, as alleged in the amended ancillary bill, but states that if they were the same shares the said subscription was fully paid as hereinbefore set forth, by the services rendered by this defendant and in accordance with the said resolution. This defendant further states that it rendered valuable services to the said
424 Air Line in and about obtaining the franchises of said Air Line, procuring right-of-way, and other services, and that the only compensation received by this defendant from the said Air Line for said services was thirteen (13) first mortgage bonds of the said Air Line and five hundred (500) shares of its stock; that the said stock at that time had no value whatsoever and that this defendant afterward sold the said bonds at eighty cents (80c.) on the dollar, realizing therefor the sum of Ten Thousand Four Hundred Dollars ($10,400.00), being the highest obtainable price of said bonds at said time and that said sum of ten thousand four hundred dollars ($10,400) and said five hundred (500) shares of worthless stock constitute the only compensation received by this defendant from the Air Line for its services rendered as aforesaid and that said compensation was less than this defendant's said services were worth. This defendant denies that it caused any fictitious entries to be made upon the books of the Air Line cancelling said alleged stock subscription for two hundred (200) shares of Construction Company stock, and denies that it caused any fictitious entries of any kind to be made on the books of the Air Line at any time; and this defendant states that if the said alleged charge against this defendant on account of said alleged stock subscriptions was cancelled, it was a proper thing for the Air Line to do for the reason that this defendant had long before paid for said stock as hereinbefore set forth.

103. This defendant in answer to paragraph B on page 70 of said amended bill, denies that it caused the Air Line to pay any overdraft of the Construction Company and this defendant denies that

the Air Line paid any debts of the Construction Company except such as it had expressly assumed and agreed to pay and this was done by the Air Line through its authorized officers and agents and with the consent and approval of the stockholders of said Air Line.

104. This defendant in answer to paragraph 13 on page 70 of said amended ancillary bill, denies the same but states that the facts were as follows: That in November, 1892, the Belt Company gave its note to the West Kansas City Land Company for $5600 upon certain terms and conditions expressed in said note and this defendant guaranteed the payment of said note and interest to the West Kansas City Land Company, thereby making this defendant liable on account of the said note of the Belt Company, and that thereupon and on or about the same time this defendant charged the Belt Company with the sum of $5600, being the amount of the liability assumed by this defendant; that said charge was made by this defend-
425 ant with the full knowledge and consent and approval of the Belt Company; that afterward demand was made upon this defendant for the payment of said note by the Land Company, the payee therein, and this defendant, at the request of the Belt Company, refused to pay the same for the reason that the Belt Company was claiming that the Land Company had not complied with the terms and conditions of the contract on account of which said note was given, and thereupon the said Land Company brought suit against the said Belt Company, and such proceedings were had in said suit that judgment was rendered against the Belt Company for the amount due on said note, and afterward the complainants, as receivers of the said Belt Company, paid the same, but this defendant states that said judgment was not rendered nor was it paid until long after the institution of this suit; that by reason of the premises the complainants are entitled to have credit upon their indebtedness to this defendant for the said sum of $5600, and this defendant is willing that complainants should have such credit; this defendant denies, however, that the said Belt Company ever paid to this defendant the sum of $5600 in cash on account of said note or any other sum on said account, but states that said item of $5600, charged by this defendant against the Belt Company was a mere charge and was made for the reason that this defendant had guaranteed said note and had become liable thereon, and it transpiring subsequent to the bringing of this suit that the said Belt Company has discharged its own liability on said note said charge so made by this defendant, though properly made at the time, should now be credited upon the indebtedness owing by the said Belt Company to this defendant.

105. In answer to paragraph 14 on page 71 of said amended ancillary bill, this defendant states that it is true that on or about November, 1899, a judgment was rendered against the Belt Company for the sum of $5000 in favor of one Zumwault in a suit brought by him to recover for personal injury sustained by him; that it is true that the Belt Company appealed said cause to the Supreme Court of Missouri, and gave an appeal bond, as required by law, and that this defendant at the request of the Belt Company, became surety on said appeal bond and that to indemnify this defendant for its liability

on said bond the Belt Company deposited with this defendant the sum of $5000; that afterwards such proceedings were had that the said judgment and said suit was on the 19th day of May, 1903, and long after the institution of this suit, reversed without being remanded, and that thereupon the liability of this defendant on said bond ceased; this defendant denies that it has refused since the re-
426 versal of said cause to account for or pay over to said Belt Company or its receivers the said sum of $5000, but on the contrary states that this defendant has at all times been willing, since the reversal of said cause, that the said receivers of said Belt Company should have credit on their indebtedness to this defendant for the said sum of $5000, and this defendant denies that said receivers are entitled to any interest on the said sum of $5000, no agreement having been made by the parties to the transaction that any interest should be paid by defendant thereon, and neither of said parties intending that any such interest should be paid.

106. In answer to paragraph 15 on page 71 of said amended ancillary bill this defendant denies it was its habit in the disposition of securities of the Belt Company or any of its constituent companies to make sale of said securities at such prices as this defendant should decide upon, or that when such sale was made to credit the said companies with a less amount than was received by this defendant, or that it was the habit of practice of this defendant to report to said companies that such sales had been made for a less amount than was actually received, but on the contrary this defendant states that no sales were made by it for the account of said companies of any of said securities except at prices previously agreed upon with the said companies, and this defendant denies that it in any instance negotiated for the sale of any securities, and after finding the price at which it could dispose of the same purchased such securities itself from the said companies, and denies that any such transactions ever took place, and denies that this defendant ever made any profit through such transactions; on the contrary, this defendant states that no securities were purchased by it from the said companies or either of them, except at prices openly and fairly agreed upon between it and the said companies, and that said prices were usually much higher than the prices at which said companies were selling said securities to other persons.

107. This defendant in answer to paragraphs 16, 17 and 18 on pages 72 to 74, inclusive, of said amended ancillary bill, denies that at any of the times therein mentioned the Belt Company was insolvent, and denies that this defendant at any time caused the said Belt Company to declare any Dividend, but on the contrary states that the said Belt Company at all of said times was managed and controlled solely by its own adult stockholders, officers and directors, and that defendant had nothing to do with the declaration of said dividend; this defendant further denies that at the time said dividends were declared it owned a large amount of stock of the said
427 Belt Company, but on the contrary states that the amount of stock at such times owned by this defendant was comparatively insignificant, and that there is no reason in law or in equity

why the Belt Company should not have paid its own dividends out of its own funds; this defendant states that there is no reason in law or in equity why the dividends of the said Belt Company should have been paid out of the funds of this defendant.

108. This defendant in answer to paragraph 19 on page 74 to said amended ancillary bill, denies that it caused the Union Terminal Company to execute its bonds in the sum of $2,000,000 or in any other sum; denies that it caused the said Union Company to secure the said bonds by mortgage; denies that it caused the Union Company to sell bonds or any of them to the Belt Company; denies that it caused the said Belt Company to sell any of said bonds to this defendant; denies that it wrongfully sold any of said bonds to anybody; denies that this defendant caused the Belt Company to guarantee the payment of said bonds of the Union Company; denies that it caused the Belt Company to pay any interest on the bonds of the Union Company; this defendant admits, however, that it purchased more than 500 of said Union Company bonds from the Belt Company and states that it paid the said Belt Company for said bonds the par value thereof or 100 cents on the dollar, which was far in excess of what the said bonds were worth, and this defendant admits that it purchased other bonds of the said Union Company from the said Belt Company at prices ranging from $800 to $950 per bond, the par value of which was $1000 per bond, and that the prices paid by this defendant to the said Belt Company were far more than the said bonds were worth.

109. In answer to paragraph 21 on page 75 of said amended bill, this defendant states that the charge therein referred to, as having been made against the Belt Company, was on account of money advanced for the said Belt Company and was made with the full knowledge, consent and approval of the Belt Company at the time and that said charge was a proper charge.

110. In answer to paragraph 22 on page 76 of said amended ancillary bill, this defendant denies that it caused the incorporation of the Fruit Auction and Cold Storage Company; states that said Company was organized at the instance and request of said Belt Company and for its benefit; states that said company was organized for
428 the purpose of increasing the freight traffic on the line of the said Belt Railroad Company; that for this purpose said company established a warehouse and trading room on the line of said Belt Company and that at said trading room commission merchants, dealers in produce and fruit, conducted an exchange, and that at said warehouse shipments of fruit and produce were received by means of the line of the said Belt Company, and that by reason thereof the said Belt Company derived a large revenue through the diversion of shipments of fruit and produce from other lines to its line, and that said company and its operations were conducted solely for the benefit of the said Belt Company; that at the request of the said Belt Company this defendant advanced moneys to the said Fruit Auction Company and that to reimburse this defendant for the advancements so made, at the request and for the benefit of the Belt Company and not otherwise, the Belt Company transferred

to this defendant 286 shares of stock of the Belt Company, but this defendant denies that said shares of stock were of the value of $6290, but on the contrary states that said stock had little, if any, value at that time.

111. In answer to paragraph 23 on page 76 of said amended ancillary bill, this defendant states that it is true that it made charges against the Belt Company aggregating the sum of $6500 on the dates stated in said bill, but states that said charges were made because this defendant on said dates, at the instance and request of the Belt Company, paid drafts aggregating said sum of $6500, which drafts had been drawn on the said Belt Company and that said drafts were for the obligations of the said Belt Company, and this defendant, having paid the same, was entitled both in law and in equity to charge the amount thereof to the Belt Company, and this defendant states that if the said Belt Company lost any money in speculation there is no reason in law or in equity why this defendant should pay such losses; that all of such charges were fully known to, ratified and acquiesced in by the said Belt Company, its officers and directors, and complainants are now estopped from questioning the same.

112. In answer to paragraphs 24 and 25 on page 77 of said amended ancillary bill, this defendant again denies that it at any time appropriated or converted to its own use any stock of the Belt Company or the Union Company or of any other company.

113. In answer to paragraph 26 on page 78 of said amended ancillary bill, this defendant states that it has already hereinabove fully answered the same, and again denies that it constructed the said Air Line but states that same was constructed by the said Construction Company; that when the said Construction Company delivered said road to the said Air Line, to wit, in the year 1892, the
429 Construction Company turned over to the Air Line all of its books of account showing in detail the cost of the said Air Line, and the said books of account have ever since been in the possession of the said Air Line, and the said Belt Company and their receivers, and that all the facts and circumstances surrounding the transactions of the said Air Line and the cost thereof were fully known to the stockholders and directors of the Air Line and the Belt Company at the time the said line was accepted from the Construction Company, and complainants are now estopped from complaining of the result of such contract, and this defendant again denies that it made any profit on the said construction contract, and avers that it had nothing to do with the said Construction Company except as a banking institution, selling the stocks and bonds received by the Construction Company in payment of its work for which stocks and bonds this defendant has fully accounted many years ago.

114. In answer to paragraph 27 on page 78 of said amended ancillary bill, defendant states that the Northern Townsite Company was a corporation organized for the purpose of buying and selling and otherwise disposing of land, particularly lots in certain townsites located on the line of the said Northern Railroad and that the said Belt Company and defendant and others were stockholders of said Townsite Company; that the only lands in which the said

Townsite Company had or claimed to have any interest were the lands upon which were situated two townsites, one called Trimble and one called Braley—and that these lands were bought and paid for wholly by the said Townsite Company; that there were other lands standing in the name of the Townsite Company which had been paid for wholly by the said Belt Company, but the said Townsite Company at no time claimed to have any interest in the said lands paid for by the Belt Company as aforesaid. The way it came about that the said Townsite Company had lands standing in its name which were owned entirely by the Belt Company, was as follows and not otherwise: The Belt Company under and by virtue of its Construction contract with the said Northern Company, was under a contract duty to furnish right-of-way for the Northern Company, and the right-of-way agent of the Belt Company, in acquiring such right-of-way, frequently found it expedient or necessary to buy a whole tract of land upon which said right-of-way was to be located and which tract of land was much larger than was needed for right-of-way or depot purposes and the title of all of said land over and above the amount necessary for right-of-way and depot purposes, was, by the Belt Company for its own convenience and for its own purposes, put, temporarily, in the name of the said Townsite Company, and the portion of
430 said land which was needed by the said Northern Company for right-of-way, was by the said Townsite Company, upon request of the Belt Company, deeded to the said Northern Company, but the Townsite Company at no time claimed to have any interest in any lands which had been bought and wholly paid for by the said Belt Company; its business was confined solely to the selling of lots in the said townsites which had been bought and paid for wholly by the said Townsite Company, and that as to the lands which had been so bought and paid for wholly by the Belt Company, the Belt Company treated the same as its own and collected the rents and profits thereof, none of said rents and profits being collected by the said Townsite Company; that none of said lands exclusive of said right-of-way, the title to which was put by the Belt Company in the name of the Townsite Company, was needed for right-of-way or railroad purposes, but was held and owned by the said Belt Company in the manner aforesaid, for the purpose of dealing in real estate and for the purpose of making a profit thereby; that the Townsite Company held the title of said lands exclusive of said townsites, wholly for the convenience and accommodation of said Belt Company, and at all times stood ready to convey the same to the Belt Company or to such other person or corporation as the said Belt Company might direct. Defendant denies that the said Belt Company was the only stockholder of the said Townsite Company, but on the contrary states that other persons and corporations were also stockholders of the said Townsite Company and contributed largely to the purchase price of said townsite lands; and defendant denies that the said Townsite lands are in equity the lands of the Belt Company, but said lands are the property of the said Townsite Company and complainants are

not entitled to any credit upon their indebtedness to defendant by reason of the transactions of the said Townsite Company or by reason of the other matters and things set forth in said amended bill. It is true that defendant at the request of the said Townsite Company, from time to time, sold through its land department certain lots and parcels of land in the said townsites of the said company and that it charged a commission therefor, as it had a right to do, and said commission was fully agreed upon between the members to the transaction and was fair and reasonable (150).

115. Defendant denies that it at all times, or at any time dominated or controlled the said townsite company, but states that said townsite company was dominated and controlled by its own officers, stockholders and directors; and defendant denies that it caused the Belt Company to have the title to any of its lands taken in the name of the said Townsite Company, but on the contrary states
431 that anything that was done in that behalf was done as the free act and deed of the said Belt Company.

116. In answer to paragraph 28 on page 80 of said amended ancillary bill, this defendant denies that it caused the Belt Company to purchase locomotives No. 51 and 52, therein mentioned, or any other locomotives, or that it ever caused the Belt Company to purchase anything, but on the contrary states that whatever the Belt Company did in that behalf it did of its own free will and accord, and this defendant denies that it made any charge against the said Belt Company for rental or otherwise except such as was justly due from the said Belt Company, and this defendant states that said charge has been fully settled by the Belt Company many years ago, and complainants are now estopped from questioning the same.

117. This defendant in answer to paragraph 29 on page 81 of said amended ancillary bill, denies that on or about July 1, 1898, or at any other time it caused the Belt Company to lease from the Second Street Company the lots in said bill described or any other lots, but on the contrary states that if any such lease was made it was made by the proper officers, directors and stockholders of the Belt Company, who were all of sound mind and able to manage their own affairs, and this defendant denies that it caused the Belt Company to execute a lease to all or any of said land to the Wells, Fargo Express Company, and this defendant denies that the said Second Street Company was one of the auxiliary companies of this defendant, and this defendant denies that it at all times or at any other time dominated or controlled the said Second Street Company, and this defendant states that whatever leases or contracts were made between the said Belt Company, Second Street Company and the said Express Company, were made in the ordinary course of business between said companies, and this defendant had no connection whatsoever therewith.

118. As to so much of the said amended ancillary bill as seeks an account of the money, property or effects of the said Belt, Union, Air Line, Consolidated, Suburban, Kansas City Terminal Construction, Elevator, Improvement, Townsite or Northern Companies, coming into the hands of this defendant prior to the 6th day of

September, 1895, or that seeks a satisfaction for or in respect of any money or property received by this defendant for or on account of any of the above named companies or with respect to any of the matters and things set forth in the said amended ancillary bill as having taken place or transpired prior to the said date,
432 this defendant says that all of the said matters and things pretended to have transpired, and all of the said money, property and effects pretended to have been received by this defendant, if any such were received, transpired and were received by this defendant more than five years before the commencement of this action or any action whatsoever, and that if the said complainants in the said amended ancillary bill had any cause of action or suit against this defendant for or concerning any of the said matters, which this defendant does not admit, that such cause of action or suit did not accrue or arise within five (5) years before the said amended ancillary bill or the said original bill herein was filed or this defendant was served with process, nor did this defendant at any time within five (5) years before the said bills were exhibited or process sued out against this defendant, promise or agree to come to any account or make satisfaction or agree to pay any sum or sums of money for or by reason of any of the said matters, nor was there any occasion for it so to do; and that by a certain Act of the General Assembly of the State of Missouri, for the limitation of actions and suits at law, it was enacted as is shown by Sections 6773, 6774 and 6775, of the Revised Statutes of the State of Missouri, for the year 1889, as follows, to-wit:

SEC. 6673. "Civil actions, other than those for the recovery of real property can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued."

SEC. 6774. "Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; third, actions for relief, not herein otherwise provided for."

SEC. 6775. "Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 6774, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for recovery of specific personal property, or for any other injury to the person or rights *or* an-
433 other, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued

until the discovery by the aggrieved party at any time within ten years, of the facts constituting the fraud."

The defendant states that the statutes have been in force during the whole time in which the said matters set forth in said amended ancillary bill are pretended to have transpired and ever since the said pretended causes of action are alleged to have accrued; and this defendant pleads the several matters aforesaid in bar to so much of the said complainant's said demands as aforesaid and prays the judgment of this Honorable Court thereon.

119. For further plea this defendant says ever since defendant had any dealings of any kind with the said Kansas City Terminal Construction, Fruit Auction, Belt, Union, Suburban, Air Line, Consolidated, Northern Elevator, Townsite *or* Improvement Companies, the said Belt Company and all of said companies have had full knowledge of all the facts and circumstances in connection with the said dealings and in connection with the disposition made of the stocks and bonds of the said companies or any of them and of the organization and management of the said companies and of the condition of their property and assets and of all the pretended acts and doings of this defendant in connection therewith, if any such acts were done; and that the said companies, including the said Belt Company, have had full knowledge of all such facts and circumstances in connection with said transactions ever since the same were had and done, if any such transactions took place; and that the said Belt Company and the other companies above named have taken no steps to enforce any rights which it had or has or claims to have, arising out of such transactions and that the said Belt Company and the other companies above named and the complainants in the said amended ancillary bill have been guilty of laches in the premises and should not now be permitted to come into a court of equity and assert any claim arising out of said transactions or to question the same, and defendant craves the same benefit from this defense as if it had formally pleaded the same in bar of said amended ancillary bill or had demurred thereto.

120. As to so much and such part of the said amended ancillary bill as seeks an account of and concerning the dealings and transactions therein alleged to have taken place between this defendant and any of the other companies therein named, this defendant says that long prior to the filing of the said bills of complaint
434 herein, from time to time and at least once in each and every month during the whole time that this defendant had any dealings with the said Suburban, Belt, Union, Air Line, Consolidated, or any of the other companies therein mentioned, this defendant caused to be exhibited to the said companies with which said dealings were had, a full, complete and correct statement in writing, of the accounts between it and the said companies or any of them, counterparts of each item of which were delivered to the said companies respectively, of all sums of money, and all property which this defendant had before that time, by the order and direction and for the use of the said companies received and of all manner of things thereunto relating or at any time prior thereto

depending between this defendant and the said companies, and in respect whereof the said bills of complaint have since been filed; and the said companies, through their proper officers, after a strict examination of the said accounts and every item and particular thereof, which accounts this defendant avers to have been true and just did approve and allow the same and did pay to this defendant in whole or in part the balances shown to be due this defendant, either in cash or by their promissory notes duly executed and delivered, or did agree to pay the said balances to this defendant, as the case might have been; and that from time to time, prior to the filing of said bills of complaint, each and every matter and thing complained of in the said amended ancillary bill was settled by the said Belt Company, either in cash or by the execution by it to defendant of notes evidencing the indebtedness shown to have been due defendant from said Belt Company by the said statements, and that in the said indebtedness were included, all and singular, the said matters complained of in the said amended ancillary bill, and the said notes were executed by the said Belt Company with full knowledge on the part of its officers and directors of the facts and circumstances from which said indebtedness arose, and that each and all of the matters aforesaid complained of in the said amended ancillary bill were many years ago and long prior to the commencement of this suit, fully settled and adjusted between defendant and the said Belt Company through the execution by the said Belt Company from time to time of t- notes given in part payment of the accounts so exhibited by the defendant to the Belt Company as aforesaid and that said notes have long since been paid and settled and that at the time said notes were executed to defendant the stockholders and officers and directors of the Belt Company and of all the other companies with whom any such dealings were had, were fully informed as to all the matters and things on account of which said notes were given and that the notes executed by the said Belt Company and which are now held by defendant, are notes evidencing the indebtedness of the Belt Company
435 arising long after the notes first hereinbefore referred to were paid and settled; and the action of the officers and directors of the Belt Company and the other companies hereinabove named in executing said notes, was afterward fully ratified and confirmed by the stock-holders of the said companies; and this defendant pleads the several matters aforesaid in bar of so much of the said amended ancillary — as prays an account herein and defendant prays the judgment of this Honorable Court thereon.

121. This defendant further states that long prior to the commencement of this action there was a complete accord and satisfaction between this defendant and all of the companies hereinabove named with respect to all of the matters and things set forth in the said amended ancillary bill, excepting only the matters set forth in paragraphs 104 and 105 hereof, which matters and things relate solely to facts and circumstances arising since the institution of this suit, and for which the complainants were not entitled to have credit on their

indebtedness to respondent until long after the said bills of complainants were exhibited.

122. Further answering, defendant states that from and after the first day of January, 1898, continuously up until the 1st day of April, 1900, defendant at sundry and frequent times loaned and advanced to the said Belt Company at its instance and request large sums of money, aggregating more than a half million dollars, for the purpose of making necessary improvements in the said Belt Company's road, and that the said Belt Company used the said money for its own purposes; that the said Belt Company from time to time repaid to this defendant some of the money so loaned and advanced by it as aforesaid, but left unpaid a very large portion thereof, for a part of which balance promissory notes, hereinafter described, were duly executed and delivered by the Belt Company to this defendant and to secure which certain stocks, bonds and property owned by the Belt Company, and hereinafter described, were pledged as collateral security; that the said Belt Company, long after any officer of this defendant had ceased to have any connection with the said Belt Company, subsequently recognized said indebtedness, evidenced by said notes, as just and valid and subsequently promised to pay the same; that during the month of June, 1900, the Belt Company at a time when no officer of this defendant had any connection therewith paid, on account of some of the said promissory notes, large sums of money which were duly credited thereon, as is hereinafter shown, and promised to pay the remainder due on said notes and the other indebtedness hereinafter described and owing to this defendant.

436 123. That this defendant now owns and holds the following promissory notes, duly executed and delivered as aforesaid to this defendant by the said Belt Company, all of which notes are long past due and unpaid, to-wit:

One note dated March 31, 1899, due July 2, 1899, for $50,000.00, with interest from date at the rate of six per cent per annum, on which there has been paid and credited on June 14, 1900, $12,500.00.

One note dated July 26, 1899, due on demand for $203,900.00, with interest at 6 per cent per annum from date, upon which there was paid and credited on June 11, 1900, $9,996.65.

One note dated October 23, 1899, due on demand, for $7,162.40 with interest at 6 per cent per annum from date.

One note dated November 7, 1899, due January 8, 1900, for $50,000.00 with interest after maturity at 8 per cent per annum, upon which there was paid and credited June 14, 1900, $12,500.00.

One note dated January 25, 1900, due May 25, 1900, for $25,000.00, with interest after maturity at 6 per cent per annum; interest paid to September 1, 1901.

One note dated February 8, 1900, due May 12, 1900, for $109,500.00 with interest from maturity at 8 per cent per annum, on which there was paid and credited October 23, 1900, as proceeds of sale of collateral made by the National Bank of Commerce, $110,250.00 leaving a balance due on October 23, 1900, of $3,240.66.

One note dated September 21, 1899, for $23,056.48, with interest after date at 8 per cent per annum.

One note dated February 9, 1900, due June 11, 1900, for $10,400.00, with interest from maturity at 6 per cent per annum.

124. In addition to above described promissory notes the Belt Company is justly indebted to this defendant on an open book account, arising subsequent to the execution by the said Belt Company of the said notes, and arising on account of money advanced at various times and in sundry sums by this defendant to, and paid out for the use and benefit of the said Belt Company, at its special instance and request, parts of which said money the said Belt Company, from time to time, repaid and was duly credited therewith, all of which sums of money, so advanced and paid out for the use and benefit of the said Belt Company, together with the payments and credits thereon, are truly set out and appear from the
437 bill of items hereto annexed and marked "Exhibit A," which bill of items shows the balance due to this defendant on said account on June 4th, 1900, as being $43,713.32.

125. And this defendant states that the stocks, bonds and property, which were assigned to it by the said Belt Company as collateral security for the said indebtedness, are as follows, towit:

10,000 shares of the capital stock of the Union Company.

4,997 shares of capital stock of the Union Company.

4,994 shares of capital stock of the Air Line.

1,120 shares of the capital stock of the Central Improvement Company.

439 shares of stock of the Northern Townsite Company.

425 shares of stock of the Missouri Elevator and Terminal Company.

25 shares of stock of the Fairmount Amusement Company.

13,920 shares of stock of the Kansas City Northern and Connecting Railroad Company.

67 9-10 second mortgage bonds of the said Northern Connecting Company.

23 first mortgage bonds of the Kansas City and Northern Connecting Railroad Company.

26 first mortgage bonds of the Kansas City Northern and Connecting Railroad Company.

315 first mortgage bonds of the Kansas City Northern and Connecting Railroad Company, also,

A certain account and claim of the Belt Company against the Kansas City, Pittsburg & Gulf Railroad Company, consisting of charges for material furnished and labor performed, switching charges and terminal rentals, due from the said Gulf Railroad Company to the said Belt Company, which account on its face amounts to $132,805.44, also,

343 1940-2240 tons of steel rails, also,

16 1712-2000 tons of fastenings.

126. And defendant states that the above enumerated promissory notes executed by the said Belt Company and now held by this defendant, were executed by the proper officers of the said Belt Com-

pany by authority expressly conferred upon said officers at
438 meetings of the Board of Directors of the said Belt Company duly convened and held, and that afterward, on February first, 1900, at a meeting of the Board of Directors of the said Belt Company duly convened and held, a majority of the directors being present, a resolution was regularly adopted ratifying the action of said officers in executing said notes and in delivering the said property to defendant as collateral security therefor.

127. This defendant states that it has heretofore sold certain of said collateral security with the knowledge and consent of the said Belt Company and has applied the same to the payment of the said promissory notes, and that as to the remaining collateral security this defendant has been temporarily enjoined, at the suit of the Cambria Steel Company in the above entitled original cause, from selling or otherwise subjecting certain of the above named stocks and bonds, so held by this defendant as collateral security, toward the payment of the indebtedness of the Belt Company to this defendant, but that certain of said collateral security has, under the order of this court, been sold by this defendant and the proceeds of certain sales are now held by this defendant in accordance with the order of this court to await the final determination of this cause. As to the said claim and account of the Belt Company against the said Gulf Company, asigned to and held by this defendant as collateral security for the said indebtdeness, this defendant states that said claim and account has been made by this defendant the subject of an intervening petition in the suit of the State Trust Company, complainant, against said Gulf Company and others, defendants, filed in this court, and that the said intervention is still pending and undetermined.

128. As to the steel rails and fastenings, hereinabove mentioned, this defendant states, that notwithstanding the said Belt Company transferred and assigned the same to this defendant as collateral security as aforesaid, it afterward refused to actually deliver the same to this defendant and this defendant was therefore obliged to bring suit in replevin therefor, which suit was brought in the State Court of Jackson County, Missouri, and resulted in a judgment in favor of this defendant and that this defendant has sold the said steel rails and fastenings, and has applied the same toward the payment of the said open account thereby reducing the balance due on said open account to the sum of $31,809.49.

129. And this defendant again shows to the court that it has no interest in the property of the Central Improvement Company or of the said Amusement Company or of the said Missouri Elevator and Terminal Company, except that it holds certain stock of the
439 said companies as collateral security, as aforesaid, for the indebtedness due this defendant by the said Belt Company, and that it holds certain mortgage liens upon the property of the said Elevator Company.

130. And this defendant further states and shows that it has frequently heretofore made demand upon the said Belt Company and upon the complainants in the said amended ancillary bill, for the

payment of each and all of said promissory notes and said book account, and that this defendant on the 1st day of April, 1900, made special demand upon the said Belt Company for the payment of all of said promissory notes which are payable on demand, and also on that date made demand on the said Belt Company for the payment of the said open book account; that the said Belt Company has failed and refused to pay the said notes or account or any part thereof.

131. The defendant submits to the judgment of this Honorable Court and humbly insists that this suit is altogether unnecessary and vexatious and that even if complainants had been entitled to any such relief as is prayed by the said bill, the same might have been obtained by proceedings at law, but defendant says that a large sum of money has been due for a long time on account of said promissory notes and said open book account and now is justly due and owing to it from the said Belt Company and complainants and that during the whole of the transactions in the said bill mentioned, the said Belt Company has repeatedly acknowledged the accuracy of the accounts rendered by defendant to it and has treated the same as being, as in fact they were, and are settled accounts, and has treated the said notes and open book accounts as justly owing and due to defendant and defendant claims the same benefit from this defense, as if it had pleaded the same to the said bill.

132. All of which matters and things hereinbefore stated this defendant is ready to aver, maintain and prove as this honorable court may direct, and hereby prays that judgment may be rendered by this Honorable Court against the Kansas City Suburban Belt Railroad Company and the said complainants as its said receivers, in favor of this defendant, for the amount of each and all of the said promissory notes, together with interest thereon, and for the amount of the said open book account with interest thereon from the 1st day of April, 1900, and that this defendant may have judgment against the said Belt Company for any and all further sums of amounts that may be found due this defendant; that the court may by proper order protect and enforce the interest of this defendant in and to the stocks, bonds, accounts and property, so deposited with and held by defendant as collateral security as aforesaid, and that the said Belt Company and its said receivers
440 may be ordered and directed to pay to this defendant whatsoever sums of money this defendant may be found entitled to herein, and that this defendant also have judgment for its reasonable costs, charges and expenses in this behalf most wrongfully expended and sustained and for such other and further relief as to the court shall seem meet and just in the premises.

GUARDIAN TRUST COMPANY,
By HARRY S. MECARTNEY AND
J. C. ROSENBERGER,
Its Solicitors.

EXHIBIT A.

Kansas City Suburban Belt Railroad Company, Debtor, to Guardian Trust Company.

1899.				
Sept. 25.	To payment of draft of W. S. Taylor, dated Sept. 23, 1899, for payment of 20 coupons Union Termi. Ry., due Aug. 1, 1899.....	$500.00		
Sept. 26.	To payment draft of W. S. Taylor, dated Sept. 26, 1899, for payment of 40 coupons Union Termi. Ry., due Aug. 1, '99.....	1,000.00		
	To expressage on 65 coupons Union Termi. Ry. from New York to Philadelphia.....	.50		
	To proportion of Philadelphia office expense for month of August, 1899.....	4.50		
Sept. 27.	To interest on note for $25,000, dated Sept. 25, 1899, from that date to Jan. 25, 1900, 122 days at 6 per cent.....	508.33		
	To revenue stamps on note of $23,056.48 given by them to Trust Co., dated Sept. 21, 1899.....	4.62		
	To telegrams.....	2.38		
	To telegrams.....	.59		
Sept. 29.	To revenue stamps on note of $25,000 given to Trust Co., dated 9-25-99.....	5.00		
	To revenue stamps on note for $25,000 given First Nat. Bank, K. C.....	5.00		
	To payment of semi-annual interest, due Oct. 4, 1899, to Provident Life & Trust Co., on two notes of $5,000 each at 6 per cent, held by them, dated April 4, 1899.....	300.00		
Sept. 30.	To payment to Nat. Bank of Commerce for draft on New York remitted for coupon interest	40,000.00		
	By proceeds of sale of draft by K. C. Suburban Belt R. R. Co. at 30 days on J. de Goeijen, jr., for florins 100,000 draft endorsed by Trust Co., amount to apply as credit to above charge of $40,000.....	.....		$39,437.39
Oct. 3.	To revenue stamps on draft of J. de Goeijen, jr., and telegram regarding draft.....	19.56		
Oct. 3.	By collection from J. de Goeijen, jr., acct. interest on $80,333.33 for the month of September	.....		521.19
441				
Oct. 4.	To payment of 20 coupons Union Termi. Railway, due Aug. 1, 1899.....	500.00		
Oct. 10.	To revenue stamps on 13,920 shares stock K. C. & N. C. R. R. Co. transferred.....	279.40		
Oct. 11.	To clerical services, Oct., 1899.....	17.00		
	To funds deposited with Drexel & Co. for payment of coupons of Union Termi. Railway and Consolidated Termi. Ry. Co.....	1,000.00		
Oct. 14.	To telegrams.....	5.76		
Oct. 19.	To expressage N. Y. to Philadelphia, on 20 coupons Union Termi. Ry.....	.13		
Nov. 7.	To interest on note of $50,000, dated March 31, 1899, renewed by note maturing Jan. 9, 1900. Interest March 31, 1899, to Jan. 9, 1900, and 6 per cent.....	2,300.67		
Nov. 8.	By collection from J. de Goeijen, jr., of interest on $80,333.33, month of Oct., 1899..	.....		536.46

Nov. 29.	To interest on daily balances, September, 1899		37.22	
	To interest on daily balances, October, 1899.		22.74	
Dec. 1.	To interest on daily balances, November, 1899		33.35	
Dec. 6.	By collection from J. de Goeijen, jr., of interest on $89,333.33 for month of November, 1899		.....	521.10
1900.				
Jan. 2.	By proceeds of sale of draft by K. C. Suburban Belt R. R. on J. de Goeijen, jr., bearing endorsement of Trust Co., draft for florins 37,735.84, sold at 39%		.....	15,000.00
Jan. 2.	To drafts of Kuhn & Co. of London, dated Dec. 20, 1899, on Trust Co., as endorser, to take up drafts on J. de Goeijen, jr., Sept. 30, 1899, for $39,437.50 not paid by him, $41,000.00; less allowances by Kuhn & Co., acct. excess in exchange, $667.40		40,332.60	
Jan. 4.	By collection of interest from J. de Goeijen, jr., on $89,333.33, month of December, 1899		.....	538.48
Jan. 25.	To draft of Kuhn & Co., London, dated Jan. 12, 1900, on Trust Co., as endorser to take up draft on J. de Goeijen, jr., Jan. 2, 1900, not paid by him		15,000.00	
Feb. 2.	By cash on account		.....	3,245.13
May 17.	To clerical services, months of November and December, 1899, January, February and March, 1900, five months, at $17.00		85.00	
June 4.	To interest on daily balances:			
	Month of Dec., 1899	$34.95		
	Month of Jan., 1900	200.65		
	Month of Feb., 1900	224.36		
	Month of Mar., 1900	254.01		
			713.97	
Sept. 26.	By net proceeds of sale of rails and fastenings turned over to Trust Co. under bill of sale: 343 1940|2240 tons rails at $33.00, $11,347.58; 16 1712|2000 tons fastenings at $33.00, $556.25. Total $11,903.83.			
	Less expenses: Premium paid on bond given in replevin suit, $300.00.			
	Commission paid A. G. Hay: 343 1940|2240 tons rails at 25c., $85.96.			
	16 1712|2000 tons fastenings at 25c., $4.21.			
	Loading cars, $17.85.			
	Demurrage on cars, $194.00.			
	Switching $81.25.			
	Expenses of A. J. Singer from Calcago to St. Louis, acct. sale, $87.50—$770.77		.....	11,133.06
			$102,744.34	$70,934.85
	Balance due Trust Co		.....	$31,809.49

442 Afterwards, to-wit, on the 7th day of August, 1905, the Answer of T. T. Crittenden, as Receiver of the Central Improvement Company, to the amended intervening petition of The Kansas City Southern Railway Company was filed. Said Answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 2468.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants; The Kansas City Southern Railway Company, Intervener.

Bill.

Answer of T. T. Crittenden, as Receiver of the Central Improvement Company, and Central Improvement Company to the Amended intervening Petition of the Kansas City Southern Railway Company.

The Central Improvement Company, one of the defendants in the above entitle cause, and T. T. Crittenden, as Receiver of the Central Improvement Company, defendants in the amended intervening petition of The Kansas City Southern Railway Company, for their separate answer to said amended intervening petition, answering, say:

These defendants admit that the intervenor is a corporation, duly organized and existing under the laws of the State of Missouri, as a railway corporation, and that it was incorporated according to law in March, 1900.

These defendants neither admit nor deny that the mortgages or deeds of trust executed and delived by The Kansas City Suburban Belt Railroad Company, Consolidated Terminal Railway Company, Kansas City & Independence Air Line, Union Terminal Railroad Company, and the Kansas City, Pittsburg & Gulf Railroad Company, described in the said amended intervening petition of The Kansas City Southern Railway Company, recited that the same should be a first mortgage and paramount lien upon the railroad of said companies, and upon all the properties and property rights of the said Companies, of every name, nature and description, then

held or that might thereafter be acquired including all the
443 privileges and franchises thereto appertaining, but ask that proof of the same be made.

These defendants, further answering, neither admit nor deny that by virtue of the foreclosure sales and the purchase thereat, by The Kansas City Southern Railway Company, described in said amended intervening petition, the said The Kansas City Southern Railway Company acquired title to any of the property of said railroad companies acquired after the execution and delivery of said mortgages or deeds of trust described in said amended intervening petition, but ask that proof of the same be made.

These defendants further answering state that they are not sufficiently informed to answer even upon information and belief as to whether the claims of the Cambria Steel Company and Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and the Kansas City Suburban Belt Railroad company are subordinate and inferior to the claims of The Kansas City Southern Railway Company, described in the said amended intervening petition; and further answering, these defendants, upon information and belief aver that the matters and things stated and set out in the said amended intervening petition, except as to those matters hereinbefore specifically answered, are true.

All of which matters and things hereinbefore stated these defendants are ready to aver, maintain and prove, as this Honorable Court may direct.

Wherefore, defendants pray that the amended intervening petition of The Kansas City Southern Railway Company may be dismissed, as to these defendants, and for their costs in this behalf most wrongfully expressed.

T. B. BUCKNER,
Solicitor for Defendants.

Afterwards, to-wit, on the 9th day of June, 1904, the Answer of The Central Improvement Company and T. T. Crittenden, its Receiver to the Amended and Supplemental Ancillary Bill of Complaint of Stuart R. Knott, and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and The Kansas City Suburban Belt Railroad Company was filed. Said Answer is in words and figures as follows:

444 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,
vs.
CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company and Fairmount Amusement Company, Defendants

Ancillary Bill.

Answer of the Central Improvement Company and T. T. Crittenden, Its Receiver, to the Amended and Supplemental Ancillary Bill of Complaint of Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and the Kansas City Suburban Belt Railroad Company.

These defendants now and at all times hereafter saving to themselves all and all manner of benefit of exceptions or otherwise than can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

1. These defendants, the Central Improvement Company and T. T. Crittenden, its Receiver, do not know and cannot set forth as their belief or otherwise whether or not the allegations in said Amended and Supplemental Ancillary Bill of Complaint are true (except as to those parts which they hereinafter specifically admit) but of the truth thereof require strict proof to be made.

445 2. The defendants admit that the Kansas City Suburban Belt Railroad Company, the Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Northern Townsite Company, Fairmount Amusement Company, Central Improvement

Company, Cambria Steel Company are corporations organized and existing under and by virtue of the laws of the State of Missouri and citizens and residents of said state and each of them having their principal office or place of business in Kansas City, Missouri, and each of them being an inhabitant of the Western Division of the Western District of Missouri, except the Cambria Steel Company which is a corporation duly created and existing under the laws of the State of Pennsylvania and a non-resident of the State of Missouri, and the Union Terminal Railroad Company which is a corporation duly created and existing under the laws of the State of Kansas and a non-resident of the State of Missouri.

3. These defendants further admit all the facts and matters alleged and set forth on pages 1, 2, 3, 4, and 5 of the Amended and Supplemental Ancillary Bill of Complaint; that the Kansas City Pittsburg and Gulf Railroad Company was a railroad corporation organized under the laws of the State of Missouri and that for the purpose of acquiring the funds with which to construct the said railroad the said Railroad Company issued its first mortgage to secure the issue of its first mortgage bonds; that on April 1, 1899, there were issued and outstanding said bonds to the amount of twenty-three million dollars ($23,000,000.00) and that at that time default was made in the payment of the installment of interest due on the said bonds and a bill for the foreclosure thereof was forthwith filed and receivers for said Railroad Company were appointed and thereafter such proceedings were had that said Railroad Company was sold under foreclosure decree.

4. These defendants admit that the Central Improvement Company was incorporated with a capital stock of two hundred thousand dollars ($200,000.00) of which one hundred forty-one thousand five hundred dollars ($141,500.00) par value has been issued; that said company was organized for the purpose of holding the title to various pieces of real estate in Kansas City, Missouri, and elsewhere purchased for the use and benefit of the Kansas City Suburban Belt Railroad Company, hereinafter for convenience referred to as the Belt Company, and the Kansas City, Pittsburg & Gulf Railroad Company and other companies; that certain pieces of such real
446 estate are used by and are vitally necessary in the operation of the railroad of the Belt Company and are held in the name of the Central Improvement Company; that the total consideration for all of the property acquired by this defendant company was furnished or advanced by the Belt Company or the Kansas City, Pittsburg & Gulf Railroad Company; the title to all of such property being taken in the name of the Central Improvement Company; that certain tracts of land so acquired have since been sold by this defendant company or by its receivers, and that $8,315.72 *dollars*, resulting from such sales, are now in the hands of T. T. Crittenden, as Receiver of this defendant company; that the title to the following described land acquired by this defendant Company as above described, all of which is of vital importance and necessary to and for the operation of the railroad of the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company, is held in the name of

this defendant company, and is, together with the said $8,315.72 *dollars,* now in the possession of T. T. Crittenden as Receiver of this defendant Company:

Real Estate Purchase No. 1:

First Street and Cheyenne Avenue, Kansas City, Kansas.

Commencing at a point in the South line of Cheyenne Avenue, in Kansas City, Kansas, 30 feet West of the North and South ½ Section line through the center of Section 22, Township 11, Range 25; thence West along said South line of Cheyenne Avenue 37.8 feet; thence in a Southwest direction on a straight line forming an angle of 56′ 9″ with said South line of Cheyenne Avenue, 680 feet more or less, to the Northerly boundary line of a tract of land owned by the Chicago, Milwaukee & St. Paul Railway Co.; thence in a northeasterly direction along said Northerly boundary line (the same being a curved line to the left 575 feet, more or less, to a point in the West line of a 60 foot street (the center line of which street is the North and South ½ Section line through the center of Section 22, Township 11, Range 25); thence along the West line of said street 197 feet to the place of beginning and containing an area of 1.65 acres.

Real Estate Purchase No. 2:

20th Street and the Kansas River, in Kansas City, Kansas.

A certain strip or piece of land situated partly in the Southeast quarter of Section 21, and partly in the Southwest quarter
447 of Section 22, Township 11, Range 25, in Wyandotte County, Kansas, and bounded and described as follows: Beginning at a point in the South line of the right of way of the Union Terminal Railroad, as said right of way is described in the deed to the Union Terminal Railroad Comapny, recorded in book 204, at page 418, and following, of the Real Estate Records of Wyandotte County, Kansas, where said South line would be intersected by the prolongation or extension Southward of the East line of Tenth Street (formerly 20th Street), in Kansas City, Kansas; thence in an Easterly direction along said line of right of way 2,178 feet; thence South 208.3 feet; thence in a Westerly direction on a line parallel to the South line of said right of way of the Union Terminal Railroad, and at the uniform distance of 200 feet from same, 2,178 feet to a point in the East line, extended Southward, of the aforesaid 10th Street, in Kansas City, Kansas; thence North along said line 200 feet to place of beginning, containing 10 acres. All in Wyandotte County, Kansas.

Real Estate Purchase No. 3:

Near Railroad Street, Kansas City, Kansas.

A certain lot or piece of land situated in the Northeast quarter of Section 22, Township 11, Range 25, in Wyandotte County,

Kansas, bounded and described as follows: Beginning at a point in the East line of Railroad Street, in Kansas City, Kansas, 1336.85 feet in a Southwesterly direction (measured on the line of said street) from the South line of Osage avenue; thence East along the South line of a tract of land formerly owned by the Western Dressed Beef Company, 270 feet, more or less, to a point in the West line of right of way of the Union Terminal Railroad; thence in a Southwesterly direction along said line of right of way, to a point where same intersects or coincides with the East line of Railroad street; thence in a Northeasterly direction along the line of said street 390 feet, more or less, to place of beginning, and containing an area of 0.48 acres. All in Wyandotte County, Kansas.

Real Estate Purchase No. 4.

Railroad Street and Mulvane Avenue, Argentine, Kansas.

Beginning at a point in the West line of the Northeast quarter of the Southwest quarter Section 20, Township 11, Range 26, Wyandotte County, Kansas, 854 feet South of the Northwest corner of same, said point being also the southwest corner of 448 land of John O'Connor; thence North 414 feet to a point in the South line of right of way of the Union Terminal Railroad Company; thence South 71 degrees 40 minutes East along said line 603.5 feet to a point in the West line of land of Morris O'Connor; thence South along same 161.4 feet; thence South 63 degree 37' West 139.5 feet to a point in the South line of land of said John O'Connor; thence West along said South line 447.58 to place of beginning, and containing 4.1 acres. All in Wyandotte County, Kansas.

Real Estate Purchase No. 6:

West 8th & Santa Fe Streets, Kansas City, Mo.

All of Lots 1, 2, 3, 4, 5, 6, 7, Block 14 West Kansas Addition No. 1, to City of Kansas (now Kansas City, Missouri); also commencing at the northwest corner of said lot, thence running due North to the Missouri River; thence East following the meanderings of said River to a point due North of the N. E. corner of said lot 5; thence due South to the N. E. corner of said Lot 5; thence West to place of beginning; also commencing at the Southwest corner of Lot 11, in said Block 14, thence north along the East line of Santa Fe street 86.67 feet to N. W. corner of Lot 8, in said block 14; thence East along the North line of said lot 8, 98.2 feet; thence Southwest making an interior angle with the last described line of 50 degrees 35' and running 112.2 feet to the South line of Lot 11, being the North line of Eighth street at a point on said line 26.2 feet East of the East line of Santa Fe street; thence West along the South line of Lot 11 and the North line of Eighth street 26.2 feet to place of beginning, subject to right of way of the Kansas City Suburban Belt Railroad. All in Jackson County, Missouri.

Real Estate Purchase No. 9:

Otis Street and Owen Avenue, Kansas City, Mo.

All of Lots numbered 1-45-46, in Block 2, in Modern Mutual Place, an addition to Kansas City, Missouri, as the same appears of record upon the recorded plat thereof, and so much of lots numbered 2 and 44 in Block 2, and so much of lots numbered 6, 7 and 8 in Block 1, in said Addition as lie N. & N. W. of a line parallel to and 20 feet South and S. E. of the center line of the most Southerly tract of the K. C. S. B. R. R. Co. or K. C. & Independence Air Line, as the same is now located across said lots, which said center line is described as follows:

449 Beginning at a point in the West line of Lot 8, in Block 1, of said Addition, 65/100 feet S. of the N. W. corner of said lot; thence in a Northeasterly direction on a line of a curve to the right of 550.8 feet radius, 210 feet more or less to a point in the W. line of lot 44, in Block 2, of said Addition 3.3 feet S. of the N. W. corner of said lot; thence continuing on said curve to the right having a radius of 550.8 feet 198.8 feet to a point in the E. line of Lot 1, in Block 2 of said Addition 2 1/10 feet south of the N. E. corner of said lot. All in Jackson County, Missouri.

Real Estate Purchase No. 10:

Highland Avenue and Front Street, Kansas City, Mo

All of Lots 31, 47 and 48 Hurck's Sub-Division of Guinotte Farm, as the same are marked and designated on the recorded plat thereof on file in the office of the Recorder of Deeds in and for the County of Jackson, State of Missouri, except such parts of said lots as lie in the Missouri River. All in Jackson County, Missouri.

Real Estate Purchase No. 11:

Commercial Street, Kansas City, Kansas.
13th and Myrtle Avenue, Kansas City, Kansas.

Lots 14, 15, 16, 17 and 18, Loomis' Riverside Addition, except such portion of said lots as lies South and West of The Kansas City Southern Railway Company (formerly the Union Terminal Railroad Company) right of way; Lots 25, 27 and 28, Clifton Place Addition, to Kansas City, Kansas; Lots 2, 3, 5, 31 & 32, Block "D," F. J. Baird's Addition to Armourdale, now a part of Kansas City, Kansas. All in Wyandotte County, Kansas.

Real Estate Purchase No. 12:

3rd and Washington Streets, Kansas City, Mo.

Lot 4, Block 5, Lykins Addition, Kansas City, Mo. All in Jackson County, Missouri.

Real Estate Purchase No. 13:

3rd and Washington Streets, Kansas City, Mo.

450 Lot 7, Block 4, Lykins' Addition, Kansas City, Mo. All in Jackson County, Missouri.

Real Estate Purchase No. 20:

9th & Fremont Streets, Centropolis, Mo.

Lot 21, Block 9 of Centropolis, Jackson County, Missouri.

Real Estate Purchase No. 21:

2nd & Wyandotte Streets, Kansas City, Missouri.

Lot 124, Block 12, Old Town, now Kansas City, Missouri.

Real Estate Purchase Nos. 22 and 23:

7th and Mulberry Streets, Kansas City, Mo.

A tract of land described by metes and bounds as follows: Beginning at the N. E. Corner of Lot 16 Block 16 in that part of Kansas City, Missouri, known as "Extension of West Kansas Addition No. 1"; thence west along the north line of said Block 16 72 feet, to the northwest corner of Lot 14 in said block; thence in a northerly direction on the prolongation or extension of the west line of said Lot 14 62.1 feet to a point 22 feet (measured at right angles) North of the center line of the main track of the Kansas City Suburban Belt R. R. Co., (now the Kansas City Southern R. R. Co.) as located and constructed upon the ground; thence in an easterly direction on a line parallel to the center line of said main track and at the uniform distance of 22 feet from said center line to a point in the northerly extension or prolongation of a line parallel to the east line of Lot 8 Block 15 in West Kansas Addition No. 1, thence South on said line to the northeast corner of Lot 8 of said Block 15; thence west to the point of beginning.

Also a certain lot or piece of land comprising parts of lots 1-2-3-4 and 5 in Block 15 in that part of Kansas City, Missouri, known as Extension of West Kansas Addition No. 1 and bounded and described as follows: Beginning at the Northwest corner of said Block thence East along the north line of same 99 feet more or less, to a point 6 feet (measured at right angles) north of the center line of the northerly switch track of the Kansas City Fort Scott and Memphis Railroad; thence in a Southwesterly di-
451 rection on a line parallel to said center line and at the uniform distance of six feet from same one hundred feet more or less, to a point in the east line of Mulberry street; thence North along said line 13 feet, more or less, to *to* the place of beginning, in Jackson County, Missouri.

Real Estate Purchase No. 24.

8th and Hickory Streets, Kansas City, Mo.

A certain lot or piece of land situated North and West of that part of Kansas City, Missouri, known as "Extension of West Kansas Addition No. One" and bounded and described as follows: Beginning at a point in the Northward extension of the East Line of Hickory Street Eight feet South of the center line of the Consolidated Terminal Railroad (now The Kansas City Southern Railway) as said road is located and constructed upon the ground, and six hundred and thirteen and six-tenths (613.6) feet North of the North line of Ninth Street; thence in a Southwesterly direction on a line parallel to the center line of said Kansas City Southern Railway Company's Railroad, and at the uniform distance of Eight (8) feet (at right angles) South of said line One Hundred and Ninety-two and eight-tenths (192.8) feet to a point in the Northern extension of the East line of Lot number Eight (8) in Block No. sixteen (16) of said Extension of West Kansas Addition No. 1; thence South along said line Fifty-five and nine tenths (55.9) feet to a point six feet North of the center line of the Kansas City, Fort Scott & Memphis Railroad Company's most Northerly main switch track; thence in a Southwesterly direction, on a line parallel to the center line of said Kansas City, Fort Scott & Memphis switch track, and at the uniform distance of six (6) feet North of said center line, One Hundred and Ninety-two and eight-tenths (192.8) feet to a point in the Northward extension of the East line of Hickory Street, five hundred and twenty-six (526) feet North of the North line of Ninth Street; thence North along said line Eighty-seven and six-tenths (87.6) feet to place of beginning, and containing 0.308 acres, more or less. All in Jackson County, Missouri.

Real Estate Purchase No. 27:

Ninth & Jefferson Streets, Kansas City, Mo.

First parcel—A triangular piece of ground in the Northwest corner of Block Three (3), Coates & Hopkins' Addition to the
452 City of Kansas (now Kansas City) bounded as follows; Beginning at a point on the West side of said Block Three (3) which is Sixteen (16) feet from the Northwest corner thereof, and running thence Northerly along said West side Sixteen (16) feet to said corner; thence Easterly along the North Side of Block Three (3) [*seventh*] (70) feet; thence Southwesterly to the place of beginning; containing about 560 square feet of 13/1000 of an acre.

Second parcel—A part of Block seven (7) in said Coates & Hopkins' Addition which is bounded as follows: Beginning at a point on the East side of said Block Seven (7), which is two hundred and Fifty-two and four-tenths (252-4/10) feet from the Northwest corner of Eighth & Henning Streets; thence Northerly Forty-six (46) feet along said East side to the Northeast corner of said Block seven

(7); thence Northwesterly along the Northerly side of Block seven (7) One Hundred Forty-four and Seven-tenths (144-7/10) feet to the Northwest corner thereof; thence South along the west side of said Block seven (7) 84 degrees and four minutes included angle Two Hundred Forty-four and Three-tenths (244-3/10) feet; thence Northeasterly 35 degrees 20 minutes included angle One Hundred Eighteen and one-tenth (118.10) feet; thence Northeasterly 187 degrees 15 minutes, included angle Sixty-seven and Five-tenths (67-5/10 feet; thence North-easterly 188 degrees 26 minutes, included angle, Sixty-eight and seven-tenths (68-7/10) feet to the point of beginning. Containing 21,215 square feet, or 487/1000 of an acre. All in Jackson County, Missouri.

Real Estate Purchase *Purchase* No. 29:

All that part of Lot 32, Hurck's Subdivision of Guinotte Farm between right of way of the K. C. S. B. R. R. and the Missouri River, including all accretions, if any, to said lot, or any part thereof. All in Jackson County, Missouri.

5. These defendants admit that on the eighth day of November, 1900, one Wash Adams was appointed Receiver of the Central Improvement Company; thereafter said Wash Adams resigned and T. T. Crittenden was duly appointed receiver as successor of Wash Adams, and said Crittenden since his appointment has held possession of the property of the Central Improvement Company, including the tracts of land above described; that neither the Belt Company nor the Kansas City, Pittsburg & Gulf Railroad Company has ever been reimbursed for the money and consideration so furnished defendants by them for the purchase of said property; that all of the above described property, including the tracts of land sold
453 or the proceeds derived from the sale thereof is the p-operty of the Belt Company or the Kansas City, Pittsburg & Gulf Railroad Company, unless it be the title has passed from said railroad companies by virtue of certain foreclosure sales had under certain railroad mortgages described in the Amended and Supplemental Ancillary Bill of Complaint.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged, without this, there is any other matter, cause or thing in said Complainant's Amended and Supplemental Ancillary Bill of Complaint material or necessary for these defendants to make answer to not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge and belief of this defendant, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

T. B. BUCKNER,
Sol'r for Defendants.

Afterwards, to-wit, on the 26th day of June, 1905, the following Replication was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainant,
vs.
CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Replication to the Answer of the Guardian Trust Company.

454 These replicants, Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and the Kansas City Suburban Belt Railroad Company, saving and reserving to themselves all and all manner of advantages of exceptions, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Guardian Trust Company, for replication thereunto saith that they do and will aver, maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by these said replicants; without that that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true; all of which matters and things these replicants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by their said bill they hath already prayed.

S. W. MOORE,
T. R. MARKS,
Solicitors for Complainants.

Afterwards, to-wit, on the 2nd day of July, 1906, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
v.
GUARDIAN TRUST COMPANY et al., Defendants.

Bill.

455 No. 2469.

EDWARD F. SWINNEY, Receiver of the Kansas City Suburban Belt Railroad Company et al., Complainants,
v.
GUARDIAN TRUST COMPANY et al., Defendants.

Ancillary Bill.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Intervenor, Complainant,
v.
GUARDIAN TRUST COMPANY et al., Defendants.

Intervening Petition.

Order.

Leave is hereby given to Edward F. Swinney, Receiver of the Kansas City Suburban Belt Railroad Company, and the Kansas City Suburban Belt Railroad Company to file their Second Amended and Supplemental Ancillary Bill of Complaint herein; to the Guardian Trust Company to file its answer thereto instanter; and to said Edward F. Swinney as Receiver and Kansas City Suburban Belt Railroad to file their replication thereto instanter.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 2nd day of July, 1906, a Second Amended and Supplemental Ancillary Bill of Complaint was filed by Edward F. Swinney, Receiver of the Kansas City Suburban Belt Railroad Company and Kansas City Suburban Belt Railroad Company.

Said Second Amended and Supplemental Ancillary Bill of Complaint is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver, Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill

456 *Second Amended and Supplemental Ancillary Bill of Complaint.*

To the Judges of the United States Circuit Court for the Western Division of the Western District of Missouri, in the Eighth Circuit, Sitting in Equity:

Your orators, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company and the Kansas City Suburban Belt Railroad Company, with leave of court, bring this their second amended and supplemental ancillary bill of complaint against the Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company and Thomas T. Crittenden, its Receiver, Cambria Steel Company, Fairmount Amusement Company, and Northern Townsite Company, each and all of which said corporations both complainant and defendants, are corporations organized and existing under and by virtue of the laws of the State of Missouri and citizens and residents of said state and each of them having their principal office and place of business at Kansas City in said state and each of them being an inhabitant of the Western Division of the Western District thereof, except the Cambria Steel Company, which is a corporation duly created and existing under the laws of the State of Pennsylvania and a non-resident of the State of Missouri.

Your orators state that on November 30, 1900, in the suit of W. W. Bierce, et al., complainants, against the Guardian Trust Company, defendant, then pending in the United States Circuit Court for the Western District of Missouri, Francis M. Black was appointed receiver of the defendant, Guardian Trust Company, and was at the time of filing the original ancillary bill herein the duly qualified and acting receiver of said company, but that since the filing of said bill the receiver for the Guardian Trust Company has been discharged and the said Trust Company is now in the possession of its corporate property, operating and conducting its own business in connection therewith; that in this suit Wash Adams was heretofore appointed receiver for the Missouri Elevator & Terminal Company, but the property and assets of the said Missouri Elevator & Terminal Company had since the filing of the original ancillary bill herein been turned over to the Guardian Trust Company, the mortgagee in certain mortgages covering the property of said Missouri Elevator & Terminal Company; that at the time of filing said original ancillary bill Wash Adams was the duly qualified and acting receiver for the Central Improvement Company, since which time the said Adams has resigned and Thomas T. Crittenden has been appointed as his successor and is now the duly qualified and acting receiver of said company; that said Thomas T. Crittenden is a citizen
457 and resident of the Western Division of the Western District of the State of Missouri.

And, thereupon, your orators complain and say that the above-named complainant, the Cambria Steel Company, heretofore exhibited to this Honorable Court its bill of complaint against the Kansas City Suburban Belt Railroad Company, a defendant, and the other corporation defendants above named, in and by which said bill of complaint said Cambria Steel Company, as such complainant, set up the recovery of a judgment by it against the Kansas City Suburban Belt Railroad Company for the sum of One Hundred Thousand Nine Hundred Sixty-Two and 91-100 Dollars ($100,-962.91), and the issuance and delivery, and return unsatisfied of an execution thereon, and in and by said bill of complaint sought to subject to the payment and satisfaction of said judgment certain rights, properties and assets belonging to the Kansas City Suburban Belt Railroad Company and the other defendants above named.

Your orators further show that prior to the filing of said bill of complaint by said Cambria Steel Company four certain bills of complaint were duly filed in this court by the Provident Life & Trust Company of Philadelphia, two of said bills being filed against the Kansas City Suburban Belt Railroad Company as the sole defendant; another of said bills was filed against the Union Terminal Railroad Company, a Kansas corporation, and the said The Kansas City Suburban Belt Railroad Company as defendants; and the other of said bills was filed against the Kansas City & Independence Air Line, a Missouri corporation, and the said Kansas City Suburban Belt Railroad Company. Each of said bills sought the foreclosure of a first mortgage, upon certain railroad property described in the said bills of complaint respectively, and which said several described

pieces of railroad property together for a long time have been operated by the Kansas City Suburban Belt Railroad Company as a continuous and allied system, said Kansas City Suburban Belt Railroad Company being also the beneficial owner of said properties by reason of owning the capital stock of said several companies. Upon the same day upon which the said bills of complaint were filed an application was made for the appointment of a receiver of all the property of said Kansas City Suburban Belt Railroad Company and on the same day, to-wit, on the sixth day of September, 1900, an order was duly entered of record in each of said causes, as well as in the above entitled cause, appointing your orator Edward F. Swinney and Stuart R. Knott as receivers of the said Kansas City Suburban Belt Railroad Company, and vesting them, as such receivers, with
458 all the rights, title, estate, property and interest of the said the Kansas City Suburban Belt Railroad Company, and authorizing and directing them as such receivers, to proceed to take such steps and institute such proceedings, legal or otherwise, as might be necessary and requisite to compel a restoration to said Kansas City Suburban Belt Railroad Company, and said Stuart R. Knott and Edward F. Swinney, as its receivers, of any property rights belonging to it and to compel an accounting from any and all persons, firms or corporations from whom the said Kansas City Suburban Belt Railroad Company might be entitled to such accounting; that said Stuart R. Knott and Edward F. Swinney, as such receivers, were also authorized to appear in any and all suits theretofore or thereafter instituted against the said Kansas City Suburban Belt Railroad Company, in its name or in the names of Stuart R. Knott and Edward F. Swinney, as the receivers, to defend any and all such suits. Your orators further show unto the court that under and by virtue of the powers and authorities so vested in them, as aforesaid, your orators for and on behalf of the Kansas City Suburban Belt Railroad Company, which is made a defendant to the bill of complaint in the above entitled cause, have appeared and filed their answer to said bills of complaint, as will appear of record herein, and having so filed said answer, your orators bring this, their ancillary bill of complaint herein against the defendants above named, and now file this, their second amended supplemental ancillary bill of complaint against said defendants; that since the filing of the original ancillary bill herein, Stuart R. Knott has resigned as receiver and said resignation has been accepted; and that Edward F. Swinney has been continued as sole receiver herein.

Your orators further show unto the court that immediately upon the appointment of your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, they took possession of each and all the property of the said Kansas City Suburban Belt Railroad Company and under and pursuant to the orders of the court so appointing them, and thereafter and until the foreclosure sale hereinafter referred to, did operate the railroad property of the said Kansas City Suburban Belt Railroad Company. That such proceedings were had in the causes above referred to that on the 6th day of November, 1901, decrees of foreclosure and sale were duly rendered directing the sale

of the railroad and properties of the Kansas City Suburban Belt Railroad Company, Kansas City & Independence Air Line, Consolidated Terminal Railroad Company and the Union Terminal Railroad Company, covered by the mortgages upon said railroads and property respectively, and on December 31, 1901, the said
459 properties so covered by said mortgages, as aforesaid, were in pursuance of said decrees of foreclosure and sale duly sold and conveyed to the purchaser, The Kansas City Southern Railway Company.

And your orators further charge and aver that the matters and things mentioned and set forth in this, your orators' second amended and supplemental bill of complaint are ancillary to the said suits so pending in this court wherein your orators, Stuart R. Knott and Edward F. Swinney, were appointed as such receivers and are properly cognizable in this court, which has possession of each and all property of the said Kansas City Suburban Belt Railroad Company, except such as was covered by its mortgage and has been heretofore conveyed as aforesaid. For convenience, the Kansas City Suburban Belt Railroad Company will be hereinafter referred to as the Belt Company; the Guardian Trust Company will hereinafter be referred to, for convenience, as the Trust Company; the Missouri Elevator and Terminal Company will be hereinafter referred to, for convenience, as the Elevator Company; the Central Improvement Company will hereinafter, for convenience, be referred to as the Central Company; the Fairmount Amusement Company will hereinafter, for convenience, be referred to as the Amusment Company.

Your orators show unto the court that the Trust Company was incorporated according to law in and about the year 1883, and that on or about the month of June, 1899, and until on or about the month of June, 1899, the name of the Trust Company was the Missouri, Kansas & Texas Trust Company, but that at said latter date such proceedings were taken as are provided by the statutes of the State of Missouri in such case made and provided, so that its name was changed to the Guardian Trust Company.

Your orators upon information and belief further show unto the court [than] on or about the first day of January, 1887, a corporation was formed under the laws of the State of Missouri known as The Kansas City Suburban Belt Railroad Company, hereinafter, for convenience, called the Suburban Company, for the purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas. That as your orators are informed and believe and so charge the facts to be the said Suburban Company was either organized by the said Trust Company, or the control of the Suburban Company passed to the Trust Company shortly after its incorporation, so that the servants and employes of the Trust Company were elected as its officers and directors and the said Trust Company at all times hereinafter mentioned dominated and controlled the said Suburban Company. That as your
460 orators are informed and believe and so charge the fact to be the Trust Company so dominating and controlling the Suburban Company by virtue of holding possession of the offices

of its board of directors and officers caused the Suburban Company to issue and deliver to it, the Trust Company, each and all of the capital stock of the Suburban Company, and also caused the Suburban Company to execute its bonds secured by a first mortgage upon all of its corporate property then held and to be thereafter acquired amounting in the aggregate to the sum of One Million Dollars ($1,000,000.00), and that said bonds in like manner, by virtue of the domination and control of the Trust Company were delivered to the Trust Company, and the Trust Company thereupon proceeded to sell and otherwise dispose of said bonds and stocks and to apply the proceeds thereof as claimed by it for the corporate purposes of the Suburban Company in the construction and operation of its road; but the Trust Company, although often requested to do so, did not at any time and never has truly accounted to the Suburban Company for the proceeds realized by it from said bonds and stock, and never has accounted in any way for said proceeds or the manner in which it has so expended the same, except as hereinafter stated.

Thereafter, as your orators are informed and believe, and so charge the fact to be, the Trust Company caused to be formed under the laws of the State of Missouri, a corporation known as the Consolidated Terminal Railway Company for the purpose of building a line of road to connect with the line of road constructed or proposed to be constructed by the Suburban Company, although the Suburban Company had full power under its charter to have constructed the said road itself. The Consolidated Terminal Railway Company is hereinafter, for convenience, referred to as the Consolidated Company. That, as your orators are informed and believe and so charge the fact to be, the Consolidated Company was formed and controlled by the Trust Company, electing as its officers and directors the servants and employes of the Trust Company so that at all times it dominated the Consolidated Company, and the Trust Company thereupon caused the Consolidated Company to issue and deliver to it its entire capital stock and also bonds secured by a first mortgage upon its corporate property then and to be thereafter acquired aggregating the sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00), and caused all said bonds to be delivered to the Trust Company, and the Trust Company thereupon proceeded to sell and dispose of said bonds and stock of the Consolidated Company so delivered to it as aforesaid and to apply the proceeds thereof as alleged by it for the corporate purposes of the Con-
461 solidated Company in the construction and operation of its road; but the Trust Company, although often requested so to do, did not and never has truly accounted to the Consolidated Company for the disposition made by it of said bonds and stock so delivered as aforesaid and the proceeds derived therefrom and the purposes to which said proceeds were applied, and never has accounted in any way therefor, except as hereinafter stated.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that thereafter and on or about the 25th day of July, 1892, the Consolidated Company and the

Suburban Company, as authorized by the Statutes of the State of Missouri, entered into articles of consolidation whereby the said two companies became one consolidated corporation, thereafter known as the Kansas City Suburban Belt Railroad Company, of which your orators, Stuart R. Knott and Edward F. Swinney, were appointed Receivers, as aforesaid, and under and by virtue of said articles of consolidation, as well as the statutes of the State of Missouri in such case made and provided, the said Kansas City Suburban Belt Railroad Company and your orators, Stuart R. Knott and Edward F. Swinney, as its receivers, have succeeded to each and all of the rights of both the Consolidated Company and the Suburban Company.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that at the time of the consolidation of said two companies, as aforesaid, the Trust Company caused its officers and employes to be elected to the positions of officers and directors of the Belt Company, the company so formed by said consolidation, and continued such persons in such positions respectively, continuously until about the month of April, 1900, whereby the Trust Company at all times, up to said last mentioned date, completely dominated and controlled the actions of the Belt Company.

Your orators further show unto the court that they are informed and believe, and so charge the facts to be, that some time prior to said consolidation and on or about the 30th day of December, 1891, it was found advisable in the course of the construction of the line of road of the Suburban Company to have a corporation formed under the laws of the State of Kansas for the purpose of building and holding the title to that portion of the line of road of the Suburban Company lying within the State of Kansas and for that purpose the Union Terminal Railroad Company, hereinafter referred to as the Union Company for the sake of convenience, was by the Trust Company caused to be incorporated under the laws of the State of Kansas and the Trust Company, as in the other
462 instances, caused its officers and employes to be elected the officers and directors of the Union Company and the Union Company was a corporation organized for the sole purpose of holding the title to said property of the Suburban or Belt Company in the State of Kansas; that the Trust Company thereupon caused all of the stock of the Union Company to be issued to the Suburban or Belt Company and also caused the Union Company to execute its first mortgage bonds in the amount of Two Million Dollars ($2,000,000.00); and said bonds were secured by a first mortgage upon all the property of the Union Company then and to be thereafter acquired; that said bonds were thereupon issued and delivered to the Trust Company for the use and benefit of the Suburban or Belt Company; that the Trust Company immediately proceeded to sell, or otherwise dispose of, the said bonds and stock of the Union Company, which had been theretofore delivered to it by the Belt Company, and to apply the proceeds derived from such sale in part, as alleged by it, to the construction and operation of the road so

built for the Belt Company and held and operated in the name of the Union Company; that the Trust Company thereupon became liable to account to the Belt Company for the proceeds and disposition of the same derived from the sale of the said bonds and stock, but although often requested to do it always has failed and refused to account truly to the Belt Company for the disposition made by it of said bonds and stock, the proceeds derived from such disposition and the manner in which said proceeds were disposed of, and has never accounted therefor in any way except as hereinafter stated.

Your orators further show unto the court that they are informed and believe and so charge the facts to be that thereafter and on or about the 23rd day of January, 1891, the Trust Company caused to be incorporated under the laws of the State of Missouri, a corporation known as the Kansas City & Independence Air Line; hereinafter, for convenience referred to as the Air Line; said company being incorporated for the purpose of building a line of road connecting the line of the Suburban Belt Company and the City of Independence, Missouri; that the capital stock of said company was placed at the sum of Five Hundred Thousand Dollars ($500,000.00). The Trust Company immediately caused its officers and employes to be elected directors and officers of the Air Line and thereupon caused the Air Line to issue its first mortgage bonds to the amount of Three Hundred Thousand Dollars ($300,000.00), secured by a first mortgage upon all of its corporate property then and to be thereafter acquired; that by virtue of the fact that the officers and directors of the Air Line were officers and employes of the Trust Company it at all times dominated and controlled the Air Line up to
463 and until the month of April, 1900; that thereafter the Trust Company acquired each and all of the bonds and stock of the Air Line, the Trust Company in fact constructing the railroad of the Air Line and acquiring said bonds and stock in consideration therefor; afterwards it proceeded to dispose of the same and to apply the proceeds, as it alleged, for the corporate purposes of the Belt Company; but the Trust Company, although often requested so to do, has never at any time truly accounted to the Belt Company for the disposition made by it of the said bonds and stock, and the proceeds realized by it therefrom and has never accounted to the Belt Company in any manner except as hereinafter stated.

Your orators further show that they are informed and believe and so charge the facts to be that the Trust Company at all times up to and about the month of April, 1900, absolutely and completely dominated and controlled the affairs of the Belt Company by reason of the fact that the officers and employes of the Trust Company were elected officers and directors of the Belt Company at the behest of the Trust Company and were simply dummies acting as the agents of the Trust Company; that the Trust Company itself attended to the disbursement of all the moneys which were realized from the sale of the bonds and stock of the several companies hereinbefore named and itself attended to the disbursement of the moneys which were used in the construction and building of the lines of road of said different companies. That

your orators are informed and believe, and on such information and belief state that the total cost of the lines of all of the said companies did not exceed the sum of about Two Million Dollars ($2,000,000.00), but that there was actually delivered to and disposed — by the Trust Company secured bonds and stock aggregating more than Five Million Dollars ($5,000,000.00) and that the Trust Company has never at any time truly accounted to the Belt Company or to your orators for the proceeds derived by it from the sale of said bonds and the disposition made by it of such proceeds and has never accounted to the Belt Company in any way, except as hereinafter stated.

Your orators upon information and belief further charge and aver that on or about the 30th day of June, 1896, the Trust Company, either in its own name or in the name of some of its officers, or some corporation controlled by it, had entered into a contract whereby it was obligated to construct a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, for the purpose of connecting at that point with the Omaha & St. Louis Railroad Company and the Omaha, Kansas City & Eastern Railroad
464 Company; that the Trust Company thereupon caused to be incorporated under the laws of the State of Missouri a corporation known as the Kansas City & Northern Connecting Railroad Company, hereinafter for the convenience called the Connecting Company, and caused certain of its officers and employes to be elected officers and directors of the Connecting Company and by virtue thereof at all times dominated and controlled the affairs of the Connecting Company; that the Trust Company, being under obligation to construct said road as aforesaid set about to discover a way in which it could cause said railroad to be constructed without incurring any liability itself and without making itself liable for the possibility of loss in such construction; that it thereupon conceived the idea of having the Belt Company undertake the construction of said railroad on consideration of the issuance of bonds and stock of the Connecting Company; that, therefore, by virtue of the domination and control which the Trust Company exercised over the affairs of both the Belt Company and the Connecting Company, the Trust Company caused a contract to be entered into between the Belt Company and the Connecting Company whereby the Belt Company agreed to construct and did construct said line of railroad for the Connecting Company in consideration, among others, of the issuance to the Belt Company of certain first and second mortgage bonds and stock of the Connecting Company, more fully specified in said contract; that said contract so entered into as aforesaid is set up in Exhibit A to the answer of the Trust Company filed in this cause, to which reference is hereby made. The said line of railroad so built as aforesaid was constructed for the sole use and benefit of the Trust Company and for the purpose of enabling it to comply with its obligations to so furnish the said railroad; that the said railroad so furnished, as aforesaid, was not and never has been of any

value whatsoever to the Belt Company; that the construction of said road, as aforesaid, by the Belt Company was the result of the Trust Company's domination and control of the Belt Company, utilizing the Belt Company to further and consummate its own purposes and ends and for its own benefit; and the said contract for the construction of said railroad of the Connecting Co-pany was so entered into *it by* as aforesaid solely by the domination and control exercised over the Belt Company by the Trust Company, and the Trust Company in so constructing said railroad as aforesaid, simply used the Belt Company as an unwilling agency in the building of the same and occupied towards the Belt Company the relation of principal; that each and all of the moneys paid out by the Belt Company for the construction of said connecting road passed through the hands of the Trust Company and all the bonds and stock which were to have been delivered to the
465 Belt Company under the terms of said pretended contract in like manner passed through the hands of the Trust Company and the Trust Company proceeded to sell or otherwise dispose of the same; that the Trust Company never at any time truly accounted to the Belt Company for the amount realized by it from said bonds and stock, and has never accounted in any manner to the Belt Company therefor, except as hereinafter stated. Your orators particularly charge and aver that the Trust Company in so using the Belt Company in the construction of said line is charged in law and in equity with the amount of the said loss claimed by the Trust Company to have resulted to the Belt Company and should be held accountable therefor.

Your orators further show unto the court that they are informed and believe and so charge the fact to be, that, during the time the Trust Company, so dominated and controlled the affairs of the Belt Company, Consolidated Company, Union Company and Air Line, it at various times had the Belt Company, Consolidated Company, Union Company and Air Line advance to it or take out of the earnings and assets of the Belt Company, Consolidated Company, Union Company and Air Line, large sums of money which it pretended to expend for and on account of the Belt Company, Consolidated Company, Union Company and Air Line; that by reason of the fact that the Trust Company at all times dominated and controlled the affairs of the Belt Company, Consolidated Company, Union Company and Air Line, and had its employes and servants elected as officers and directors of the Belt Company, Consolidated Company, Union Company and Air Line, your orators are unable to state the amount of money so appropriated by the Trust Company and belonging to the Belt Company. Consolidated Company, Union Company and Air Line, and which the Trust Company alleges was expended for the corporate purposes of the Belt Company, Consolidated Company, Union Company and Air Line, but upon information and belief your orators charge and aver that said amount aggregates upwards of Five Hundred Thousand Dollars ($500,000.00); and that the Trust Company has never at any time truly accounted

for the said money so received by it, nor the manner in which it was expended, and has never accounted in any manner therefor except as hereinafter stated.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that during the times hereinbefore mentioned the Trust Company took upon itself the business of paying out practically all the moneys which were paid out for the benefit of the Belt Company and of buying for the Belt
466 Company practically all the property which the Belt Company needed to acquire in its business of operating said road and used the moneys of the Belt Company for that purpose, but, instead of taking the title of the property so purchased, in the name of the Belt Company, the Trust Company caused other corporations to be formed for the purpose of holding the naked legal title to said respective properties, and caused the capital stock of said corporations so organized as aforesaid to be issued to the Belt Company and then turned over to the Trust Company or to be issued to the Trust Company direct in trust, for the use and benefit of the Belt Company; and the Trust Company caused its own servants and agents and employes to be elected and continued as the officers and directors of such companies respectively and at all times, down to the month of April, 1900, so that the Trust Company, in the same manner that it controlled the affairs of the Belt Company, dominated and controlled the actions and affairs of the said subsidiary companies; that among the companies so organized by the Trust Company, in the manner aforesaid, is the Missouri Elevator & Terminal Company, with a capital stock of One Hundred Thousand Dollars ($100,000.00), of which Forty-Two Thousand Five Hundred Dollars ($42,500.00) has been issued; that the said company owns two certain elevators in Kansas City, Missouri, along the line of the Belt Company; and that the Trust Company, caused the construction of said elevators, and one other elevator, which has since been destroyed by fire, and in the construction of the same used the money of the Belt Company; said money being paid out to the Trust Company upon its request; that no true accounting has ever been had between the Trust Company and the Belt Company as to the amount of money which it actually expended for the construction of said elevators or of the manner in which it disposed of the funds received by it from the Belt Company for the alleged purpose of undertaking such construction, although requests for such accounting have frequently been made upon the officers of the Trust Company, and no accounting has ever been made therefor, except as hereinafter stated. That the Trust Company caused the Belt Company to assume all the outstanding debts and liabilities of the Missouri Elevator & Terminal Company, and upon said outstanding debts and liabilities the Belt Company paid large sums of money, for which said Belt Company has never been reimbursed. That upon the 8th day of November, 1900, one Wash Adams was appointed Receiver of the Missouri Elevator & Terminal Company; that since that date the court in this cause has made an order turning over to the Trust Company the said properties of the Elevator Company for the collection of the rents therefrom

and the application of said rents upon underlying mortgages or encumbrances held by the Trust Company; that the Trust Company also caused to be organized the Central Improvement
467 Company, a corporation organized under the laws of the State of Missouri, with a capital stock of Two Hundred Thousand Dollars ($200,000.00), of which One Hundred Forty-One Thousand Five Hundred Dollars ($141,500.00) par value has been issued; that said company was organized for the purpose of holding the title to various pieces of real estate in Kansas City, Missouri, and elsewhere purchased for the use and benefit of the Belt Company, and the Kansas City, Pittsburg & Gulf Railroad Company, another Missouri railroad, and other of the companies above mentioned so organized, dominated and controlled by the Trust Company; that the officers and employes of the Central Company, all of whom were the officers, servants or employes of the Trust Company, continued nominally in office and to control and manage such company until about the month of April, 1900; that certain pieces of real estate which are of vital importance to the Belt Company are held in the name of the Central Company; that the Trust Company took upon itself the duty of purchasing the said pieces of property and using for that purpose funds of the Belt Company; that various sums of money were, during the period above mentioned, paid out by the Belt Company to the Trust Company for the purpose of purchasing such pieces of real estate; that the Trust Company has never truly accounted to the Belt Company, although often requested so to do for the sums of money so received by it and the disposition made by it of such sums of money, and has never accounted at all therefor, except as hereinafter stated. That certain shares of stock of the said Central Improvement Company were also, although belonging to the Belt Company, issued to the Trust Company and it has disposed of the same, and although frequently requested so to do it has never truly accounted to the Belt Company therefor and has never accounted at all therefor, except as hereinafter stated. That a large amount of property was purchased with money advanced by the Belt Company, the title to which property, however, was taken in the name of the Central Improvement Company; that all of said property in truth and in fact has belonged to the Kansas City Suburban Belt Company; that the Belt Company has never been reimbursed for the money so advanced as aforesaid; that upon the 8th day of November, 1900, one Wash Adams, Esq., was appointed Receiver of the Central Improvement Company; that thereafter said Wash Adams resigned and T. T. Crittenden, Esq., was duly appointed receiver, as the successor of Wash Adams, and the said Crittenden since his appointment has held possession of the property of the Central Improvement Company, all of which in truth and in fact belonged to the Kansas City Suburban Belt Railroad Company, and now belongs to it, unless the title
468 thereto has passed from it by virtue of the foreclosure sale of the property covered by its mortgage, as hereinbefore stated; that another subsidiary company organized by the Trust Company was the Fairmount Amusement Company, with a total Capital stock of Twenty-five Hundred Dollars ($2,500.00), all of

which belongs to the Belt Company: that said company was organized, dominated and controlled in the same manner by the Trust Company as the other corporations hereinabove set forth; that all of the moneys expended by the Fairmount Amusement Company were moneys supplied by the Belt Company or supplied by the Trust Company and charged to the Belt Company; and the Trust Company took upon itself the duty of disbursing all of the said funds, and that large sums of money were paid by the Belt Company to the Trust Company for that purpose, but the Trust Company has never at any time truly accounted to the Belt Company for said money so received by it or the manner in which it expended the same, although often requested so to do, and has never accounted in any way therefor, except as hereinafter stated. That said Fairmount Amusement Company was organized for the purpose of operating what is commonly known as Fairmount Park, along the line of the Kansas City & Independence Air Line road; that during the time that the Trust Company so dominated and controlled the Belt Company it caused the Belt Company to advance to it large sums of money for the purpose of fitting up said Fairmount Park; that the Trust Company took upon itself the duty of expending said sums of money for the purpose of fitting up Fairmount Park; that as your orators are informed and believe, upward of Three Hundred and Fifty Thousand Dollars ($350,000.00) was thus supplied to the Trust Company for the purpose of fitting up Fairmount Park; that the Trust Company has never at any time truly accounted to the Belt Company for the manner in which it expended such sums of money, although frequently requested so to do, and has never accounted at all therefor except as hereinafter stated; that another company organized by the Trust Company was the Northern Townsite Company, a Missouri corporation, with an authorized capital of One Hundred Thousand Dollars ($100,000.00), of which Ninety-Two Thousand Eight Hundred Dollars ($92,800.00) has been issued; that said company was organized by the Trust Company in connection with the construction of the Kansas City & Northern Connecting Railroad for the purpose of acquiring property at or near townsites along the line of said road; that the Trust Company in the same manner as it dominated the other corporations above named caused its own servants and employes to be elected and maintained as officers and directors of said Townsite Company
469 and at all times dominated and controlled the affairs of said Townsite Company; and the Trust Company caused the Belt Company to advance to it upwards of Forty-Seven Thousand Dollars ($47,000.00), which it used in the purchase of property which kas [take-] in the name of the Townsite Company; and your orators are informed and believe and on such information and belief state that substantially all the money with which the property of the said Townsite Company was acquired was money advanced by the Belt Company, and that the Trust Company instead of issuing the Belt Company all of the capital stock of the Townsite Company issued large portions of it to itself or to other persons for its use and benefit, or otherwise disposed of the same; that the Trust Company

has never truly accounted to the Belt Company at any time for the money so received by it for the purpose of said Townsite Company, from the Belt Company, or the manner in which it expended the same, although frequently requested so to do, and has never accounted in any manner therefor, except as hereinafter stated.

Your orators further show unto the court that they are informed and believe and so charge the fact to be that the Trust Company also caused to be organized under the laws of the State of Missouri, a corporation known as the Kansas City, Pittsburg & Gulf Railroad Company, for the purpose of constructing a line of railroad from Kansas City, Missouri, to the Gulf of Mexico; and that the said railroad was so constructed under the direction of the Trust Company acting through the said railroad corporation; and for the purpose of acquiring funds with which to construct the said railroad, the said Railroad Company issued its first mortgage to secure the issue of bonds herein specified, and on or about the first day of April, 1899 there were issued and outstanding bonds to the amount of Twenty-Three Million Dollars ($23,000,000.00); that at that time a default was made in the payment of an installment of interest due on the said bonds, and a bill was forthwith filed for the foreclosure thereof and receivers of the said railroad were appointed, and thereafter such proceedings were had that the said railroad was sold under the foreclosure decree.

Your orators further show unto the court that they are informed and believe and so charge the fact to be that the Belt Company, the Union Company, and Air Line above named were very largely dependent upon the said Kansas City, Pittsburg & Gulf Company for their earnings, and an operating contract was in existence between
— the Belt Company; so that it was well known to the Trust
470 Company that if the said Kansas City, Pittsburg & Gulf Railroad Company went into the hands of receivers it would necessarily and inevitably result in insolvency of the Belt Company and other companies hereinbefore named, and would necessitate their ultimately being thrown into the hands of receivers and the mortgages upon the property being foreclosed; that the Trust Company by reason of the domination and control which it exercised over the affairs of the said Kansas City, Pittsburg & Gulf Railroad Company well knew that at and for some time prior to the first day of April, 1899, said company would make default in the payment of the installment of interest due on that date and that such default would inevitably result in the filing of a bill to foreclose the mortgage and for the appointment of receivers for the said road and that the Trust Company thereupon set about to contrive a scheme whereby it might appropriate to itself, before the Belt Company passed beyond its control, all of the remaining property and assets of the Belt Company which were in such shape that they could by any possibility be transferred to the Trust Company. That the Trust Company thereupon caused to be exhibited to its own officers and employes who were holding the positions of officers and directors of the Belt Company various claims and demands which it alleged were due and owed by the Belt Company to it and caused such of its own officers and

employes as were holding the positions of officers and directors of the Belt Company to pass upon and approve said claims and demands, and thereupon caused its own officers and employes so holding the positions of officers and directors in the Belt Company between the 31st day of March, 1899, and the 9th day of February, 1900, to execute to the Trust Company various pretended promissory notes and other negotiable instruments for the alleged purpose of securing to the Trust Company the payment of the said pretended claims which it held against the Belt Company, and caused its own officers and employes, so holding the positions of officers and directors of the Belt Company, to cause to be delivered or transferred to it various stocks, bonds and accounts and other personal property belonging to the Belt Company as collateral security for the said pretended indebtedness of the Belt Company to the Trust Company.

Your orators further charge and aver, upon information and belief, that the notes so fraudulently caused to be made by the Belt Company to the Trust Company are as follows:

Note dated March 31st, 1899, payable on July 2d, 1899, for $50,000, with interest at the rate of 6 per cent per annum.

Note dated July 26th, 1899, payable on demand with 6 per cent interest for $203,900.

471 Note dated Sept. 21st, 1899, payable on demand, with 8 per cent interest for $23,056.48.

Note dated Oct. 23d, 1899, payable on demand, with 8 per cent interest, for $7,162.40.

Note dated November 7th, 1899, due January 9th, 1900, with 8 per cent interest, for $50,000.00

Note dated January 25th, 1900, due May 25th, 1900, with 6 per cent interest, for $25,000.

Note dated February 8th, 1900, due May 12th, 1900, with 6 per cent interest, for $109,500.00.

Note dated February 9th, 1900, due June 11th, 1900, with 8 per cent interest, for $10,400.

The stocks and bonds and other property which the Trust Company fraudulently caused its own officers and employes as officers and directors of the Belt Company to turn over to it for the purpose of securing the payment of the said pretended notes as aforesaid, are as follows:

338 first mortgage, 30 year 5 per cent gold bonds of the Kansas City & Northern Connecting Railroad Company of the denomination of $1000, dated January 1, 1897, being bonds numbered 1467, 1769 to 1773, both inclusive; 1799 to 1818, both inclusive; 1324 to 1331, both inclusive; 1756 to 1768, both inclusive; 1184 to 1216, both inclusive; 1466, 1369 to 1400, both inclusive; 1431 to 1440, both inclusive; 1609 to 1658, both inclusive; 1659 to 1708, both inclusive; 1819 to 1851, both inclusive; 1774 to 1798, both inclusive; 1301 to 1323, both inclusive, and 76 of said bonds the numbers of which are not known to your orators; also 50 of said bonds numbered 1129 to 1178, both inclusive.

67 and 9-10 second mortgage, 30 year 5 per cent income bonds of the Kansas City & Northern Connecting Railroad Company of the

denomination of $1000 each, dated January 1st, 1897, being bonds numbered 1064 to 1098, both inclusive; 1149 to 1157, both inclusive; 1162 to 1173, both inclusive; 1192 to 1202, both inclusive.

Certificate No. 227, entitling the holder to 250-1000 of said mortgage income bonds.

Certificate No. 229, entitling the holder to 250-1000 of said second mortgage income bonds.

Certificate No. 220, entitling the holder to 150-1000 of said second mortgage income bonds.

472 25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100 each, as evidenced by certificates Nos. 9, 6, 5 and 4.

1120 shares of the capital stock of the Central Improvement Company of the par value of $100 each, as evidenced by certificate- Nos. 148, 149 and 147.

439 shares of the capital stock of the Northern Townsite Company of the par value of $100 each, as evidenced by certificate No. 11.

425 shares of the capital stock of the Missouri Elevator and Terminal Company of the par value of $100 each, as evidenced by certain certificates Nos. 36, 34, 37, 40 and 38.

19,997 shares of the 20,000 shares constituting the capital stock of the Union Terminal Railroad Company.

4994 shares of the capital stock of the Kansas City and Independence Air Line.

15 Kansas City and Northern Connecting Railroad Company's second mortgage income bonds.

About 600 tons of new steel rails, theretofore purchased by, and then belonging to said Belt Company, and being stored in its yards.

Your orators further charge that the Trust Company also caused the Belt Company to assign to it an open account against the Kansas City, Pittsburg & Gulf Railroad Company in an amount of One Hundred Thirty-Three Thousand Fifty-Eight and 4-100 Dollars ($133,058.04), to secure said alleged indebtedness.

Your orators further charge and aver upon information and belief that the said notes were executed and the said account assigned and the said property above described given as collateral security solely under and by virtue of the domination and control of the Trust Company over the Belt Company and at the time the said action was pretended to have been taken by the Belt Company the officers and directors of the Belt Company so causing the Belt Company to take such action were either officers and directors or servants of the Trust Company, and as such officers and directors or servants and employes of the Trust Company were personally interested in securing to the Trust Company all the available assets of the Belt Company, and that the execution of said promissory notes and delivery of said collateral security under such circumstances was fraudulent and void as against the Belt Company, and in law and in equity ought to be set aside.

473 Your orators further charge and aver upon information and belief that the Trust Company continued to keep its own

officers, servants and employes filling the positions of officers and directors of the Belt Company down to about the month of April, 1900, when the said Kansas City, Pittsburg & Gulf Railroad Company having been sold under foreclosure decree and a re-organization of said property joined with the Belt Company having been undertaken, the control of the said Belt Company passed into other hands, and that during all the time until said month of April, 1900, the said Trust Company continuously kept its own officers and employes in the positions of officers and directors of the Belt Company, so that at no time were there any persons holding the positions of officers and directors of said Belt Company, who were not personally interested in said Trust Company, and desirous of assisting the said Trust Company in every possible way; and at no time was there ever any true accounting had between the Trust Company and the Belt Company, for or by reason of the matters and things hereinabove set forth, except such an accounting as the officers and employes of the Trust Company, so holding the positions of officers and directors of the said Belt Company pretended to make in looking over and going through the form of approving the accounts and statements rendered to the Belt Company by the Trust Company.

Your orators further show unto the court that ever since the control of the Belt Company passed out of the hands of the Trust Company the Belt Company prior to the appointment of your orators as receivers, endeavored to procure from the Trust Company a true accounting for and by reason of the matters and things hereinabove set forth, for the purpose of determining the true state of accounts between the Belt Company and the Trust Company; but all such demands of the Belt Company have been refused by the Trust Company.

Your orators further show that, since the filing of the original and ancillary bill herein the Trust Company has prepared and submitted a statement of account which it pretends and claims to be a full and complete statement of account of all the matters and transactions had between it and the Belt Company, and the other companies aforesaid, covering the matters hereinbefore set forth; but your orators charge the fact to be that the said account is insufficient, untrue and that it does not properly or truly account for the stocks and bonds and other properties received by the Trust Company from, for or on account of the Belt Company and the other companies aforesaid; that many of the charges against the Belt Company and the other companies aforesaid contained in said
474 account are untrue, illegal, unauthorized and ought not in law or equity to be permitted to stand as charges against the Belt Company and the other companies aforesaid; that the Trust Company in making said account has omitted therefrom a large number of credits to which the Belt Company and the other companies aforesaid is properly and lawfully entitled; and your orators hereby set forth their objections to said account by reference to specific items and instances, without, however, in any degree waiving their right to object to said account as a whole or to insist that no such account has been rendered by the Trust Company as is con-

templated and required by law or equity or the equity rules governing such matters.

In the said pretended statement the accounts of the Trust Company against the Union Company, Consolidated Company and Air Line were consolidated with the account of the Belt Company in 1893, so that all charges made against or on account of said lines now appear in the statement of the account of the Belt Company.

1. Your orators further show that the Suburban Company was organized under the laws of the State of Missouri on or about January 8th, 1887; that nothing was done by the Suburban Company in the way of construction of its road or the issue or sale of its securities until on or about May 31, 1889. Prior to said date Mr. A. E. Stillwell, Vice President of the Trust Company, and his associates among the officers and directors of the Trust Company came into control of the Suburban Company; and the Trust Company through them, undertook to promote and finance the Suburban Company and to construct, or cause the construction, of its line of railroad. The plan adopted by the Trust Company for this purpose was to cause the Suburban Company to issue a large amount of securities, consisting of bonds and stocks, to be used in securing money with which to construct the railroad, and for this purpose to organize as its agency a construction company which, directly or through some contractor, should construct the line of the Suburban Company and nominally take the securities of the Suburban Company in payment therefor. It was the further intention and purpose of the Trust Company, as a part of the same plan, to cause securities of the Suburban Company to be issued very largely in excess, in value, of the cost of constructing the line of the Suburban Company, and to cause [*said securities to pass through the Trust Company, and to*] said securities to pass through the Trust Company, which would exact large and exorbitant amounts (under the guise of commissions and services for promotion and of a similar nature), and to cause such securities finally to be distributed among the stockholders and directors of the Con-
475 struction Company which was to be organized very largely from the officers and directors of the Trust Company; so that the large profits arising from the enterprise might inure to the Trust Company and its officers, directors and their friends and associates; and in accordance with the aforesaid plan the Trust Company caused the Suburban Company on or about May 31, 1889, to enter into a contract with A. E. Stilwell (said contract being hereinafter referred to as the Stilwell contract) dated June 1, 1889, by the terms of which said Stilwell, or assigns, agreed to organize a construction company within sixty days from the date of said contract, to be called the Kansas City Terminal Construction Company, for convenience hereinafter called the Construction Company, and to cause said Construction Company to build the line of railroad of the Suburban Company from Broadway Street in Kansas City, Missouri, and along Second Street to Harrison Street; thence in a northeasterly direction along the recorded survey of said line, as near as may be, to Cecil Station near the Blue River; said road to be double track the entire distance, with not less than sixty pound steel rails and to be built in

all particulars in a first class manner. It was further provided in said contract that the work should begin not later than the first day of September, 1889, and to be completed within twelve months from that date; that the Construction Company should buy such grounds as it might deem necessary for the use of said railroad company for depot purposes and to pay for all rights of way remaining unsecured by the railroad company; that the Construction Company should build a depot of such dimensions and cost and locate same at such a point and equip the road in such manner as it might deem for the best interests of the railroad company, and to pay all and every nature of expense incurred by the building of said road. In consideration for the building of the road, as above stipulated the Suburban Company agreed in said contract to issue its first mortgage bonds upon that portion of its line above described in the sum of Five Hundred Thousand Dollars ($500,000.00), bearing six per cent interest, the bonds to be in such form and of such denomination and to run such length [*in such form and of such denomination and to run such length*] of time as the said Stilwell or his assigns might designate; that of this issue of bonds the Suburban Company should place in escrow with the Trust Company, Four Hundred and Fifty Thousand Dollars ($450,000.00) of the same, face value, along with Nine Hundred Thousand Dollars ($900,000.00), face value of the stock of the Suburban Company, to be delivered by said Trust Company as trustee to the said Stilwell, or his assigns, upon the faithful completion of said road as in said contract provided.

476 On the day of the execution of said contract, to-wit, June 1, 1889, said A. E. Stilwell duly transferred and assigned the said contract to the Trust Company in consideration of the sum of Ten Thousand Dollars ($10,000.00), and the Trust Company, as the assignee of said Stilwell, thereupon undertook to comply with and perform all the conditions and terms of said contract imposed upon said Stilwell.

Your orators further show that, in pursuance of the duty and obligation cast upon the Trust Company by said contract, it proceeded to and did organize a corporation called the Kansas City Terminal Construction Company; and the Trust Company caused its own stockholders, employes, officers and directors to be elected and appointed officers and directors of the Construction Company, so that the Trust Company by reason thereof at all times absolutely dominated and controlled the Construction Company. The stockholders of the Construction Company were also made up of the stockholders, employes, officers and directors of the Trust Company and such of their friends as they were willing to permit to come in and enjoy the fruits and profits of the plan. The Construction Company thereupon began the construction of the railroad of the Suburban Company between the points above designated as Broadway Street and Cecile Station; and had only partially completed the construction of said road, the acquirement of the right of way and the performance of their duties and obligations required by said contract, when, on or about May 9, 1890, the officers of the Construction Company and of the Suburban Company and of the Trust Company (who were substantially the

same persons and having the same purposes and ends in view), with the intent to secure to themselves large and exorbitant profits through their interest in the Construction Company and the Trust Company, and contracting with themselves as the representatives of the said corporations, caused the Construction Company and the Suburban Company to go through the form of agreement, by the terms of which the Suburban Company agreed to receive and accept the uncompleted railroad so partially constructed by the Construction Company as aforesaid as a full compliance with the requirements of said Stilwell contract and to authorize and direct the Trust Company to turn over to the Construction Company the stocks and bonds described in said Stilwell contract; and accordingly by virtue of such control and domination so exercised by the Trust Company over the Suburban Company, the latter went through the form of accepting the said uncompleted railroad and directing the Trust Company to release the said securities, and the Trust Company did re-
477 lease and turn over to the Construction Company bonds of the Suburban Company in the amount of Four Hundred Thousand Dollars ($400,000.00), face value, and stock of the Suburban Company in the amount of Six Hundred Thousand Dollars ($600,000.00), face value, retaining for itself and its officers Fifty Thousand Dollars ($50,000.00), par value of the bonds, and Three Hundred Thousand Dollars ($300,000.00), par value of the stock, as hereinafter set forth; and said stock and bonds in the amount of Six Hundred Thousand Dollars ($600,000.00) and Four Hundred Thousand Dollars ($400,000.00), respectively, were thereupon distributed by the Trust Company and by the Construction Com—to the stockholders, employes, officers and directors of said two companies and their friends who had been permitted to participate in the scheme as aforesaid.

Your orators further show that the action of the Trust Company in causing the Suburban Company to accept a partial compliance with its terms as and for a full compliance, and in causing said securities to be issued, was contrary to the best interests of the Suburban Company, oppressive, inequitable and was solely by virtue of the said domination and control and to the end that the persons so in control and domination might realize unlawful gains and profits; and the said transaction ought not in equity to be permitted to stand as against parties in interest in the Suburban Company.

(a) Your orators further show that the cost of the road and right of way so constructed and acquired by the Construction Company did not exceed the sum of Two Hundred and Ninety-Two Thousand Dollars ($292,000.00), and that the bonds and stock as aforesaid so turned over to the trust Company and the Construction Company as the pretended consideration were of the reasonable value of Four Hundred and Eighty Thousand Dollars ($480,000.00), and that the unlawful profits of said transaction amounting to the sum of One Hundred and Eighty-Eight Thousand Dollars ($188,000.00), with interest thereon from May 9th, 1890, at six per cent per annum, ought in equity and good conscience to be accounted for by the Trust Company and paid to your orators, and that the pretended

account rendered by the Trust Company omits said item, to which the complainants are properly entitled.

(*b*) Your orators further show that at the time of issuing the bonds aforesaid there were issued the sum of Five Hundred Thousand Dollars ($500,000.00) par value, and that those remaining after delivery by the Trust Company to the Construction Company of bonds of par value of Four Hundred Thousand Dollars ($400,-000.00), to-wit, bonds in the sum of One Hundred Thou-
478 sand Dollars ($100,000.00), par value, were fraudulently wrongfully and unlawfully taken and appropriated by the Trust Company for its own benefit; and that said bonds so wrongfully taken and appropriated were of the reasonable value of Ninety Thousand Dollars (-90,000.00); that at the same time the capital stock issued by the Suburban Company was of the par value of One Million Dollars ($1,000,000.00), and that remaining after the delivery by the Trust Company to the Construction Company of Six Hundred Thousand Dollars ($600,000.00), par value, as aforesaid, to-wit, the sum of Four Hundred Thousand Dollars ($400,000.00), par value, of said capital stock was fraudulently, wrongfully and unlawfully taken and appropriated by the Trust Company to its own use, and the said stock so wrongfully taken and appropriated was at that time of the reasonable value of Eighty Thousand Dollars ($80,000.00); that your orators are entitled in equity and good conscience to have the Trust Company account for and pay over to *to* your orators the value of said stocks and bonds, to-wit, the sum of One Hundred and Seventy Thousand Dollars ($170,000.00), with interest thereon from May 9, 1890, at six per cent per annum, all of which the Trust Company refuses to do and all of which said items are omitted as credits from said pretended statement of the Trust Company.

(*c*) Your orators further show that by reason of the failure of the Trust Company and its agents to fully complete said contract as provided for under the terms of the said Stilwell contract, the Suburban Company, its successor the Belt Company, one of your orators, as well as the receivers of the B lt Company, who are also your orators, were compelled to and did expend large sums of money to complete the construction of said railroad, and for the purchase of certain right of way which should have been procured and furnished by the Trust Company or by its agent, the Construction Company under said Stilwell contract, and which would have been so furnished but for the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said contract as and for a full performance thereof; that a partial list of the amounts so expended by the Suburban Company during the year 1890-1891, are as follows:

For Right of Way and Expenses in Connection Therewith.

Date.	Name.	Amount.
May .., 1890	M. Uhrig, Curator	$101.10
" 10, 1890	Emma Ackerman and others	50.56
" .., 1890	Dobson & Trimble	1,767.00
" 22, 1890	H. H. Noland, Clk. 1st Div.	650.50
June .., 1890	Winford Dougherty	550.00
" 14, 1890	Winford Dougherty	10.00
" 25, 1890	Chi. & Alton, damages	4,202.00
479		
July 17, 1890	Dobson & Trimble	1,198.73
" 29, 1890	C. R. Barnhart	441.50
" " 1890	G. Friday	75.00
Aug. 8, 1890	T. D. Windrate	54.00
" 8, 1890	Sedden & Edwards Brick Co.	400.00
.... .., 1890	J. P. Knoche	252.50
Oct. 28, 1890	Land Title & Guar. Co.	42.50
" 23, 1890	T. S. Case	20.40
Jan. 21, 1891	Jennie Barber	25.00
May 10, 1890	Nat'l W. Wks. Co.	$11.25
" 14, "	Smith & Bradbury	251.25
" 14, "	Smith & Bradbury	403.57
" 20, "	Mrs. S. J. Crute	300.00
" 31, "	K. C. Switch & Frog Co.	333.00
" 31, "	K. C. Switch & Frog Co.	666.00
" 31, "	K. C. Switch & Frog Co.	128.00
June 6, "	K. C. Bolt & Nut Co.	252.00
June 6, "	Am. Supply Co.	108.48
" 19, "	Richards & Conover H. Co.	4.17
" "	Western S. & D. Co.	37.50
" 19, "	American Supply Co.	128.97
" 3, "	Pay Roll, Cons. Train	208.75
" 19, "	Am. Supply Co.	120.42
.... .., "	Smith & Bradbury	3,682.10
June .. 1890	Am. Supply Co.	225.70
July 7, "	Am. Supply Co.	60.87
" .., "	Smith & Bradbury	695.66
" 17, "	K. C. Switch & Frog Co.	1,161.00
" .., "	C. R. Barnhart	314.00
" 26, "	J. Smith	10.00
" .., "	Holton, Warren Lbr. Co.	128.01
" .., "	Holton, Warren Lbr. Co.	104.55
July .., 1896	Holton, Warren Lbr. Co.	183.60
" " "	Holton, Warren Lbr. Co.	124.95
" " "	Holton, Warren Lbr. Co.	199.92
" " "	Holton, Warren, Lbr. Co.	74.06
" " "	Holton, Warren Lbr. Co.	74.06
Aug. 8, 1890	Kansas City Switch & Frog Co.	1,440.00
" 9, "	Kit Colyer	95.00
Aug. 8, "	Smith & Bradbury	842.30
" .., "	Smith & Bradbury	643.5[illegible]

Date.			Name.	Amount.
Aug.	5,	"	J. H. Knoche	100.00
"	..,	"	J. Whitaker	62.00
Aug.	24,	"	Smith & Bradbury	318.45
Sept.	6,	"	Kansas City Switch & Frog Co.	576.00
"	6,	"	Pinkerton Detective Agency	139.50
"	6,	"	Kansas City Bolt & Nut Co.	387.50
"	6,	"	Kansas City Bolt & Nut Co.	29.04
....	",	"	Richards & Conover	8.17
....	..,	"	Smith & Bradbury	992.00
....	..,	"	Kansas City Switch & Frog Co.	824.40
Sept.	27,	1890	Smith & Bradbury	1,273.53
....	..,	"	Kansas City Swith & Frog Co.	43.75
....	..,	"	Smith & Bradbury	1,602.00
Dec.	22,	1890	H. R. & Co.	962.98
Jan.	13,	1891	F. M. & Co.	210.00
May	26,	1890	Smith & Bradbury	3,500.00

That your orators are entitled in equity and good conscience to a credit upon the pretended account produced by the Trust
480 Company for each and all of the amounts above set forth, and interest thereon at six per cent per annum from the dates when said payments were made, all of which have been improperly and unlawfully omitted from the said pretended account by the Trust Company.

(*d*) Your orators further show that by reason of the failure of the Trust Company to fully comply with the terms of and conditions of the said Stilwell contract and to furnish the right of way and depot required to be furnished by said Trust Company as a part of said contract, it became necessary to secure additional parcels of right of way, all of which the Trust Company was obligated to procure and furnish under the said Stilwell contract, and the Trust Company undertook to procure such right of way for the Suburban Company and did procure the same and in all cases charged the cost thereof, together with interest thereon, to the Belt Company, and the items so charged appear as debits in the pretended statement produced by the Trust Company; that in many instances the Trust Company caused the Suburban or Belt Company to itself purchase said necessary right of way and to execute notes for deferred payments thereon and said notes and the interest payments as they were made from time to time were duly charged to the Belt Company and appeared as debits in said pretended account; that the Trust Company failed to furnish a depot for the Suburban Company as in and by said contract it was obligated to do through itself or through its agent, the Construction Company, and the Trust Company after the pretended completion of said Stilwell contract undertook to and did construct a depot building for the Suburban Company at Second and Wyandotte Streets and charged the cost thereof to the Belt Company, and said charges appear as debits in the pretended account presented by the Trust Company. The amount so expended for right of way aggregates the sum of One Hundred and Twelve Thou-

sand, Two Hundred Thirty-nine and Eighteen-hundredths Dollars ($112.239.18) the itemized statement of which, showing the amounts and dates when the various items were charged to the Belt Company appears upon the itemized statement marked Exhibit "1" under the head of "Right of Way," hereto attached and made a part hereof. The interest paid on right of way notes as aforesaid, the payment of which was made necessary by the Trust Company's failure to comply with said Stilwell contract, aggregates the sum of Forty-three Thousand Sixty-six and 30/100 Dollars ($43,066.30), an itemized statement of which, showing the dates, and amounts paid is set forth in the said Exhibit "1" under the head of "Interest on Right of Way notes," herewith attached as aforesaid; and the Trust Company charged the Belt Company, and the Belt Company
481 paid the same in cash to the Trust Company, the following items of interest on said right of way notes aforesaid, none of said items appearing on the pretended statement presented by the Trust Company and for such items credit should be allowed the Belt Company and for pretended statement with interest thereon from the date of payment thereof:

Sept. 16th, 1892.	Interest on note of W. S. Taylor favor Berth Schoen	$127.80
Sept. 28th, 1892.	Interest on note of W. S. Taylor favor of Rosalie Sachs	214.77
Oct. 14th, 1892.	Interest on note and deeds of trust....	832.99
March 14th, 1893.	Interest on account of note of A. L. Howe for $49,333.33	1,480.00
March 30th, 1893.	Interest on two $5,000 notes secured by deed of trust on property at Second and Wyandotte Streets	300.00

(*e*) In addition to the amounts appearing upon the pretended statement of the Trust Company as so expended for right of way by the Trust Company and charged to the Belt Company, the Belt Company on or about June 2d, 1896, paid to Louise W. Crane and others, who were then owners of an undivided half interest in lot 124, block 12, of old town, all in Kansas City, Mo., the sum of Three Thousand Dollars ($3,000) as a partial payment for said interest in said lot; that it was the duty of the Trust Company or the duty of its agent the Construction Company, to procure and furnish this tract of land as a part of the right of way called for under the Stilwell contract of June 1, 1889, the said payment was made neecssary because of the failure of the Trust Company or its agent, the Construction Company, to comply with the perform the terms of the said Stilwell contract and because of the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said Stilwell contract as and for a full performance thereof; that said item of Three Thousand Dollars ($3,000.00) is wholly omitted in the pretended account or statement presented by the Trust Company and that the Belt Company is entitled to and should have credit for said item with interest thereon from the date [of] thereof.

(*f*) In addition to the amounts appearing upon the pretended statement of the Trust Company as so expended for right of way by the Trust Company and charged to the Belt Company, the Suburban Company on or about April 4, 1890, paid to Thomas J. Emery, who was then the owner of lots 141 and 142 of block fourteen
482 (14), old town, all in Kansas City, Mo., on account of the purchase of said lots the sum of Four Thousand Five Hundred Dollars ($4,500), and in addition thereto two notes of Five Thousand Dollars ($5,000) each were given as the balance of the purchase price of said lots in the manner hereinafter described; that it was the duty of the Trust Company or the duty of its agent, the Construction Company, to procure and furnish this tract of land as a part of the right of way that was called for under the Stilwell contract of June 1, 1889; and said payment was made necessary because of the failure of the Trust Company or its agent, the Construction Company, to comply with and perform the terms of the said Stilwell contract, and because of the unlawful actions of the Trust Company in causing the Suburban Company to accept a partial compliance with said Stilwell contract as and for a full performance thereof; that said item of Four Thousand Five Hundred Dollars ($4,500) is wholly omitted in the pretended account or statement presented by the Trust Company and that the Belt Company is entitled to and should have a credit for said item with interest thereon from the date of the payment thereof.

(*g*) It was the duty of the Trust Company or the duty of its agent, the Construction Company, to procure and furnish to the Suburban Company a right of way across lots ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), and fifteen (15), of block ten (10), of old town, and lot one hundred and one (101), of block ten (10), old town, all in Kansas City, Mo., as a part of the right of way called for under the Stilwell contract of June 1, 1889; that the right of way of the Suburban Company crosses the said lots and that the said Suburban Company's road, as so built by the Trust Company or its agent, the Construction Company, passes over and upon these said lots; that the Trust Company or its agent, the Construction Company, has omitted and wholly failed to procure and furnish such right of way for and upon said lots as called for and provided under the terms of the said Stilwell contract; that at the time of the institution of this action the reasonable value of the right of way over and upon lots ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14) and fifteen (15), of blocks ten (10), of old town, so omitted to be provided by the said Trust Company or its agent, the Construction Company, was Eleven Thousand Two Hundred and Fifty Dollars ($11,250); that at the time of the institution of this action the reasonable value of the right of way over and upon lot one hundred and one (101), block ten (10), old town, so omitted to be provided by the said Trust Company or its agent, the Construction Company, was Five Thousand Dollars ($5,000.00); that the reasonable value of the right of way over and upon
483 the said lots, to-wit, Eleven Thousand Two Hundred and Fifty Dollars ($11,250.00) and Five Thousand Dollars ($5,-

000.00) are wholly omitted in the pretended account or statement presented by the Trust Company, and that the Belt Company is entitled and should have credit for the said items of Eleven Thousand Two hundred and Fifty Dollars ($11,250.00) and Five Thousand Dollars ($5,000.00) with interest thereon from the date of the omission of said Trust Company or its agent, the Construction Company, to procure and furnish said right of way.

(*h*) There was paid by the Trust Company as rental for certain right of way, all of which said right of way the Traust Company was obligated to procure and furnish under the said Stilwell contract, and charged against the Belt Company in the pretended statement, the sum of One Thousand Two Hundred Eighty-three and Twenty-hundredths Dollars ($1,283.20), an itemized statement of which is set forth in said Exhibit "1", under the head of "Rental Paid for Right of Way", hereto attached, which said payment was made necessary because of the failure of the Trust Company to comply with and perform the terms of said Stilwell contract.

(*i*) In addition to the amounts appearing upon the pretended statements of the Trust Company as so expended for right of way and rental thereof by the Trust Company and charged to the Belt Company, the Belt Company, or its receivers, all of whom are your orators herein, between March, 1897, and January 1, 1902, were compelled to pay to the Pacific Express Company (who was then the owner of lot one hundred and one (101), block-ten (10), of old town, all in Kansas City, Mo.), as rental for right of way of said Belt Company across said lot the sum of Fourteen Hundred Seventy-five Dollars ($1,475.00); that the amounts so expended by the Belt Company or its receivers are as follows:

Amount Paid by the Belt Company.

March,	1897	$25.00
April,	1897	25.00
May,	1897	25.00
May,	1897	25.00
June,	1897	25.00
June,	1897	25.00
Sept.,	1897	25.00
Oct.,	1897	25.00
Nov.,	1897	25.00
Dec.,	1897	25.00
Jany.,	1898	25.00
Feb.,	1898	25.00
March,	1898	25.00
April,	1898	25.00

May,	1898	25.00
June,	1898	25.00
July,	1898	25.00
Aug.,	1898	25.00

Sept.,	1898	25.00
Oct.,	1898	25.00
Nov.,	1898	25.00
Dec.,	1898	25.00
Jany.,	1899	25.00
Jany.,	1899	25.00
Feby.,	1899	25.00
March,	1899	25.00
March,	1899	25.00
May,	1899	25.00
June,	1899	25.00
June,	1899	25.00
July,	1899	25.00
Sept.,	1899	25.00
Oct.,	1899	25.00
Nov.,	1899	25.00
Dec.,	1899	25.00
Jany.,	1900	25.00
Feby.,	1900	25.00
March,	1900	25.00
April,	1900	25.00
May,	1900	25.00
June,	1900	25.00
July,	1900	25.00
Aug.,	1900	25.00
August,	1900	25.00
		$1,100.00

Amounts Paid by the Receivers of the Belt Company.

October,	1900	$25.00
November,	1900	25.00
December,	1900	25.00
January,	1901	25.00
February,	1901	25.00
March,	1901	25.00
April,	1901	25.00
May,	1901	25.00
June,	1901	25.00
July,	1901	25.00
August,	1901	25.00
September,	1901	25.00
October,	1901	25.00
November,	1901	25.00
December,	1901	25.00
		$375.00

485 That it was the duty of the Trust Company or the duty of its agent, the Construction Company, to procure and furnish the right of way over said lot as a part of the right of way called for under the Stilwell contract of June 1, 1889, and said payments were made necessary because of the failure of the Trust Company, or its agent, the Construction Company, to comply with and perform the terms of said Stilwell contract and because of the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said Stilwell contract as and for a full performance thereof; that the said items of rental amounting to Fourteen Hundred and Seventy-five Dollars ($1,475.00) are wholly omitted in the pretended account or statement presented by the Trust Company and that the Belt Company and its receiver (your orators herein) are entitled to and should have credit for said items with interest thereon from date of payment thereof.

(*j*) There was expended by the Trust Company and charged to the Belt Company as appears in the said pretended statement the sum of Fifty-nine Thousand Two [Hundre*y*] Sixty-five and Sixty-two-One Hundredths Dollars ($59,265.62) as the cost of the depot building at Second and Wyondatte Streets in Kansas City, Missouri, which said building should have been constructed by the Trust Company, or its agent, the Construction Company, under and in pursuance of the terms of said Stilwell contract; an itemized statement of the items composing the charge of Fifty-nine Thousand Two Hundred Sixty-five and 62-100 Dollars ($59,265.62) is set forth in said Exhibit "1", under the heading "Second and Wyandotte Depots", hereto attached.

(*k*) There was expended by the Trust Company and charged to the Belt Company, as appears in the said pretended statement, the sum of Twenty-two Thousand One Hundred Fifty-eight and Seventy-five Hundredths Dollars ($22,-58.75) as the cost of other station depots, platforms, sand house, round house and labor and material furnished, all of which should have been constructed, procured and furnished by the Trust Company or its agent, the Construction Company, under and in pursuance of the terms of the said Stilwell contract. An itemized statement of the items composing this charge of $22,158.75 is set forth in Exhibit "1" hereto attached, under the head of "Other Buildings".

Your orators further say that all the foregoing matters, which appear (and are set forth in said exhibit) as debits in the pretended account presented by the Trust Company are unlawful and unjust and represent matters for which the Trust Company and not the Belt Company was and is responsible; that all of said items
486 should be eliminated from said account and the Belt Company should be credited with interest thereon from the respective dates when said charges were made; that all of the foregoing matters not appearing upon the pretended statement are items which the Trust Company has unlawfully and improperly omitted therefrom and with which the Belt Company, in equity, should be credited.

(*l*) Your orators further show that, by reason of the failure of

the Trust Company and its agents to fully complete said construction contract, it became necessary for the Suburban Company or its successor, the Belt Company, one of your orators herein, to acquire ground for right of way and switching yards in Kansas City, Missouri, upon the line of its road, which should have been furnished and provided by the Trust Company, or its agent, the Construction Company, under and in pursuance of the said Stilwell contract; that accordingly the Trust Company caused the Second Street Improvement Company, which was also one of the auxiliary companies created and officered by it, to execute a lease from it to the Consolidated Terminal Railway Company covering a strip of land in section twenty-five (25), township fifty (50), range thirty-three (33), in Jackson County, Missouri, containing twenty-eight (28) acres, which land adjoined the right of way and railroad tracks of the Suburban Company running parallel to such tracks at a distance of 4,809.8 feet. It was provided in said lease that the lessee should pay a yearly rental of Three Thousand Dollars ($3,000.00) and that the lessee should also have an option of purchase of said property on certain terms therein specified. Your orators duly paid said rent as it accrued from year to year, amounting to the aggregate sum of Twenty-six Thousand Two Hundred and Fifty Dollars ($26,250.00) and that the reasonable value of said property at the time of the institution of this action was Forty-Four Thousand One Hundred Twenty-five Dollars ($44,125.00). Your orators are entitled in equity and good conscience to be credited upon the pretended accounts produced by the Trust Company for each and all said rental payments with interest thereon at six per cent per annum from the date of such payments and for the value of said property at the time of the institution of this action, with interest thereon as above stated; all of which credits have been improperly and unlawfully omitted from said account by the Trust Company.

(*m*) Your orators further show that by reason of the failure of the Trust Company and its agents to fully complete said Stilwell contract it became necessary for the Belt Company to acquire certain property at Second and Wyandotte Streets in Kansas
487 City, Missouri, being lots 112, 113 and 114, block 11, Old Town, Kansas City, Missouri, for depot purposes; that thereupon the Trust Company caused the said Second Street Improvement Company, one of its auxiliary corporations aforesaid, to lease to the Suburban Company for a period of ten years from June 1, 1891, lots one hundred and twelve (112) and one hundred thirteen (113), block eleven (11), Old Town, all in Kansas City, Mo., which said property, together with said lot 114, block 11, Old Town, Kansas City Missouri, properly came within the terms of said Stilwell contract and should have been furnished and provided by the Trust Company or by its agent, the Construction Company; under the said lease for said lots 112 and 113 the Belt Company was caused to and did pay rental to the Second Street Improvement Company for the use of said lots from June 1, 1891, to October 31, 1901, a total of One Hundred and Twenty-Five (125) months, at the rental fixed in said lease of Two Thousand Five Hundred Sixty-Six and forty-

hundredths Dollars ($2,566.40) per annum, or a total of Twenty-Six Thousand Seven Hundred Thirty-three and sixty-four-hundredths Dollars ($26,733.64); and that the value of said lots at the time of the institution of this action was the sum of Twenty-Five Thousand Seven Hundred and Fifty Dollars ($25,750.00), and your orators are entitled in equity and good conscience to a credit upon the pretended account produced by the Trust Company for the sum paid as rentals with interest thereon at six per cent per annum from the date of each payment and for the said sum of Twenty-Five Thousand Seven Hundred and Fifty Dollars ($25,750.00), with interest thereon; all of which credits have been improperly and unlawfully omitted from said pretended account by the Trust Company.

(*n*) Your orators further show that on March 20, 1890, the McClelland, Stumpf & Peltzer Brick Manufacturing Company owned lots one hundred forty-three (143), one hundred forty-four (144), one hundred forty-five (145) and one hundred forty-six (146), in block fourteen (14); lots one hundred nineteen (119), one hundred twenty-two (122), one hundred twenty-three (123), one hundred twenty-five (125), and an undivided half interest in lot one hundred twenty-four (124), in block twelve (12), and lot one hundred thirty-eight (138), in block thirteen (13), all in Old Town, Kansas City, Missouri, all of which property is located in the vicinity of Second and Wyandotte Streets and is a part of the depot grounds of the Belt Company and was a part of the right of way to be acquired and furnished by the Trust Company or by its agent, the Construction Company, under the Stilwell contract of June 1, 1889,

488 In March, 1890, the said Brick Manufacturing Company conveyed all of the foregoing property to Alfred L. Howe, agent or dummy of the Trust Company, and on the same date the said Howe executed two notes for Forty-Nine Thousand Three Hundred Thirty-Three and thirty-three hundredths Dollars ($49,333.33) each, to secure to the said Brick Manufacturing Company the balance of the purchase price of the same, and a deed of trust to secure said notes was placed upon all said property. On June 23d, 1890, the said Howe conveyed said property to the Belt Company. The first of said notes was for $49,333.33, which became due March 20, 1891, and the second became due March 20, 1892, both bearing six per cent interest; the first of said notes was paid by the Trust Company on March 23, 1891, and charged by it to the Belt Company. On March 14, 1890, the said Brick Manufacturing Company conveyed to W. S. Taylor, an agent and dummy of the Trust Company, lots nine (9), ten (10), eleven (11), twelve (12) thirteen (13), fourteen (14) and fifteen (15) in block eleven (11) of King & Bouton's Re-survey of the East Half of block eleven (11), Old Town, in Kansas City, Missouri, for a consideration of Forty-One Thousand One-Hundred Dollars ($41,100.00), and said Taylor executed to said Brick Manufacturing Company three notes in the sum of Ten Thousand Dollars ($10,000.00) each, dated June 1, 1890, to secure the unpaid purchase money, and gave a deed of trust to secure said notes. The property just described is located at Second and Wyandotte Streets, in Kansas City, Missouri, upon

which the depot building of the Belt Company was afterwards constructed, and it was a part of the property and right of way that should have been furnished by the Trust Company, or by its agent, the Construction Company, under the terms of the said Stilwell contract of June 1, 1889. The Kansas City Terminal Construction Company, in recognition of its obligation to pay for this property at or about the time of its purchase paid from its treasury to the said Brick Manufacturing Company or for it the sum of Eleven Thousand One Hundred Dollars ($11,100.00), which, with the said three notes of Ten Thousand Dollars ($10,000.00), given for deferred payments, made up the purchase price of said property; the said Taylor, after the execution of the said three notes, conveyed said property to the Belt Company. On April 7, 1890, Thomas J. Emery owned the following described real estate in Kansas City, Missouri, to-wit, lots twelve (12) and thirteen (13) of King & Bouton's Re-survey of the west half of block ten (10), Old Town; also lots one hundred forty-one (141) and one hundred forty-two (142), block fourteen (14), Old Town; on said date he duly conveyed said property to the said Alfred L. Howe, who was
489 acting in the same capacity as aforesaid; that said Howe gave back to said Emery two notes for Nine Thousand Three Hundred Seventy-Five Dollars ($9,375.00), with six per cent interest, to secure the unpaid portion of the purchase price, securing said notes with a deed of trust upon the property; and thereafter on June 23, 1890, conveyed lots one hundred forty-one (141) and one hundred forty-two (142) in block fourteen (14) to the Belt Company, and the remainder of the property was conveyed to the Second Street Improvement Company; that of said two notes Nine Thousand Three Hundred and Seventy-Five Dollars ($9,375.00) each, the sum of Ten Thousand Dollars ($10,000.00), or Five Thousand Dollars ($5,000.00) on each of said notes, represented the deferred payments on the property acquired for and deeded to the Belt Company; that all of said Emery property was a part of the property and right of way that should have been procured and furnished by the Trust Company or by its agent, the Construction Company, under the terms of the said Stilwell contract of June 1, 1889.

Your orators further show that the notes described representing deferred payments on property purchased for and afterwards conveyed to the Belt Company are as follows:

Date. of note.	Date due.	Int.	In favor of.	Amount.
4- 4-1890	6- 4-1891	6 per cent	T. J. Emery.....	$5,000.00
4- 4-1890	4- 4-1892	6 per cent	T. J. Emery.....	$5,000.00
6-117890	6- 1-1891	6 per cent	McClelland, Stumpf Peltzer Brick Mfg. Company	$10,000.00
6- 1-1890	6- 1-1892	6 per cent	Do	$10,000.00
6- 1-1890	6- 1-1893	6 per cent	Do.	$10,000.00
3-20-1890	3-20-1892	6 per cent	Do.	$49,333.33

Your orators further show, that on or about October 15, 1897, the Belt Company was embarrassed financially and insolvent and that it had outstanding notes of a large amount, including the notes above mentioned, which were secured by a first mortgage as aforesaid; that the stock of the Belt Company was depressed in value and certain of the officers of the Trust Company and certain investors in it and in the Belt Company became desirous of improving the financial condition of the Belt Company by getting off its books certain of its bills payable, including the notes mentioned, in order that by certain manipulations a dividend might be declared, and the market in the stocks of the Belt Company might be improved and the parties interested might profit therefrom in their stock dealings and transactions. Accordingly, an arrangement was made between certain officers of the Trust Company and J. de Goeijen, by the terms of which the Trust Company assumed and agreed to pay the said real estate notes, including the notes above mentioned,
490 and the amount of said notes, including the said sum of Eighty-Nine Thousand Three Hundred and Thirty-Three and thirty-three-hundredths Dollars ($89,333.33), was by the Trust Company charged to the Belt Company on the books of the Trust Company, and the same now appears as a debit to the Belt Company in the pretended statement submitted by the Trust Company. At the time of said transaction, and on or about October 15, 1897, pursuant to the plan aforesaid, the said J. de Goeijen purchased certain bonds belonging to the Belt Company, which were by the Trust Company credited upon its books to the Belt Company in an amount sufficiently large to cover all of said notes, so that upon the books of the Belt Company all of said bills payable had been eliminated, and the Belt Company was thus enabled to make out and send to stockholders and financial publications a clean statement showing an improved financial condition for the purpose of bolstering up the market value of its stock aforesaid, all of which was accordingly done. The said statements showing said credits extended by the Trust Company and the improved financial condition of the Belt Company resulting therefrom, were sent out to stockholders and investors and the financial publications aforesaid, and the public was invited to purchase and trade in the stocks as well as the bonds of the Belt Company, in reliance upon such statements. And your orators aver that thereafter the public did deal in, buy and sell the stocks and bonds of the Belt Company, and investments were made in reliance upon said statements.

Your orators further show, that on or about the month of April, 1899, and after the appointment of receivers for the Gulf Company, the Trust Company had good reason to believe and did believe that it would soon lose control of the Belt Company, and that other and independent directors and officers would be elected, and it thereupon set about to relieve itself of its assumption and agreement to pay the said notes above mentioned aggregating Eighty-Nine Thousand Three Hundred Thirty-Three and 33-100 Dollars, and thereupon made the pretense and claim that the aforesaid credit which it extended to the Belt Company on or about October 15, 1897, was on

the understanding that the funds for such credit should be supplied by the said J. de Goeijen, and that said J. de Goeijen had failed to supply said funds; and thereupon said Trust Company undertook by an entry upon its own books to relieve itself of its said assumption and agreement to pay said notes aggregating $89,333.33, but failed, neglected and refused upon so doing to credit the account of the Belt Company with said sum, as it should have done. At that time the said De Goeijen was indebted to the Trust Company in an amount in excess of said sum, which said De Goeijen was un-
491 able to pay, or by reason of their intimate financial relationship the Trust Company was unable or unwilling to collect from De Goeijen, and thereupon the Trust Company contrived the plan of causing the Belt Company to take over its worthless account against De Goeijen, in lieu of crediting the Belt Company with such sum, as it should have done as aforesaid. At said time the Trust Company well knew that said account against De Goeijen was worthless and uncollectable, and its action in causing said entries to be made on the books of the Belt Company and in refusing, itself to credit the Belt Company, was fraudulent and unlawful attempt on the part of the Trust Company to relieve itself of its assumption of the agreement to pay said notes in said sum of $89,333.33, and at the same time to release said amount charged to the Belt Company on account of such assumption. By reason of the premises, the Trust Company is estopped to deny that the credit it extended to the Belt Company as aforesaid was an absolute credit, and is so estopped from saying that said credit was a conditional one, and cannot in equity and good conscience claim the right to unload upon the Belt Company the worthless claim against De Goeijen in lieu of crediting the Belt Company or paying said notes, neither of which has been done by the Trust Company.

Your orators claim, therefore, that the charge of Eighty-Nine Thousand Three Hundred Thirty-Three and 33-100 Dollars ($89,-333.33), made by the Trust Company to the Belt Company on or about October 15, 1897, which appears in the pretended statement submitted by the Trust Company, should be eliminated therefrom, together with all charges of interest which also appear in said pretended statement, and that the Belt Company should be credited with same amount and interest thereon from said date of October 15, 1897, together with interest upon the charges of interest made in connection therewith as aforesaid.

(1) Your orators further state that on or about May 9, 1890, when the Suburban Company and the Construction Company undertook, as above stated, to declare the contract between them for the construction of the first section of the Suburban Company's road duly performed in all respects, the said Construction Company had an overdraft at one of the banks in Kansas City, Missouri, in the sum of Three Hundred and Thirteen and 76-100 Dollars ($313.76), whereby the said Construction Company owed said bank the said sum of money; that the Trust Company, through its officers and agents, unlawfully and fraudulently caused the Suburban Company to take up and pay said overdraft in said sum on the 7th day

of May, 1890, and said sum is wholly omitted in the pre-
492 tended statement of account submitted, and the Belt Company should be and is entitled to be credited with interest thereon from the day of payment thereof.

(2) Your orators further show that upon the organization of the various companies above named, to-wit, the Suburban Company, the Consolidated Company, the Union Company, the Air Line and the Northern Connecting Company, the Trust Company as above set forth caused these companies respectfully to issue stocks and bonds, and thereupon the Trust Company undertook the disposition of said stocks and bonds, in some instances going through the form of purchasing said stocks and bonds itself and in other cases disposing of said stocks and bonds to others, and in connection therewith made large and exorbitant charges to the Belt Company under the guise of commissions for so doing.

(*a*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Belt Company:

Aug. 8, 1890	$15,000.00
Dec. 22, 1894	4,000.00
Oct. 10, 1894	1,250.00
July 29, 1897	1.58
Feb. 8, 1899	75.00
Apr. 6, 1894	22.50
Nov. 20, 1895	62.50

(*b*) In addition to the foregoing amounts, the Trust Company on or about November 27, 1891, charged the Belt Company the sum of One Thousand Dollars ($1,000.00), as and for a commission in connection with the Belt Company; and the said amount was paid to the Trust Company by the Belt Company. The amount of this payment does not appear on the pretended statement presented by the Trust Company.

(*c*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Consolidated Company:

Oct. 26, 1891	$522.50
Apr. 4, 1892	6,000.00
Oct. 26, 1891	30,000.00
Dec. 17, 1891	6,000.00
Oct. 27, 1891	402.50
Oct. 26, 1891	120.00
Nov. 13, 1891	320.00
Nov. 2, 1891	150.00
493 Nov. 2, 1891	80.00
Nov. 12, 1891	1,182.50
Nov. 16, 1891	463.18
Nov. 21, 1891	750.00
Nov. 23, 1891	4,455.00
Dec. 4, 1891	24.00

Dec. 7, 1891	24.00
Dec. 19, 1891	300.00
Jan. 9, 1892	30.00
Jan. 12, 1892	300.00
Jan. 30, 1892	750.00
Feb. 11, 1892	90.00
Feb. 26, 1892	60.00
Feb. 29, 1892	225.00
Mar. 11, 1892	30.00
Mar. 19, 1892	60.00
Mar. 19, 1892	750.00
Apr. 6, 1892	2,802.80
Apr. 12, 1892	1,200.00
July 13, 1892	240.00
Aug. 2, 1898	40.88
Feb. 8, 1899	46.00

(*d*) In addition to the foregoing charges that appear upon the said statement, the Trust Company took and appropriated to its own use the stock and bonds of the Consolidated Terminal Company under the guise of commissions as follows:

Dec. 17, 1891, 1000 shares of stock of the value of $32,220.00.

Dec. 17, 1891, 30 bonds of the value of $25,410.00.

Mar. 17, 1892, 240 shares of the stock of the value of $7,732.00.

July —, 1892, 3100 shares of stock of the value of $103,333.33.

(*e*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Union Terminal Company:

	Dec. 31, 1892	$500.00
	Jan. 13, 1893	7,500.00
	Jan. 23, 1893	3,200.00
	Jan. 26, 1893	15,000.00
	Apr. 5, 1893	6,250.00
	Sept. 16, 1898	50.00
	Oct. 6, 1898	100.00
494	Oct. 18, 1898	50.00
	Jan. 17, 1899	231.25
	Jan. 18, 1899	277.50
	Feb. 17, 1899	230.00
	Aug. 2, 1898	90.63
	Feb. 8, 1899	117.00

(*f*) In addition to the foregoing charges the Trust Company charged the Belt Company under the guise of commissions and caused the Belt Company to pay the same in connection with the Union Company the following sums:

September 26, 1892	$4,400.00
October 7, 1892	500.00
November 10, 1892	800.00
December 31, 1892	550.00
January 7, 1893	250.00

The amount of these payments does not appear on the pretended statement presented by the Trust Company.

(*g*) In addition to the foregoing items appearing upon the pretended statement, the Trust Company took, appropriated and converted to its own use, under the guise of commissions, three hundred (300) shares of Union Company stock of the value of Nine Thousand Eight Hundred Sixty-Four Dollars ($9,864.00), which does not appear upon said statement.

(*h*) In addition to the foregoing items, the Trust Corporation took, appropriated and converted to its own use, under the guise of commissions for services rendered, the following stocks and bonds of Union Company:

October 21, 1892, 60 bonds of the value of.....	$54,000.00
1,500 shares of stock of the value of.....	49,320.00

(*i*) In addition to the foregoing items the Trust Company took, without consideration, appropriated and converted to its own use one thousand (1,000) shares of Union Company stock of the value of Thirty-Two Thousand Eight Hundred and Eighty Dollars ($32,880.00).

(*j*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Air Line:

Mar. 17, 1892.....	$520.00
June 20, 1892.....	50.00
July 6, 1892.....	700.00

(*k*) In addition to the foregoing appearing on said statement there was taken and appropriated by the Trust Company and
495 by it converted to its own use, on or about December 9, 1891, the following:

13 mortgage bonds of the Air Line of the value of $11,193.00.

500 shares of stock of the Air Line of the value of $15,950.00, for which no credit is given to the Belt Company in said statement.

(*l*) In addition to the foregoing appearing on said statement there was taken and appropriated by the Trust Company and by it converted to its own use in the year 1892, 500 shares of Air Line stock of the value of $15,950.00.

(*m*) In addition to the foregoing items the Trust Company in the year 1895 took, appropriated and converted to its own use under the guise of commissions and service for promotion in connection with the Air Line, 80 shares of stock of the East Kansas City Land Company (then the property of the Belt Company) of the value of Eight Thousand Dollars ($8,000.00).

(*n*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Kansas City & Northern Connecting Railroad Company:

July 19, 1896	$400.00
July 29, 1896	400.00
Oct. 1, 1899	50.00
Dec. 10, 1896	8,250.00
Dec. 10, 1896	3,012.00
Dec. 23, 1897	50,000.00
Dec. 23, 1897	15,791.00
Dec. 23, 1897	1,250.00
Feb. 9, 1898	250.00
Feb. 24, 1898	300.00
Sep. 8, 1898	950.00
Dec. 27, 1898	250.00
May 23, 1899	62.50

Your orators further show that as above set forth the Trust Company, at all times while it was handling the stocks and bonds of the companies mentioned, absolutely dominated and controlled said companies and was using them, and each of them, as its own instrumentality or dummy for its own benefit and profit; that the Trust Company occupied a fiduciary relation to said companies and that any contract or contracts made or claimed to have been made between the Trust Company and said companies respectively,
496 providing for commissions, donations or services were unlawful, inequitable and oppressive, and neither said contracts nor the charges above made were ever submitted to or approved by the parties in interest in said companies; that the said charges and exactions made under the guise of commissions or services were not only exorbitant, but by reason of the relationship between the Trust Company and the said companies the Trust Company did not have the right in law to charge the said companies any commissions whatsoever for the sale or handling of said securities or for anything done or services performed on account of which said charges were made; that the charges for said commissions contained in said pretended statement should be eliminated and the Belt Company should be credited upon said account with interest on said charges from the dates when they were made; and in respect to the charges for commissions not appearing upon said pretended statement, the Belt Comapny should be and is entitled to a credit from the Trust Company with interest from the date of the payment thereof; and the value of the stocks and bonds so appropriated by the Trust Company as aforesaid, together with interest thereon from the dates respectively of such appropriation, should be credited to the Belt Company upon said statement.

3. Your orators further show that upon the organization of the various companies above named, to-wit, the Suburban Company, the Consolidated Company and the Union Company, the Trust Company as above set forth caused these companies respectively to issue stocks and bonds, and thereupon the Trust Company undertook the handling and disposition of said stocks and bonds, and, in addition to the exaction of commissions as above stated, the Trust Company exacted and caused the Belt Company to pay certain other

charges under the name of trustee's fees, which your orators allege are wrongful and unlawful charges, for the reasons hereinbefore and hereinafter set forth, said charges being as follows:

(*a*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of trustee's fees in connection with the Union Company, as follows:

Jan. 13, 1893	$22,500.00
Jan. 23, 1893	9,600.00
Apr. 5, 1893	18,750.00
Feb. 27, 1893	375.00

In addition to the foregoing charges the Trust Company charged the Belt Company under the guise of Trustee's fees and caused the Belt — to pay the same in connection with the Union Company, the following sums:

497	Sept. 26, 1892	$13,200.00
	Oct. 7, 1892	1,650.00
	Nov. 10, 1892	2,400.00
	Dec. 31, 1892	1,650.00
	Jan. 7, 1893	750.00

The amount of these payments does not appear on the pretended statement presented by the Trust Company.

(*b*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of trustee's fees in connection with the Consolidated Company:

Apr. 25th, 1892	$7,000.00

(*c*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of trustee's fees in connection with the Suburban Company, to-wit:

From September, 1891, to and including May, 1900, at the rate of $17.00 per month, aggregating $1,326.00.

(*d*) In addition to the foregoing charges that appear upon the said statement, the Trust Company took and appropriated to its own use, the following stocks of the Suburban Company under the guise of trustee's fees or services, as follows:

Sept. 12, 1892, 1 share of the value of $33.00.

Your orators further show that, as hereinbefore set forth, the Trust Company at all times while it was handling the stocks and bonds of the companies mentioned absolutely dominated and controlled said companies and was using them and each of them as its own instrumentality or dummy for its own benefit and profit; that the Trust Company occupied a fiduciary relation to said companies and that any contract or contracts made, or claimed to have been made, between the Trust Company and said companies respect-

ively, providing for trustee's fees, were unlawful, inequitable and oppressive, and neither said contracts nor the charges above made were ever submitted to or approved by the parties in interest in said companies; that the said charges and exactions made under the guise of trustee's fees were not only exorbitant, but, by reason of the relationship between the Trust Company and the said companies, the Trust Company did not have the right in law to charge the said companies any trustee's fees whatsoever in connection with the sale or handling of said securities or for anything done or services performed, on account of which said charges were made; that the charges for said trustee's fees contained in said pre-
498 tended statement should be eliminated and the Belt Company should be credited upon said account, with interest on said charges from the date when they were made and in respect to the charges for trustee's fees not appearing upon said pretended statement of the Trust Company, the Belt Company should be and is entitled to a credit from the Trust Company with interest from the date of payment thereof; and the value of the stocks so appropriated by the Trust Company as aforesaid, together with interest thereon from the date of such appropriation, should be credited to the Belt Company upon said statement.

4. Your orators further show that upon the organization of the various companies above named, to-wit, the Suburban Company and the Consolidated Company, the Union Company, the Air Line and the Northern Connecting Company, the Trust Company as above set forth caused these companies respectively to issue stocks and bonds, and thereupon the Trust Company undertook the handling and disposition of said stocks and bonds and appropriated and converted to its own use large amounts of the stock of said companies under the pretense that said stock was taken by the Trust Company as a bonus.

(*a*) On or about August 8, 1890, the Trust Company took and appropriated, under the guise of a bonus, 2,200 shares of stock of the Suburban Company, of the value of $72,600.00.

(*b*) Upon the following dates the Trust Company appropriated and converted to its own use, under the guise of a bonus, the following shares of stock of the Consolidated Company:

Dec. 7, 1891,	248 shares of the value of	$ 7,990.56
Nov. 7, 1892,	16 shares of the value of	515.52
Nov. 7, 1892,	104 shares of the value of	3,350.88
Dec. 8, 1892,	388 shares of the value of	12,501.36
Dec. 4, 1891,	24 shares of the value of	773.28

(*c*) Upon the following dates the Trust Company appropriated and converted to its own use, under the guise of bonus, stock of the Union Company, as follows:

Oct. 31, 1892	230 shares of the value of	$ 7,595.28
Dec. 31, 1892,	9 shares of the value of	295.92
Dec. 31, 1892,	2 shares of the value of	65.76
Jan. 5, 1893,	5 shares of the value of	164.40

Jan. 7, 1893,	20 shares of the value of.....	657.60
Jan. 7, 1893,	2400 shares of the value of.....	78,912.00
Jan. 23, 1893	504 shares of the value of.....	16,571.52
Apr. 5, 1893,	1000 shares of the value of.....	32,880.00
Jan. 20, 1894,	350 shares of the value of.....	11,508.00

499 (*d*) Upon the following dates the Trust Company appropriated and converted to its own use, shares of stock of the Kansas City & Independent Air Line under the guise of bonus, as follows:

June 23, 1892,	70 shares of stock of the value of.....	$ 2,333.00
June 23, 1892,	7 shares of stock of the value of.....	223.30

(*e*) Upon the following dates the Trust Company took from the Belt Company and appropriated and converted to its own use the following shares of stock of the Kansas City & Northern Connecting Railroad Company, under the guise of bonus:

Oct. 9, 1896,	2000 shares of the value of.....	$ 6,000.00
Sept. 21, 1897,	70 shares of the value of.....	210.00

And on the following dates the Trust Company took from the Belt Company and appropriated to itself and converted to its own use the second mortgage bonds of the Kansas City & Northern Connecting Railroad Company as follows:

July 20, 1896,	140 bonds.....	$63,000.00
Sept. 21, 1897,	4 9–10 bonds.....	2,205.00

Your orators further show that as hereinbefore set forth the Trust Company at all times while it was handling the stocks and bonds of the companies mentioned, absolutely dominated and controlled said companies, using them and each of them as its instrumentality or dummy for its own benefit and profit; that the Trust Company occupied a fiduciary relation to said companies and was the promoter and organizer of each and all of them; that there was no consideration whatever for the above mentioned stocks and bonds so taken by the Trust Company as between the Trust Company and the Belt Company, but that said stocks and bonds were so taken by the Trust Company solely by virtue of its domination and control over it; that in equity and good conscience the Trust Company should account to the Belt Company for the value of all of said stocks and bonds so unlawfully taken by it from the Belt Company, and the Belt Company is entitled to credit upon the pretended statement presented by the Trust Company for the value of said stocks and bonds so unlawfully appropriated as aforesaid, together with interest thereon from the dates respectively of such appropriations.

5. Your orators further show that upon the organization of the various companies above named, to-wit: The Suburban Company, the Consolidated Company, the Union Company, the Air Line, and the

Northern Connecting Company, the Trust Company began the practice of loaning money to the said companies, taking the
500 promissory notes of the company to which the money was so loaned, and charging such loan to the Belt Company; that from time to time moneys were advanced by the Trust Company to or for said companies, and the same were charged to the Belt Company in open account and from time to time the securities, consisting of stocks and bonds of said companies, were bought by the Trust Company from said companies, or sold by the Trust Company, for them, and the proceeds credited in open account to the Belt Company; that in this manner there were from time to time many notes of large amounts given by the Belt Company upon which the Trust Company charged the Belt Company with interest and discount in large sums; that interest on daily balances upon said open accounts was also computed, usually at the close of each month, and if the balance was in favor of the Belt Company an allowance was made of interest on the average daily balance for such month at the rate of two per cent per annum, but if the balance was in favor of the Trust Company, interest upon the average daily balance for such month was allowed at the rate of from seven per cent to ten per cent, and the amount of such interest charged to the Belt Company in open account, and the interest so charged to the Belt Company in open account was included in the daily balances for subsequent months, and also in the promissory notes of the Belt Company taken from time to time, and in that manner the interest exacted by the Trust Company was compounded monthly upon daily balances, and at stated periods upon the said promissory notes.

Your orators further show that in the pretended statement of account presented by the Trust Company there are unlawful charges of interest and discount as follows:

(*a*) Between the dates of June 14, 1890, and June 4, 1900, there isc harged in open account by the Trust Company against the Belt Company various items of interest on daily balances at the per cent. above stated, which, after the deduction of interest allowed the Belt Company on daily balances, amounts to the sum of $16,105.45, an itemized statement of which, showing the dates upon which said charges were made upon the pretended statement presented by the Trust Company, and the amount of each charge is set forth in a statement under the heading "Interest on Daily Balances," hereto attached and made a part hereof as Exhibit "2."

The item shown on the Exhibit in red represents the allowance of interest on daily balances where the same are in favor of the Belt Company; the items in blue show the charges of interest in favor of the Trust Company and against the Belt Company.

501 (*b*) On May 16, 1892, there was charged in open account as shown by the pretended statement presented by the Trust Company in connection with the Air Line Company against the Belt Company Eighty-five and 18-100 Dollars ($85.18), interest on open account, and the Trust Company charged the Air

Line and the Air Line paid the same in cash to the Trust Company the following items of cash, none of said items appearing on thep retended statement presented by the Trust Company.

Interest on Air Line Notes.

July	28, 1892,	Interest on note	$ 840.00
October	24, 1892,	Interest on note	291.05
March	22, 1893,	Interest on note	1,616.67

Interest on Air Line Overdrafts with the Trust Company.

January	14th, 1893,	Interest on overdraft	$1,459.85
March	22nd, 1893,	Interest on overdraft	211.62
April	24th, 1893,	Interest on overdraft	85.21
June	5th, 1893,	Interest on overdraft	48.78

(*c*) Between the dates of June 14th, 1890, and November 7th, 1899, there was charged by the Trust Company against the Belt Company for discount on said notes, the sum of Nineteen Thousand Eight Hundred Thirty-Two and 9-100 Dollars ($19,832.09); an itemized statement of which, together with the dates upon which said charges were made in the pretended statement presented by the Trust Company, with the amount of each charge, appears on said Exhibit "2" under the head "Discount on Notes."

(*d*) Between the dates of June 14, 1890, and November 7, 1899, there was charged by the Trust Company upon its books against the Belt Company for interest on said notes above mentioned, the sum of Forty-Four Thousand Seven Hundred Sixty-Three and 48-100 Dollars ($44,763.48), and same appears as charges against the Belt Company upon the pretended statement presented by the Trust Company, an itemized statement of which, with the dates upon which said charges were made, and the amount of each charge is shown on said Exhibit "2," under the heading of "Interest on Notes," and the Trust Company charged the Belt Company and the Belt Company paid the same in cash to the Trust Company, the following items of interest, none of said items appearing on the pretended statement presented by the Trust Company.

502 *Interest on Belt Company's Notes.*

August	30, 1892,	Interest on note	$1,104.70
September	5, 1892,	Balance of interest on account Sept. 1, 1892	151.76
September	19, 1892,	Interest	703.33
January	12, 1897,	Interest	109.80
July	24, 1899,	Interest	113.34
January	12, 1900,	Interest	500.00

Interest on Belt Company's Overdrafts with Trust Co.

January 14, 1893, Interest on daily balance May, 1892, to November, 1892	$ 699.03
March 22, 1893, Interest on overdraft	1,102.48

(*e*) During the year 1892 there were charged as shown upon the pretended statement of the Trust Company, in connection with the Air Line, against the Belt Company, items of interest upon notes given by the Air Line to the Trust Company as hereinbefore described, as follows:

May 16, 1892	$146.67
June 17, 1892	437.50
Dec. 8, 1892	66.67

(*f*) Between the dates of September 1, 1896, and January 1, 1897, there were charged in open account, as shown by the pretended statement, by the Trust Company, against the Belt Company, certain items of interest upon alleged anticipated payments upon the subscriptions by various parties, including the Trust Company, to the bonds of the Northern Connecting Company, and that said items are as follows:

September 28, 1896	$ 41.91
October 7, 1896	1,179.77
December 11, 1896	3.64
" " 1896	14.88
" " 1896	17.22

(*g*) On August 11, 1892, there were charged in open account, as shown on the pretended statement by the Trust Company, in connection with the Consolidated Company, against the Belt Company, certain items of interest upon alleged anticipated payments upon the subscriptions by various parties to the bonds of the Consolidated Terminal Company, amounting to the sum of $10,195.93.

(*h*) In addition to the amounts appearing upon the pretended statement presented by the Trust Company between the dates September 15, 1896, and June 4, 1900, there were charged by the Trust Company against the Belt Company by reason of the Belt Company constructing the railroad of the Connecting Com-
503 pany, various items of interest on daily balances at the per cent above stated, which after deduction of interest allowed the Belt Company on daily balance amount to the sum of Twenty-Eight Thousand Three Hundred Thirty and 1-100 Dollars ($28,330.01), an itemized statement of which showing the amount of each charge, is set forth in the statement, under the heading "Interest on Daily Balance," hereto attached and made a part hereof as Exhibit "3;" the items shown on the exhibit in red represent the amount of interest on daily balances where the same are in favor

of the Belt Company; the items in blue show the charges of interest in favor of the Trust Company, as against the Belt Company.

(*i*) In addition to the amounts appearing upon the pretended statement presented by the Trust Company between the dates of September 15, 1896, and June 4, 1900, there was charged by the Trust Company, or the Trust Company caused other persons to charge against the Belt Company, for interest on notes that the Trust Company caused the Belt Company to give by reason of the Belt Company constructing the Connecting Company, the sum of Thirty-Six Thousand Four Hundred Nineteen and 86-100 Dollars ($36,419.86), an itemized statement of which, showing the said charges and the amount of said charges, is set forth in the statement under the heading of "Interest on Notes," hereto attached and made a part hereof as Exhibit "3."

(*j*) That the amount of compound interest so compounded as hereinbefore described by the Trust Company and charged against the Belt Company by the Trust Company amounts to the sum of Seventeen Thousand Nine Hundred Twenty-Nine and 44-100 Dollars ($17,929.44).

(*k*) In addition to the foregoing charges of interest and discount there were other charges of interest and discount made by the Trust Company against the Belt Company to the amount of One Hundred and Fifty Thousand Dollars ($150,000.00), which the Belt Company was caused by the Trust Company to pay from funds in its treasury.

Your orators further show that as hereinbefore stated, the Trust Company at all times, covering the period of the charges aforesaid, absolutely dominated and controlled the said companies and was using them, and each of them, as its own instrumentality or dummy for its own benefit and profit; that the Trust Company, as the promotor of said companies, and by reason of its control and domination over them, at all times occupied a fiduciary relation to
504 said companies and was not entitled in equity and good conscience to make said excessive and unreasonable charges and exactions; that by reason of the relationship between the Trust Company and the said companies as hereinbefore stated, the Trust Company did not have the right to charge the said companies any interest whatever upon daily balances, or otherwise, and that the charges for said items of interest contained in said pretended statement should be eliminated, and the Belt Company should be credited upon said account with interest on said charges from the dates when they were made, and there should be credited upon said account also the amount of compound interest and the interest which the Belt Company was caused to pay from its own funds to the Trust Company, together with interest on said payments from the time when they were made respectively, and credit for the items of interest shown as paid and omitted from the pretended statement of the Trust Company, should be allowed upon said pretended statement with interest from the date of payment thereof.

6. Your orators further show that the Trust Company during

the period beginning with the year 1892 down to the year 1900, maintained what it called its "Building Department," which consisted of a limited number of employes, whose duty it was to make contracts for such building or construction work as the Trust Company might desire to have done in carrying out its various enterprises in connection with its auxiliary companies, including the Belt Com-any, the Consolidated Company, the Union Company, the Air Line, the Elevator Company and Amusement Company; that all of the work done for said companies could, and should, have been done by said companies, respectively, but the Trust Company contrived the scheme of its Building Department in order that work of that character might be done by the Trust Company and large and exorbitant chargest made therefor, from which the Trust Company might reap a large profit by causing the Belt Company to pay, not only the cost of such work and materials, but also large sums in addition thereto under the guise of superintendence; that the aforesaid plan was carried out to the extent that a large amount of work was done by the said Building Department, for the companies above named, and the Trust Company caused the Belt Company to pay not only the cost thereof, but from ten per cent, to fifteen per cent, additional under the guise of superintendence; that the amount of said superintendence so charged by the Trust Company to the Belt Company, together with the dates on which said charges were made, and the amount of each charge, is shown under the heading of "Superintendence," on Exhibit "2," hereto attached, and aggregates the sum of
505 Forty Thousand Four Hundred Fifty-Six and 32-100 Dollars ($40,456.32); that of said sum fifty (50) per cent. was clear profit to the Trust Company; that the Trust Company charged to the Belt Company the said sum of $40,456.32, and the same appears upon the pretended statement presented by the Trust Company; that the Trust Company by reason or its relation to the said companies did not have the right in law to charge the said companies any sum whatsoever as superintendence in excess of the actual cost thereof, and did not have the right to profit out of said transactions; that the said profits of the Trust Company arising from said transactions should be eliminated from said pretended statement, and the Belt Company should be credited upon said account with interest on the amounts so eliminated from the dates when the said charges were made.

7. Your orators further show to the court that in the year 1895 the Trust Company, under the pretense of increasing the earnings of the Air Line, caused by the incorporation of the Fairmount Amusement Company, and the establishment and exploitation of Fairmount Park, and in so doing the Trust Company caused to be expended by the Air Line and by the Belt Company large sums of money in the acquisition of a large tract of land near the railroad of the Air Line between Kansas City and Independence, and the construction of buildings thereon and the adaptation of said grounds for the purpose of a public park; that the moneys so

furnished by the Air Line as aforesaid were afterward, by the direction of the Trust Company, charged to and assumed by the Belt Company so that ultimately all of the expenses in connection with the exploitation of Fairmount Park were charged to the Belt Company, and the various items making the aggregate thereof appear as debits to the Belt Company upon the pretended statement presented by the Trust Company; that the result of the organization and operation of Fairmount Park was a net loss of Two Hundred Ninety-Three Thousand Three Hundred three and 68-100 Dollars ($293,303.68), all of which the Belt Company was required by the Trust Company to stand; that the scheme of Fairmount Park was a financial failure and the Trust Company knew, or should have known, that it would be such failure, and the conduct of the Trust Company in causing the Belt Company to organize and carry on said enterprise and to stand the loss arising therefrom was and is inequitable, unjust and oppressive, and the Trust Company should in equity and good conscience be required to stand said loss itself, and the amount of said loss should be eliminated from the charges against the Belt Company upon the pretended statement produced by the Trust Company, or if that is impossible by reason of inability to identify the various items going to make
506 the deficiency, then the amount of said loss, together with interest thereon, should be credited upon said pretended statement.

8. Your orators further show to the court that the Trust Company caused the incorporation of the Missouri Elevator and Terminal Company on or about January 4, 1892, and after its incorporation the Trust Company caused to be constructed for it by the building department of the Trust Company three elevators, and caused the Elevator Company to operate said elevators and to execute upon its corporate property mortgages in large amounts to pay the purchase price of its properties.

(*a*) The operation of said elevator by the Elevator Company resulted in a loss, which was represented in part by a charge upon the books of the Trust Company against the Elevator Company in the amount of Three Hundred Ninety-One and 17-100 Dollars ($391.17); that the Trust Company on or about the 29th day of April, 1893, found that the Elevator Company was hopelessly insolvent and unable to pay said amount, and thereupon it charged said amount so due it from the Elevator Company, together with other items alleged to be due from the Elevator Company, to the Trust Company, amounting in all to the sum of Fifteen Thousand Two Hundred Ninety-Six and 68-100 Dollars ($15,296.68) to the Belt Company, and said charge of $15,296.68 now appears in the pretended statement presented by the Trust Company as a charge against the Belt Company; that the action of the Trust Company in so charging against the Belt Company the debt of the Elevator Company was wrongful, and said charge was without consideration, and the said charge should be eliminated from the said pretended statement.

(*b*) On or about June, 1893, and while the Trust Company,

then holding all of the stock of the Elevator Company in its name and in the names of its directors and officers and their wives, knew that the Elevator Company was hopelessly involved and could not be made a success, the Trust Company caused the Belt Company to go through the form of an agreement with the Elevator Company, by the terms of which the Belt Company was to acquire and take title to all of the elevators and other properties of the Elevator Company, except one thousand four hundred and sixty-one (1461) shares of stock of the Belt Company theretofore exchanged by the Trust Company and its directors, officers and their wives, for Elevator stock, and in consideration thereof the Belt Company was to issue to the Elevator Company 146.1 shares of the capital stock of the Belt Company and to assume the liabilities of the Elevator, all of which were then owing by the Elevator Company to the Trust Com-
507 pany; that said shares of stock were duly issued by the Belt Company and delivered to the Elevator Company and the liabilities of the Elevator Company were charged to the Belt Company, but the contract was never carried out in any other respect. The said 146.1 shares, upon being so received by the Elevator Company, together with the shares of the Belt Stock above referred to, were caused by the Trust Company to be delivered to it and its directors and officers and their wives, so that the Belt Company never at any time received any consideration for said 146.1 shares of Belt stock, of the reasonable value of Four Thousand Seven Hundred and Seventy Dollars ($4,770.00), which said amount should be allowed as a credit upon the pretended statement presented by the Trust Company, together with interest thereon at the rate of six per cent. per annum from said 8th day of June, 1893.

(*c*) From September, 1892, to September, 1894, the Trust Company caused the Belt Company to pay out from its own treasury to the Trust Company for the completion of the property of the Elevator Company the sum of Fourteen Thousand One Hundred Eighty-Five and 4-100 Dollars ($14,185.04), for which the Belt Company received no consideration. The said sum of $14,185.04 was paid out of funds of the Belt Company advanced to it by the Trust Company, and charged in the pretended statement presented by the Trust Company, and, therefore, said sum with interest thereon should be credited to the Belt Company on said statement.

(*d*) On or about September 1, 1894, the Trust Company caused the Belt Company to go through the form of an agreement with the Elevator Company, by the terms of which the Elevator Company was to reacquire and take title to all the property of the Elevator Company that had been received by the Belt Company by reason of the pretended agreement of June, 1893, above mentioned, together with all improvements and additions made upon and to the said elevators and property by the Belt Company, amounting in value to the sum of Fourteen Thousand One Hundred Eighty-Five and 4-100 Dollars ($14,185.04), and in consideration thereof, the Elevator Company was to issue and did issue to the Belt Company 425 shares of the Elevator Company's stock, and was to re-assume and did re-assume Thirty-Two Thousand Dollars ($32,000.00) of

the liabilities of the Elevator Company that had been assumed by the Belt Company by reason of the said agreement of June, 1893; and the Belt Company, in addition to the transfer of said property to the Elevator Company, was to continue its assumption of the balance of the liabilities of the Elevator Company, amounting to Fifteen Thousand Two Hundred Ninety-Six and 68-100 Dol-
508 lars ($15,296.68), that had been assumed by the Belt Company by reason of said agreement of June, 1893. The stock of the Elevator Company so received by the Belt Company was worthless, as the Trust Company well knew, and the said $32,000 of liabilities re-assumed by the Elevator Company was evidenced by certain promissory notes of the Elevator Company secured by certain deeds of trust upon the elevators and properties of the said Elevator Company.

Between Sept. 1, 1894, and June 1, 1900, the excess of expenditures occasioned by the operation of the properties and elevators of the Elevator Company over the receipts therefrom amounted to Seventeen Thousand Eight Hundred Seventy-Seven and 82-100 Dollars ($17,877.92), and this loss to the Elevator Company, the Trust Company, solely by reason of its coercion, domination and control over the Belt Company, unlawfully caused to be charged to and paid by the Belt Company without any consideration therefor; the act of the Trust Company in having said charge made and paid was inequitable and oppressive and the Belt Company is entitled to a credit upon the pretended statement of the Trust Company for ($17,877.92), with interest thereon, from the date of payment thereof.

(*e*) In addition to the charges appearing upon the pretended statement, the Trust Company unlawfully caused the Belt Company to pay to it, without consideration therefor, between December, 1894, and June, 1899, as interest upon the said $32,000 of notes of the Elevator Company all of which were the obligations of said Elevator Company, the sum of Ten Thousand Dollars ($10,000.00); of this amount so paid Two Thousand Dollars ($2,000.00) appear as charges against the Belt Company upon the pretended statement presented by the Trust Company; and the Belt Company was caused by the Trust Company to pay the balance, Eight Thousand Dollars ($8,000.00), to it from funds in its treasury; all of said payments were made solely by reason of the coercion, domination and control of the Trust Company and said payments are inequitable and oppressive; the Belt Company is entitled to a credit upon the said pretended statement for the asid Two Thousand Dollars ($2,000.00) with interest thereon from the date of payment thereof; and the Belt Company is further entitled to a credit from the Trust Company for the said $8,000.00 with interest thereon from the date of payment thereof.

9. Your orators further state that in the year 1895, the Trust Company caused to be incorporated a railroad corporation under the laws of the State of Missouri, called the "Kansas City & Northern Connecting Railroad Company," herein referred to as the
509 Connecting Company, for the purpose of constructing a line of railroad from Kansas City, Missouri, to Pattonsburg, Mis-

souri, in order to connect with the railroads at that time running eastwardly to Chicago, Illinois, and northwardly to Council Bluffs, Iowa.

Afterwards, and in the same year, the Trust Company caused the Belt Company to enter into a contract with the Connecting Company, by the terms of which the Belt Company undertook to acquire the right-of-way and to construct the railroad of the Connecting Company between the points aforesaid, in consideration of which the Connecting Company agreed in said contract to execute, issue and deliver to the Belt Company, bonds and stocks of the Connecting Company; that the Belt Company was caused by the Trust Company to enter upon the execution of said contract and to construct the said railroad, and the Belt Company did secure the right-of-way and construct the railroad of the Connecting Company between Kansas City and Pattonsburg. In so doing the Belt Company was caused to expend large sums of money for right-of-way, material and for construction, and the stocks and bonds of the Connecting Company were wholly inadequate in value to reimburse the Belt Company for the money so expended, so that there resulted a large loss to the Belt Company in the matter of said contract, amounting to the sum of One Hundred Sixteen Thousand Six Hundred Forty-Four and 53-100 Dollars ($116,644.53), all of which of said deficiency was by the Trust Company charged to the Belt Company and the various items going to make the said deficiency appear upon the pretended statement presented by the Trust Company as charges against the Belt Company.

Your orators further state that the action of the Trust Company in so requiring the Belt Company to enter into said contract and construct said railroad, resulting in said loss, was wrongful, oppressive and was done solely for the benefit of the Trust Company that it might profit from the handling of the securities of the Connecting Company, which, under said contract, would be received nominally by the Belt Company, but in reality by the Trust Company; that the Trust Company knew and should have known that said venture would result in a large loss to the Belt Company, and the amount of said loss in equity and good conscience ought not to be charged to and borne by the Belt Company, and the same should be eliminated from the pretended statement presented by the Trust Company, together with interest thereon; or, if the same cannot be identified, then that credit be given for the amount thereof with interest.

510 10. Your orators further show that on January 1, 1897, July 1, 1897, January 1, 1898, and July 1, 1898, there fell due certain coupons upon bonds of the Kansas City & Northern Connecting Railroad Company, outstanding in the hands of various holders; that said coupons were the obligations of said Connecting Company, and were not in any manner obligations, either direct or contingent on the part of the Belt Company.

(a) When the said coupons became due on said dates respectively, the Kansas City & Northern Connecting Railroad Company was without funds to pay the same, and the Trust Company in or-

der to bolster up and protect the credit of the Kansas City & Northern Connecting Company, and to prevent a default on its part in the payment of its interest, did take up and pay said coupons in the amounts and on or about the dates hereinafter stated, to-wit:

Jan. 18, 1897	Interest allowed to Jan. 1, 1897, on $100,000 K. C. & N. C. R. R. bonds..	$2,500.00
July 14, 1897	Interest allowed on $51,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	1,275.00
Aug. 3, 1897	Interest on $100,000 K. C. & N. C. R. R. bonds due July 1, 1897.....	2,500.00
Oct. 12, 1897	Interest on $300,000 K. C. & N. C. R. R. bonds, due July 1, 1897.....	7,500.00
Dec. 31, 1897	Interest on $100,000 K. C. & N. C. R. R. bonds, due July 1, 1898.....	2,500.00
Dec. 31, 1897	Interest on $700,000 K. C. & N. C. R. R. 5 per cent bonds, due Jan. 1, 1898, interest being computed from date bonds were sold.....	7,375.67
Dec. 31, 1897	Interest paid on $51,000 K. C. & N. C. R. R. 5 per cent bonds.....	1,275.00
Aug. 13, 1898	Interest on $10,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1898, paid by Trust Company to A. & P. Roberts	250.00
July 28, 1898	Interest on $1,234,000.00 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1898	30,850.00
	Total	$56,025.67

511 (*b*) Your orators further show that the Trust Company by virtue of its domination and control over the Belt Company did cause the Belt Company to pay, and it did pay from the funds in its treasury, the interest upon certain bonds of the Kansas City & Northern Connecting Railroad Company, falling due as aforesaid at or about the said dates, to the persons and in the amounts following, to-wit:

Oct. 14, 1897.	John H. Carr, interest on $4,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	$100.00
Oct. 13, 1897.	Estate of P. C. Hollis, interest on $5,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	125.00
Oct. —, 1897.	F. B. Hubbell, interest on $1,000 K. C. & N. C. R. R. bonds, due July 1, 1897	25.00
Oct. —, 1897.	Mrs. Frances A. Weeks, interest on $1,000 K. C. & N. C. R. R. bonds, due July 1, 1897	25.00
Oct. —, 1897.	Wm. H. Nicholson, interest on $5,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	125.00
Oct. —, 1897.	Wells-Fargo Company, interest on $100,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	2,500.00
— —, 1897.	N. Norton, Asst. Secretary, account various parties, interest on $249,000 K. C. & N. C. R. R. 5 per cent bonds, due Jan. 1, 1898	6,225.00
	Total	$9,125.00

The amount of these payments does not appear on the pretended statement furnished by the Trust Company.

(c) Your orators further show that all of the foregoing payments made by the Trust Company are charged to the Belt Company in the pretended statement of account except the item of $9,125.00 in the amounts and at the dates above set forth and there is also charged to the Belt Company in said statement interest upon the said payment of $30,850.00, amounting to $167.95, and also the amount of $77.13 as a commission or brokerage for paying said coupons.

The said charges made by the Trust Company against the Belt Company and entered on said pretended statement, including the item of Nine Thousand One Hundred Twenty-five Dollars ($9,125.00) are unlawful, inequitable and were caused to be paid by the Belt Company or made arbitrarily by the Trust Company without reason or excuse, but for the pretended reason that the claim of the Trust Company arising out of its payments of said interest could not be collected from the Kansas City & Northern Connecting, because of its financial inability to make said payment, and that the Belt Company being in better financial standing could be made to pay same by charging it to the account of the Belt Com-
512 pany; and your orators are entitled to have said items so appearing in said pretended account eliminated as charges against the Belt Company. The aforesaid payments made by the Belt Company on account of said interest coupons were unlawful and inequitably made by the Belt Company as a result of the coercion and domination of the Trust Company, and not by reason of any liability therefor on the part of the Belt Company, and the Belt

Company is in equity and good conscience entitled to be credited with the amount thereof, together with interest thereon from the dates of payment at the rate of six per cent per annum.

(*d*) Your orators further show that on or about July 31, 1898, the Belt Company was the owner of the first mortgage bonds of the Kansas City & Northern Connecting Company, and also the owner of Three Hundred and Fourteen (314) coupons attached thereto, which said coupons were then due; that said coupons were the direct obligation of the Kansas City & Northern Connecting Railroad Company, due and payable to the Belt Company, said bonds being at that time in the control of the Trust Company. The Trust Company on or about said date, did wrongfully cause the said coupons, amounting in value to the sum of Seven Thousand Eight Hundred and Fifty Dollars ($7,850.00) to be taken from said bonds and cancelled as having been paid, and denied and still denies to the Belt Company the right to said coupons or the interest thereon; that said act of the Trust Company was wrongful and inequitable and operated to deprive the Belt Company of said sum of Seven Thousand Eighty Hundred and Fifty Dollars ($7,850.00) and interest thereon at six per cent from said date, for which in equity and good conscience the Trust Company should account to the Belt Company and said sum has been omitted by the Trust Company from its pretended statement.

(*e*) Your orators further state that in the pretended account presented by the Trust Company in connection with the Belt Company the following charges appear:

Sept.	1, 1893	$700.00
Feb.	26, 1894	6,800.00
Mar.	1, 1894	700.00
Aug.	30, 1894	6,800.00
Sept.	1, 1894	700.00
Feb.	26, 1895	6,800.00
Mar.	1, 1895	700.00
Aug.	31, 1895	6,800.00
Dec.	20, 1895	700.00
Feb.	27, 1896	6,800.00
Mar.	2, 1896	700.00
Aug.	27, 1896	6,800.00
Sept.	1, 1896	700.00
	Feb. 26, 1897	6,800.00
513	Feb. 27, 1897	700.00
	Aug. 26, 1897	6,800.00
Aug.	28, 1897	700.00
Feb.	26, 1898	6,450.00
Mar.	1, 1898	1,050.00
Aug.	29, 1898	6,450.00
Aug.	31, 1898	1,050.00
Mar.	1, 1899	6,450.00
Mar.	1, 1899	1,050.00

That all of said charges were made against the Belt Company on account of interest on first mortgage bonds of the Air Line which were alleged by the Trust Company to have been paid by it to the holders of the coupons evidencing the same including the Trust Company; that the Belt Company had not assumed or become liable to pay the interest on said Air Line bonds and was not in any way liable therefor; that the action of the Trust Company in making said charges to the Belt Company was not warranted and unlawful and was solely by reason of its power and domination over the Belt Company and said charges should be eliminated from the said pretended account, and the Belt Company should be credited with interest on said amounts respectively at six per cent from the dates respectively when the said charges were made.

11. Your orators further state that on or about September 25, 1893, the Belt Company was the owner of Two Hundred second mortgage bonds of the par value of One Thousand Dollars ($1,000) each, issued by the Kansas City & Independence Air Line and secured by a mortgage upon the property of that company. The Belt Company on that day was also the owner of Twenty-five Hundred (2,500) shares of stock of the par value of One Hundred Dollars ($100.00) each, issued by the Union Company. On said 25th day of September, 1893, a contract in writing was entered into between the Belt Company and the Trust Company, which recited that the Belt Company was the owner of the entire issue of the second mortgage bonds of the Kansas City & Independence Air Line, which issue consisted of Two Hundred (200) bonds of the par value of One Thousand Dollars ($1,000.00) each, subject to the interest which the Trust Company had as trustee in thirty (30) of said bonds, numbered from one seventy-one (171) to two hundred (200), both inclusive, aggregating the principal sum of Thirty Thousand Dollars ($30,000.00), and held in trust by the Trust Company under the mortgage or deed of trust, given by the Kansas City & Independence Air Line of date March 1, 1893, and also reciting that the Belt Company was the owner of Twenty-Five Hundred (2,500) shares of the capital stock of the Union Terminal Railroad Company, of the par value of One Hundred Dol-
514 lars ($100.00) each; and further reciting that the Belt Company was desirous of selling and disposing of the entire issue of said second mortgage bonds and the said 2,500 shares of stock for the purpose of raising money and means to properly extend, equip, repair, maintain and operate its road and to meet its obligations then and thereafter incurred, and that the Trust Company had agreed to purchase said bonds and stock at and for the price and sum thereafter stated in said contract. It was, therefore, mutually agreed in said written contract, that the Belt Company should sell and deliver and that the Trust Company should purchase and receive and pay for the entire issue of the second mortgage bonds of the Kansas City & Independence Air Line, aggregating the principal sum of Two Hundred Thousand Dollars ($200,000.00), and also Two Thousand Five Hundred (2,500) shares of the capital stock of the Union Terminal Railroad Company, of the par value of Two

Hundred and Fifty Thousand Dollars ($250,000.00) at and for the price of the earned interest on said bonds, at the time of their delivery to the Trust Company, and the sum of One Hundred and Fifty Thousand Dollars ($150,000.00), to be paid upon the terms and at the times thereinafter stated; that is to say that the Belt Company should deliver to the Trust Company the said 2,500 shares of the capital stock of the Union Terminal Railroad Company upon the execution of said contract, and whenever the Belt Company should demand the Trust Company should take in amounts of Ten Thousand Dollars ($10,000.00), par value or multiples thereof, so many of said second mortgage bonds as the Belt Company might deliver; and the Trust Company agreed to pay the Belt Company therefor upon said contract all of the earned interest on the bonds so delivered to it and seventy-five per cent (75) of the face value of the principal sum thereof. It was further agreed in said written contract that said second mortgage bonds, numbered from one (1) to one hundred and seventy (170) both inclusive, aggregating the principal sum of One Hundred and Seventy Thousand Dollars ($170,000.00), should be delivered and paid for on or before eighteen (18) months from the date of said contract, and that so many of said bonds, numbered from one hundred and seventy-one (171) to two hundred (200), both inclusive, aggregating the principal sum of Thirty Thousand Dollars ($30,000.00), as should remain unsold by the Trust Company as trustees, under and by virtue of the terms of said mortgage or deed of trust, securing said bonds, on the first day of March, 1898, should be delivered and paid for within six months from said March 1, 1898.

(*a*) Your orators further show that in accordance with said contract there was delivered to the Trust Company by the Belt
515 Company the entire issue of said second mortgage bonds, being two hundred (200) bonds, of the par value of One Thousand Dollars ($1,000.00) each, and the Trust Company gave to the Belt Company credit for one hundred and thirty (130) of said bonds at the sum or price of Seven Hundred and Fifty Dollars ($750.00) each, — follows:

Oct.,	1893,	100 bonds at 75.....	$75,000.00
Mar.,	1894,	6 bonds at 75.....	4,500.00
Jan.,	1895,	6 bonds at 75.....	4,500.00
Mar.,	1895,	6 bonds at 75.....	4,500.00
Dec.,	1895,	6 bonds at 75.....	4,500.00
Mar.,	1896,	6 bonds at 75.....	4,500.00
			$97,500.00

Your orators further state that the Trust Company failed, neglected and refused within the time limited in said contract, or at any time thereafter, to purchase and pay for the remaining seventy (70) second mortgage Air Line bonds, of the par or face value of One Thousand Dollars ($1,000.00) each, as specified in said contract; but on the contrary, the Trust Company afterwards discovered

that the said second mortgage bonds could not be sold upon the market, and were worthless, and it thereupon devised a plan or scheme to re-sell and unload the same upon the Belt Company; and accordingly to carry out said plan it caused the Belt Company to enter into a pretended agreement rescinding said contract of September 25, 1893, and attempting to release the Trust Company from its obligation to take the remaining seventy (70) of said bonds, all of which was inequitable and against good conscience and the same is not binding upon your orators.

(*b*) In further consummation of said fraudulent plan the said Trust Company caused entries to be made upon its books and upon the books of the Belt Company charging the Belt Company as and for a return of said 130 bonds so purchased by the Trust Company at Seven Hundred and Fifty Dollars ($750.00) each as aforesaid, as follows:

July 1894, 80 bonds at 75.....	$60,000.00
June, 1896, 50 bonds at 75.....	37,000.00
	$97,500.00

(*c*) Your orators further show that the Trust Company in equity and good conscience should be held to account and pay to the Belt Company the contract price of the said seventy second mortgage bonds, being the amount of Fifty-Two Thousand Five Hun-
516 dred Dollars ($52,500.00), together with interest thereon at 6 per cent from the 25th day of March, 1895.

(*d*) Your orators further show unto the court that the 2,500 shares of the Union Company stock, so delivered to the Trust Company under said contract as aforesaid, were appropriated by the Trust Company to its own uses and for its own benefit and that it never at any time returned said stock to the Belt Company or accounted for the proceeds thereof. *On* or about May, 1894, the Trust Company exchanged said stock with the Belt Company for 2,500 shares of the par value of $100.00 each of the capital stock of the Belt Company, which was worth at that time Sixty-Two Thousand Five Hundred Dollars ($62,500.00); that the Trust Company received and thereafter disposed of the said stock of the Belt Company and has never accounted to your orators therefor, as in equity and good conscience it is bound to do, together with interest thereon at six per cent per annum from the 25th day of March, 1895.

Your orators are entitled to have allowed to them upon the pretended account presented by the Trust Company a credit represented by the contract price of said seventy bonds, to-wit, the sum of Fifty-Two Thousand Five Hundred Dollars ($52,500.00) with interest thereon, or if the court should find that said contract was duly rescinded, then your orators are entitled to a credit, represented by the value of said 2,500 shares of stock, to-wit, the sum of Sixty-Two Thousand Five Hundred Dollars ($62,500.00, and interest thereon.

Your orators further show that the act of the Trust Company in charging back to the Belt Company the said One Hundred and

thirty (130) bonds at Seven Hundred and Fifty Dollars ($750.00) per bond was unlawful and inequitable for the reason that said bonds were then worthless, as the Trust Company well knew, and that in equity and good conscience said charges should be eliminated from said pretended account.

12. Your orators further show that the Trust Company caused to be constructed the railroad of the Air Line and used for that purpose a corporation previously created by it, called the Kansas City Terminal Construction Company.

The Trust Company caused the Air Line to enter into a contract with said Construction Company for the construction, equipment and completion of the railroad of the Air Line; under the terms of said contract the Construction Company was to receive the stocks and bonds of the Air Line in certain amounts fixed in said contract.

The Construction Company entered upon the construction of
517 said railroad, but before the same was fully completed, the Trust Company caused the Air Line and the said Construction Company to go through the form of an agreement by the terms of which the Air Line was to accept the then partially completed railroad as and for full compliance with said contract and was to turn over to the Construction Company the securities provided in said contract to be turned over, upon its final completion.

And it was further provided that the Air Line should assume all the liabilities of the Construction Company and should succeed to and take over all of its assets. This plan was carried out and the uncompleted railroad was turned over to the Air Line, the securities were delivered to the Trust Company and the Air Line assumed the liabilities and took over the assets of the Construction Company.

(*a*) Among the assets of the Construction Company was the subscription made by the Trust Company in the name of A. E. Stilwell, trustee, to the capital stock of the Construction Company in the sum of Twenty Thousand Dollars ($20,000.00), which had been duly subscribed by the Trust Company, but upon which nothing had ever been paid. In the disposition of *of* the securities received by the Construction Company as aforesaid, this unpaid subscription on the part of the Trust Company was treated as paid, and a proportionate amount of the securities of the Air Line, to-wit: One Hundred and Ninety-Five (195) shares of stock, Twenty-Four and 375-1000 bonds (24.375) of the then aggregate value of Twenty-Six Thousand Dollars ($26,000.00) was turned over to and received and retained by the Trust Company but the Trust Company notwithstanding refused, and has ever since refused to pay such subscription, or any part thereof, but caused entries to be made upon its books and upon the books of the Air Line, cancelling said stock subscription by a fictitious charge. Your orators show, therefore, that by reason of the premises the Trust Company ought in equity and good conscience to account for any pay over to the Belt Company the amount of said subscription, to-wit: Twenty Thousand Dollars ($20,000.00) with interest thereon from the date that same was made, to-wit: March 30th, 1891, at the rate of six (6) per cent per annum to date, or that the Trust Company should account for any pay over

to the Belt Company the reasonable value of the securities so wrongfully received by the Trust Company as aforesaid, together with interest thereon at the rate of six per cent per annum from the date of such delivery to-wit: the 18th day of March, 1892, and that your orators are entitled to a credit upon the pretended statement presented by the Trust Company in the amount of said sub-
518 scription, with interest, or in the amount of the value of said securities with interest, as your orators may elect.

Your orators further show that if it should be claimed by the Trust Company and made to appear that the subscription mentioned in the preceding paragraph as hav- been made by A. E. Stilwell, trustee, was not in fact and in law the subscription of the Trust Company, then your orators show that the said charge made by the Trust Company against the Air Line for the sum of Twenty Thousand Dollars ($20,000.00), some two years after the transactions mentioned in the preceding paragraph, was an unlawful and fictitious charge and fraudulent as against the Belt Company; that the reason assigned by the Trust Company for making said charge was that it was for services, when as a matter of fact, no services were rendered by the Trust Company, and the charge was merely an unlawful method adopted by the Trust Company to get rid of its liability on said stock subscriptions.

(*b*) Your orators further state that on or about May 17, 1892, when the Air Line and Construction Company undertook, as above stated, to declare the contract between them for the construction of said Air Line road duly performed in all respects, the said Construction Company had an overdraft of $2,436.08, and owed the Trust Company in open account the sum of $13,436.08; the Trust Company, through its officers and agents, unlawfully and fraudulently caused the said overdraft of $2,436.08 and $600.00 of said open account to be charged in open account upon the books of the Trust Company against the Air Line; and $10,400.00 of said open account that was paid by the Air Line to the Trust Company does not appear on the pretended statement; and charges afterwards, by the consolidation of accounts, becoming a charge against the Belt Company; the said $600.00 and $2,436.08 items appear as debit charges against the Belt Company in the pretended statement presented by the Trust Company, and the Belt Company should be and is entitled to a credit for the said items on the pretended statement, including the item of $10,400.00, with interest thereon from the date of payment thereof.

(*c*) Your orators further show that by reason of the failure of the Trust Company and its agents to fully complete said contract for constructing, equipping and completing the Air Line, the Air Line was compelled to and did expend large sums of money to complete the construction and equipment of said railroad, all of which should have been provided by the Trust Company, or by its agent, the Con-
519 struction Company, under said contract, and which should have been so furnished but for the unlawful action of the Trust Company in causing the Air Line to accept the partial compliance with said contract as and for the full performance

thereof. A partial list of the sums of money so expended by the Air Line are as follows:

January, 1892, For cross-ties	$20.75
January, 1893, For Cross-ties	38.25
April, 1892, For completion of Air Line Depot at Independence, Missouri	2,512.48

All of the above sums were paid in cash to the Trust Company and do not appear upon the pretended statement of the Trust Company.

March 21, 1892, Partial payment for 2 Air Line Engines $5,000.00

The preceding item appears as a charge to the Air Line upon the pretended statement presented by the Trust Company.

1892 to 1895, for balance purchase price paid by Air Line to Burnham & Williams upon said engines	$10,000.00
1892 to 1893, for right of way grading and completion of Air Line	25,000.00

The preceding two items do not appear upon the pretended statement presented by the Trust Company.

That your orators are entitled in equity and good conscience to a credit upon the pretended account produced by the Trust Company for each and all of the amounts above set forth, omitted from said pretended statement of the Trust Company, and interest thereon at 6 per cent per annum from the date when said payments were made; and the above items set forth appearing on said pretended statement should be eliminated and a credit should be given upon said account with interest upon said charges from the date when made, all of which have been improperly and unlawfully omitted from said pretended account by the Trust Company.

13. Your orators further show that in December, 1891, a contract was entered into between the West Kansas City Land Company and the Consolidated Terminal Railroad Company, under the terms of which the Land Company agreed to sell to the Consolidated Company a strip of land twenty-eight (28) feet in width over and across certain land in Kansas City, Jackson County, Mis-
520 souri, for a consideration of Ten Thousand Dollars ($10,000.00) of which amount Four Thousand Dollars ($4,000.00) was to be paid upon the delivery of a warranty deed and the balance three years thereafter; while the contract was in the name of the Consolidated Company, it was for the benefit of the Belt Company and the said payment of $4,000.00 was made by the Belt Company. The Belt Company in November, 1892, gave its note to the West Kansas City Land Company for Five Thousand Six Hundred Dollars ($5,600.00), being the balance of the purchase price of said land, and the Trust Company guaranteed the payment of said note and interest to the West Kansas City Land

Company and took from the Belt Company the sum of $5,600.00 in cash and retained the same as a special deposit to cover its liability on said note and agreed to pay interest thereon at the rate of six (6) per cent per annum; that afterwards such proceedings were had that your orators, by the judgment and decree of the Circuit Court of Jackson County, Missouri, affirmed by the judgment of the Supreme Court of the state, were adjudged to pay and did pay said note and interest on June 13, 1901, amounting to Seven Thousand Nine Hundred Ten and 32-100 Dollars, ($7,910.32); and thereupon the Trust Company became in duty bound to return and refund to your orators the said sum of Five Thousand and Six Hundred Dollars ($5,600.00), and interest thereon; but the Trust Company has failed and refused and ever since has failed and refused to pay said sum to your orators, and the Trust Company has failed in its pretended account to give your orators credit therefor, to which in equity and good conscience, it is entitled; that the same appears upon the pretended account submitted by the Trust Company as a charge against the Belt Company under date of November 28, 1892, which said charge is unlawful and should be expunged; and the interest thereon should be credited to the Belt Company.

14. Your orators further state that on or about November, 1899, a judgment in the sum of Five Thousand Dollars ($5,000.00) was rendered against the Belt Company in the suit of one Zumwalt to recover for personal injuries sustained by him. That the Belt Company thereupon appealed said case to the Supreme Court of the State of Missouri, and gave an appeal bond as by law required; that the Trust Company signed said appeal bond as surety and required the Belt Company to deposit with it the sum of Five Thousand Dollars ($5,000.00) to cover its liability as surety on said bond; that such proceedings were had that the judgment in said case of Zumwalt was on or about the 19th day of May, 1903, reversed without being remanded and thereupon the liability of the trust Company, as such surety, ceased, but notwith-
521 standing such release from liability the Trust Company has refused and still refuses to account for or pay over to your orators the said sum of $5,000.00, together with interest thereon, to which your orators in equity and good conscience are entitled and the Trust Company has failed and omitted to credit your orators on its said pretended statement of account with said sum of $5,000.00 to which, with interest thereon from said 29th day of November, 1899, your orators are entitled.

15. Your orators further show to the court that it was the habit and practice of the Trust Company in the disposition of bonds and stocks of the Belt Company, the Consolidated Company, the Air Line and the Union Company, or other stock or bonds belonging to said railroads, to make sales of said bonds and stocks at such prices as the Trust Company should decide upon, and then when such sales had been made, to credit the Belt Company with a less amount, representing to the Belt Company that the sale so made by the Trust Company as aforesaid, had been made at and

for a much less price than the amount or rate at which the sale had actually been made. In other instances the Trust Company would have an opportunity to make an advantageous sale of stock or bonds, and with such sale in view would cause the Belt Company to go through the form of selling such stocks or bonds to the Trust Company, and the latter would then, or within a short time thereafter, consummate the sale in contemplation; or the Trust Company in other instances would cause the Belt Company to go through the form of selling said stock or bonds to the Trust Company at a price much less than their value, shortly thereafter the Trust Company would sell such stock and bonds at a greater price than was allowed by the Trust Company to the Belt Company for said stock or bonds. In this manner, the Trust Company derived large profits from the transactions in addition to all the charges for commissions and services hereinbefore mentioned, the said profits consisting of the difference between the amounts at which the sales would be made by the Trust Company and the amounts reported by it to the Belt Company as the amount of the sale, and for which the Belt Company received credit, or the amount of the pretended purchase by the Trust Company; that the amount of said profits is to your orators unknown, but your orators are informed and believe, and so charge upon their information and belief, that the profits so received by the Trust Company, and unlawfully retained by it, exceed the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00); that the Trust Company has never at any time accounted to the Belt Company for such profits so unlawfully retained by it, and your orators are entitled to have said profit
522 ascertained and determined and the amount thereof, with interest thereon, credited upon the pretended statement presented by the Trust Company.

16. Your orators further show that on the 24th day of August, 1893, the Belt Company was insolvent, as its directors, who were made up of the officers and directors of the Trust Company, then well knew; that notwithstanding such insolvency the said directors were caused by the Trust Company to go through the form of declaring a dividend payable in the capital stock of the Company and, accordingly the Belt Company acting under the domination and control of the Trust Company and being coerced into such action, did declare a stock dividend and did deliver to its various stockholders its capital stock of the par value of Fifty-One Thousand Two Hundred Sixty-Two and 20-100 ($51,262.20) Dollars and of the reasonable market value of Seventeen Thousand Eighty-seven and 40-100 Dollars $17,087.40), all of which was unlawfully and fraudulent as against the Belt Company and amounting to an appropriation by the Trust Company of the capital stock of the Belt Company in said amount; that of the said stock dividend so paid the Trust Company received as a holder of the capital stock of the Belt Company its stock of the par value of Four Thousand Six Hundred Eighteen and 20-100 Dollars ($4,618.20) and of the market value of One Thousand Five Hundred Thirty-Nine and 40-100 Dollars ($1,539.40); your orators show, therefore, that in equity and good

conscience they are entitled to a credit upon the pretended statement presented by the Trust Company in the sum of $17,087.40 with interest thereon at six (6) per cent from the 1st day of November, 1893.

17. Your orators further show, that on the 7th day of April, 1894, the Belt Company was insolvent, as its directors who were made up of the officers and directors of the Trust Company then well knew; that notwithstanding such insolvency the said directors were caused by the Trust Company to go through the form of declaring a dividend payable in the capital stock of the Company, and, accordingly, the Belt Company, acting under the domination and control of the Trust Company and being coerced into such action, did declare a stock dividend and did deliver to its various stockholders its capital stock of the par value of Seventy-eight Thousand Six Hundred Fifteen and 86-100 Dollars ($78,615.86) and of the reasonable market value of Twenty-six Thousand Two Hundred Five and 28-100 Dollars ($26,205.28), all of which was unlawful and fraudulent as against the Belt Company and amounting to an appropriation by the Trust Company of the capital stock of the Belt Company in said amount; that of the said stock dividend so paid the Trust Company received as a holder of the
523 capital stock of the Belt Company, stock of the par value of Sixteen Thousand Three Hundred Thirty-eight and 20-100 Dollars ($16,338.20) and of the market value of Five Thousand Four Hundred Forty-six and 6-100 Dollars ($5,446.06); your orators show, therefore, that in equity and good conscience they are entitled to a credit upon the pretended statement presented by the Trust Company in the sum of Twenty-six Thousand Two Hundred Five and 28-100 Dollars ($26,205.28) with interest thereon at six (6) per cent from the 1st day of May, 1894.

18. Your orators further show that in November, 1897, the Belt Company was wholly insolvent as the Trust Company then well knew, but notwithstanding that fact the Trust Company caused the Belt Company to go through the form of declaring a dividend of one and one-half per cent upon all outstanding stock and a resolution was accordingly adopted by the directors of the Belt Company declaring such dividend: that thereafter the Belt Company so acting under the coercion and control of the Trust Company, as aforesaid, did pay out as and for such dividend the sum of Seventy-one Thousand Two Hundred and Fifty Dollars ($71,250.00), of which said amount the Trust Company, as a stockholder of the Belt Company, received a large amount. That the action of the Trust Company in so requiring said dividend to be paid was unlawful, wrongful and the amount so caused to be paid out by the Belt Company together with interest thereon should in equity and good conscience be allowed as a credit upon the pretended statement by the Trust Company.

19. Your orators further show that after the incorporation of the Union Terminal Railroad Company the Trust Company caused it to execute its bonds in the sum of Two Million Dollars, and in order to secure the same to execute a mortgage upon all of its corporate property, then or thereafter acquired; that it was provided in said

mortgage that the proceeds of all of the bonds, except one hundred and fifty (150) reserved for interest-paying purposes, should be used in the construction and equipment of the railroad of said company; that after said railroad had been constructed the Trust Company caused the Union Company to deliver to the Belt Company and caused the Belt Company to deliver to the Trust Company one thousand one hundred and sixty (1,160) Union Company bonds of the par value of One Million One Hundred and Sixty Thousand Dollars ($1,160,000.00) and the cash value of One Million, Forty-four Thousand Dollars ($1,044,000.00); that although the Trust Company was the Trustee in said mortgage and knew of the authorized
524 purpose for which said bonds could be used as aforesaid, it wrongfully sold said bonds to various investors and used the proceeds thereof to credit the account of the Belt Company, the debit side of which had been greatly augmented in amount by the fraudulent conduct on the part of the Trust Company in making to the Belt Company excessive and exorbitant charges for services, interest and commissions and upon other pretexts in the manner hereinbefore set forth; that the said bonds so wrongfully put afloat by the Trust Company by their terms drew interest at the rate of five (5) per cent per annum and the Belt Company which had theretofore been required by the Trust Company to guarantee said bonds was thereafter required and compelled by the Trust Company to pay interest in large amounts upon said bonds in the amount of Four Hundred and Thirty-two Thousand Dollars ($432,000.00); that the conduct of the Trust Company in the premises was wrongful and in violation of its trust and resulted in imposing upon the Belt Company the necessary burden of said interest payments which appear as charges to the Belt Company in the pretended statement by the Trust Company. That your orators are entitled in equity and good conscience to have said charges of interest eliminated from said statements or if the said charges in respect to the particular bonds cannot be identified with certainty in said account, then to have said account credited with the amount so paid by the Belt Company, together with interest thereon from the respective dates of payment.

20. Your orators further show that on or about April 28th, 1892, the Trust Company sold to one Caroline A. Perkins three Consolidated Company bonds for twenty-five hundred and fifty dollars ($2,550.00); that said bonds were the property of the Belt Company, but that the Trust Company fraudulently and wrongfully refused and neglected and has ever since refused and neglected to pay said proceeds of said bonds to the Belt Company, or to in any way account for them, and the Belt Company is entitled to credit for said sum as of said date, together with interest thereon.

21. Your orators further state that on or about the 12th day of December, 1895, the Trust Company charged against the Belt Company the sum of Five Thousand Dollars ($5,000.00) and credited the same to "Arkansas Lands;" that your orators are informed and believe that said charge was fictitious and fraudulent and that in truth and in fact said sum of Five Thousand Dollars was not then nor at

any time advanced by the Trust Company to or for the Belt Company, and that the Belt Company received no benefit or consideration therefrom and that the said charge of Five Thousand Dollars in equity and good conscience ought to be eliminated from the
525 pretended statement presented by the Trust Company and that the Belt Company should be credited with interest on said amount from the time when said charge was made.

(*b*) Your orators further state that in the pretended account presented by the Trust Company in connection with the Belt Company, the following charges and credits appear.

Sept. 30, 1899.	To payment to National Bank of Commerce for draft on New York remitting for coupon interest	$40,000.00
September 30, 1899.	By proceeds of sale of draft by K. C. Sub. Belt R. R. Co. at 30 days on de Goeijen, Jr., for florins 100,000; draft endorsed by Trust Company, amount to apply as credit to above charge of $40,000.00.....	$39,437.50
Jan'y 2, 1900.	By proceeds of sale of draft by K. C. Suburban Belt R. R. Co., on J. de Goeijen, Jr., bearing endorsement of Trust Company, draft for florins 37,735.84 sold at 39¾.....	$15,000.00
Jan'y 2, 1900.	To drafts of Kuhn & Co., of London, dated December 20, 1899, on Trust Company as endorser to take up drafts on J. de Goeijen, Jr., Sept. 30, 1899, for $39,437.50 not paid by him, $41,000.00 less allowances by Kuhn & Co., account of excess and exchange 667.40....	$40,332.60
Jan'y 25, 1900.	To draft of Kuhn & Co., London, dated January 12th, 1900, on Trust Company as endorsers to take up draft on J. de Goeijen, Jr., Jan. 2nd, not paid by him.	$15,000.00

Leaving a net charge against the Belt Company of $40,895.10; that the Trust Company did not furnish to the Belt Company said sums or any part thereof for the purpose of paying or taking up coupons of the Union Terminal bonds due August 1st, 1899, or for any other purpose or purposes; that said charges and credits and the resulting net charge against the Belt, were made arbitrarily by the Trust Company against the Belt Company and without consideration to the Belt Company and do not represent money ad-

vanced or paid out to or for the Belt Company or at its instance or request, and said charges and credits should be eliminated from the pretended statement presented by the Trust Company.

(*c*) Your orators further state that in the pretended account presented by the Trust Company, in connection with the Belt Company, there are the following charges made by the Trust Company against the Belt Company as follows:

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Sept. 7, 1899.	Draft, W. S. Taylor to pay 40 coupons Union Terminal Ry., due August 1, 1899.....	1,000
Sept. 7, 1899.	Draft, W. S. Taylor to pay 120 coupons Union Terminal Ry. Co., due Aug. 1, 1899	3,000
Sept. 11, 1899.	Draft, W. S. Taylor to pay 20 coupons Union Terminal Ry. Co., due August 1, 1899..	500
Sept. 13, 1899.	Draft, W. S. Taylor to pay 40 coupons Union Terminal Ry., due August 1, 1899.....	1,000
Sept. 16, 1899.	Draft, W. S. Taylor to pay 40 coupons Union Terminal Ry. Co., due August 1, 1899..	1,000
Sept. 19, 1899.	Draft, W. S. Taylor to pay 40 coupons Union Terminal Ry. Co., due August 1, 1899..	1,000
Sept. 21, 1899.	Draft, W. S. Taylor to pay 40 coupons Union Terminal Ry. Co., due August 1, 1899..	1,000
Sept. 25, 1899.	To payment draft W. S. Taylor dated Sept. 23rd, 1899, for payment of 20 coupons Union Terminal Ry. due August 1, 1899.	500
Sept. 26, 1899.	To payment draft W. S. Taylor dated Sept. 26, 1899, for payment 40 coupons Union Terminal Ry. Co., due August 1, 1899..	1,000
Oct. 4, 1899.	To payment draft W. S. Taylor 20 coupons Union Terminal Ry., due August 1st, 1899	500
Oct. 11, 1899.	To funds deposited with Drexel & Co. for payment of coupons of Union Ter. Ry. and Consolidated Ter. Ry. Co.....	1,000

And that said charges represent payments made by the Trust Company to itself or others on account of 450 Union Terminal Coupons due August 1st, 1899, owned or claimed to be owned by the Trust Company; that the amount of said coupons have heretofore been again paid in cash to the Trust Company so that the Trust Company has received payment twice in respect to said coupons and that the aforesaid charges are therefore unauthorized and invalid, and should be eliminated from the said pretended statement presented by the Trust Company.

(*d*) Your orators further state that in the pretended account presented by the Trust Company in connection with the Belt Company there are the following charges:

	Premium paid on bond in replevin suit.....	$300.00
September 26, 1900.	Commission paid A. G. Hay.....	.....
	343 1940-2240 tons of rails at 25...	85.96
	16 1712-200 tons fasteners at 25....	4.21
	Loading cars.....	17.85
	Demurrage on cars.....	194.00
	Switching	81.25
	Expenses of A. J. Singer from Chicago to St. Louis account sale....	87.50
		$770.77

527 And that said charges and outlays were not made at the instance or the request of said Belt Company and were not authorized by it, and the Belt Company received no consideration for said charges and the same were not properly payable by the Belt Company and hence they should be eliminated from the pretended account by the Trust Company.

22. Your orators further show to the court that about the year 1892, the Trust Company caused the incorporation of the Fruit Auction and Cold Storage Company under the laws of the State of Missouri; that the incorporators of said company were Arthur E. Stilwell, Arthur A. Mosher, Edward L. Martin and William S. Taylor; that the articles of incorporation of said company recited that one-half of the capital stock thereof, to-wit, Seventy-five Thousand Dollars ($75,000.00) had been paid up in lawful money of the United States, when in truth and in fact no part of said capital stock had been paid up; that the Trust Company caused said Cold Storage Company to engage in the business of the sale of fresh fruits in Kansas City, Missouri, and after said business had been conducted for a few months it went out of business owing the Trust Company a large sum of money; that thereupon and on or about the 13th day of February, 1894, the Trust Company, in order to recoup its losses sustained in the matter of said Fruit Auction & Cold Storage Company, appropriated to its own use two hundred and eighty-six (286) shares of the stock of the Union Company belonging to the Belt Company of the value of Six Thousand Two Hundred Ninety-two Dollars ($6,292.00) and used the same to wipe out the debt owing by the said Cold Storage Company to the Trust Company; that the taking of said stock and its appropriation to wipe out the debt of said Cold Storage Company on the books of the Trust Company was fraudulent and wrongful as against the Belt Company as was without any consideration whatsoever given to it; the pretended statement presented by the Trust Company does not contain any credit for the value of said stock but your orators show that a credit for such amount with interest thereon should be allowed.

23. Your orators further state that in the pretended account presented by the Trust Company, there is, under date of September 13, 1898, a charge against the Belt Company of Two Thousand and Five Hundred Dollars ($2,500.00) for moneys represented to be paid by the Trust Company in unlawful stock transactions in the stock of

the St. Joseph & Grand Island Railroad Company purchased as a speculation on margins alleged to have been carried on the account of the Belt Company; and in the same account, under date of
528 September 15, 1898, there appears a charge of Two Thousand Dollars ($2,000.00) and on the 9th day of December, 1898, a charge of Two Thousand Dollars ($2,000.00) for similar unlawful transactions in margins in stock of the St. Joseph & Grand Island Railroad Company alleged to have been for the account of the Belt Company; that said transactions were unlawful and beyond the corporate power of either the Trust Company or the Belt Company and it is inequitable and unfair that the said transactions and the loss resulting therefrom in the sum of Five Thousand Nine Hundred Eighty-nine and 50/100 Dollars ($5,989.50) should be charged against the Belt Company and said entries therefor- are incorrect and should be expunged from the alleged account, and credit allowed for interest thereon.

24. Your orators further show that, in addition to the stock of the Belt Company taken and appropriated by the Trust Company as above set forth, the Trust Company did *on* or about September, 1890, take, appropriate and convert to its own use Four Hundred and Ninety-nine Thousand Dollars ($499,000) par value of the capital stock of the Belt Company, of the actual value of that time of One Hundred Sixty-six Thousand Three Hundred Thirty-three and thirty-three one-hundredths Dollars ($166,333.33) for which the Trust Company has failed and refused to account upon its pretended statement, or otherwise; and your orators are entitled to be credited upon the said pretended statement with the value of said stock as aforesaid, together with interest thereon from the date when the same was so appropriated.

25. Your orators further show that *on or* about the year 1892, the Trust Company took, appropriated and converted to own use 2,455 shares of the capital stock of the Union Company of the par value of Two Hundred Forty-five Thousand Five Hundred Dollars ($245,500.00) and of the actual value of Forty-nine Thousand One Hundred Dollars ($49,100.00), for which the Trust Company has failed, neglected and refused to account on its pretended statement, and your orators are therefore entitled to credit on said statement for said sum of Forty-nine Thousand One Hundred Dollars ($49,100.00) with interest thereon from said date.

26. Your orators further show that the Trust Company caused to be constructed the railroad of the Air Line and used for that purpose a corporation previously created by it called the Kansas City Terminal Construction Company, as set forth in paragraph twelve herein; that the Trust Company caused the Air Line to enter into a contract with the said Construction Company for the construc-
529 tion and completion of the railroad of the Air Line; under the terms of said contract the Construction Company was to receive Two Hundred Thousand Dollars par value of the stock and Two Hundred fifty Thousand Dollars par value of the first mortgage bonds of the Air Line. The Construction Company entered upon the Construction of said railroad, but before the same was fully com-

pleted the Trust Company caused the Air Line and the said Construction Company to go through the form of an agreement by the terms of which the Air Line was to accept the then partially completed railroad as and for a full compliance with said contract and was to turn over to the Construction Company the securities provided in said contract to be turned over upon its final completion as aforesaid, and thereupon the said railroad was turned over to the Air Line and the said securities above mentioned, which had at all times remained in the custody of the Trust Company, were by the Trust Company appropriated to its own use; that the actual cost to the Trust Company of the construction of said Air Line was the sum of One Hundred Seventy Thousand Seven Hundred Forty-seven and twenty-nine one-hundredths Dollars ($170,747.29), and the Trust Company realized from said transaction a profit of One Hundred Twenty-nine Thousand Two Hundred Fifty-two and seventy-one one-hundredths Dollars ($129,252.71); that by reason of the relation of the parties as hereinbefore more specifically set out, it is unjust and inequitable that the Trust Company should retain said profits or any of them, but it should be required to account to the Belt Company therefor and the same should be allowed as a credit upon the pretended statement presented by the Trust Company together with interest thereon.

27. Your orators further show that in connection with the contract between the Belt Company and the Connecting Company aforesaid, and as a part of the obligation assumed by the Belt Company to procure the right of way for the railroad of the Connecting Company, the Belt Company was caused by the Trust Company to purchase and acquire certain lands along the line of said railroad in addition to the right of way and take the title thereto in a corporation which the Trust Company caused to be organized under the laws of the State of Missouri, called the Northern Townsite Company, hereinafter referred to as the Townsite Company, one of the defendants herein, which corporation was at all times officered by the officers and employes of the Trust Company and at all times dominated and controlled by the Trust Company.

a. The Trust Company caused the Belt Company to advance to the Townsite Company and also to advance in the purchase of
530 lands which were conveyed to the Townsite Company a large sum of money, to-wit, the sum of $46,463.75; that all the lands now held by the Townsite Company were purhcased with money so caused to be furnished by the Belt Company and the greater portion of said lands still stand in the name of the Townsite Company; but certain lands heretofore standing in the name of the Townsite Company have been sold and the proceeds thereof are now held by your orators, Stuart R. Knott and Edward F. Swinney, as Receivers of the Townsite Company heretofore appointed by this court. That the Trust Company furnished to the Townsite Company the sum of $6,288.57 and no more. Your orators show, therefore, that by reason of the premises they are entitled to have the properties now standing in the name of the Townsite Company conveyed to them as and for the property rightfully belonging to the Belt Company and also to have the said moneys arising from the sale of

said lands and also from the rentals thereof, transferred to them in like manner, together with any other assets of the Townsite Company arising or growing out of the moneys so furnished by the Belt Company as aforesaid; or at the option of your orators they are entitled to credit upon the pretended statement presented by the Trust Company with the amount of moneys so furnished by the Belt Company as aforesaid, with interest thereon from the dates when said moneys were so furnished.

(*b*) The Trust Company in connection with the affairs of the Townsite Company charged and collected a commission of 10 per cent on moneys handled or land sold for it and these charges made between July, 1896, and 1901, amounting to Ten Hundred and Eighty-five Dollars ($1,085.00) are unlawful and improper charges by reason of the relations of the companies to each other and should be eliminated from the pretended statement presented by the Trust Company.

28. Your orators further show that in the pretended statement submitted by the Trust Company under date of April 20th, 1891, there is a charge against the Belt Company in the sum of Three Thousand Eight Hundred Thirty-five and 50-100 Dollars ($3,835.50) and afterwards under date of November 19, 1891, a credit against the same charge of One Thousand Seven Hundred Eighty-one Dollars ($1,781.00), leaving a net charge against the Belt Company of Two Thousand and Fifty-four and 50-100 Dollars ($2,054.50), purporting to be charged for rent of engines Numbers 51 and 52 from January 20, 1891, to Oct. 31, 1891, 284 days, at $7.00, $1,988.00; also rental of engine No. 51, October 31st to November 19th, 19 days, at $3.50, $66.50; total $2,054.50. This charge of $2,054.50
531 should be eliminated from the pretended statement and credit allowed thereon as of date November 19, 1891, for the following reasons: In January, 1891, the Belt Company had a large credit balance with the Trust Company in excess of Two Hundred Thousand Dollars ($200,000.00), upon which it was receiving no interest from the Trust Company and such credit balance extended for many months thereafter. In January, 1891, the Trust Company caused the Belt Company to purchase two engines, being locomotives Nos. 51 and 52, and instead of permitting the Belt Company to pay for the same as it should have done, the Trust Company in April, 1891, gave to the vendors of the locomotives its own note and charged said note and the interest on said note to the Belt Company, and afterwards, in November of the same year, the Trust Company caused entries to be made so as to show that it had purchased said engines in order that it might sell the same to the Kansas City Terminal Construction Company and the Consolidated Company, and thereupon unlawfully and oppressively charged to the Belt Company said sum of $2,054.50, pretending that the same was rental upon said engine- at the rate of $3.50 each per day; that said charge of rental covers the period during which the engines were as shown by the books of the Trust Company and also the books of the Belt Company, the property of the Belt Company. Your orators, therefore, claim that said charge should be eliminated from the pretended statement and that credit with interest

should be allowed the Belt Company for said amount from the date when said charge was made.

29. Your orators further show that on or about July 1, 1898, the Trust Company caused the Belt Company to lease from the Second Street Improvement Company parts of lots 12, 13, 14 and 15 in block 10, King & Bouton's Re-survey, in Kansas City, Missouri, comprising a piece of land 25 by 75.4 feet, the rental named in said lease being at the rate of One Hundred Dollars ($100.00) per month, and the Second Street Improvement Company, by the terms of said lease, reserved the privilege of cancelling the same upon thirty days' written notice; on the same day the Trust Company caused the Belt Company to lease all of said land to Wells, Fargo Express Company for Twenty-five Dollars ($25.00) per month, the Belt Company reserving the right to cancel said lease upon thirty days' written notice, provided, however, that if such notice should be given within two years from the date of the lease the Belt Company should pay to the Express Company the Sum of One Thousand Dollars ($1,000.00). Your orators further show that said land was not necessary for a right of way or for the operation of the Belt Company, but the Trust Company caused it to be leased to the Belt Company and by
532 the latter sub-leased to the Express Company for the purpose of aiding the Second Street Improvement Company to the extent of Seventy-five Dollars ($75.00) per month, the Improvement Company being at that time one of the auxiliary companies of the Trust Company and dominated and controlled by it and officered by the officers and employees of the Trust Company.

Your orators further show that the act of the Trust Company in causing the said lease to be made, was wrongful and oppressive and imposed an unnecessary charge of $75.00 per month on the Belt Company; that between the dates of July, 1898, and December, 1899, the Belt Company was caused to pay to the said Improvement Company the sum of Eighteen Hundred Dollars ($1,800.00), and during the same period it collected from the Express Company under said lease the sum of Four Hundred and Fifty Dollars ($450.00), leaving a net expenditure as a result of the making of said lease in the sum of Thirteen Hundred and Fifty Dollars ($1,350.00), for which, with interest thereon from the dates of the payments made, your orators are entitled to credit upon the pretended statement presented by the Trust Company.

In consideration whereof and for as much as your orators are remediless in the premises except in a court of equity, your orators therefore pray the aid of this court;

(*a*) That an accounting be taken of the various transactions and dealings between the Trust Company and the Belt Company; or by the Trust Company for the use and benefit of and as trustee and agent for the Belt Company, and that the Trust Company be required to pay the balance found to be due by it, if any, upon such accounting; that in taking such accounting all claims and demands alleged to be held by the Trust Company against the Belt Company in Kansas and Missouri, where the Trust Company used the Belt Company simply as an instrumentality and agency for its own use

and benefit, be charged against the Trust Company and it be held liable for all losses incurred or claimed to have been incurred by the Belt Company about the same.

(*b*) That the said notes hereinabove described may be found and decreed by this court to have been executed in the fraudulent manner and for the fraudulent purposes above set forth and without consideration; and that said notes may be by this court directed to be surrendered up and cancelled, and that each and all of the stocks, bonds and other securities, including the assigned account above mentioned, fraudulently delivered to the Trust Company by its officers and employes in the manner hereinabove set forth, may be ordered by this court surrendered and delivered up or reassigned to the Belt Company.

533 (*c*) That each and all of the property purchased with the money of the Belt Company and belonging in equity to it, the legal title to which is held in the name of any of the companies hereinbefore set forth, may be required by the decree of this honorable court to be conveyed to the Belt Company, or to its receiver for it.

And your orators pray for a continuance of the writ of injunction herein against the Guardian Trust Company, its agents, servants and employes, restraining and enjoining them and each of them from selling, transferring or in any wise disposing of the said notes above mentioned and so executed by the Belt Company to the Trust Company; and from selling, transferring or in any wise disposing of the said bonds and stocks and other property hereinabove described, delivered to said Trust Company as collateral security for said notes.

And may it please your honors to grant unto your orators the subpœna of the United States of America issuing out of and under the seal of this Honorable court directed to the Guardian Trust Company, the Missouri Elevator & Terminal Company, the Fairmount Amusement Company, the Central Improvement Company and Thomas T. Crittenden, its receivers, the Northern Townsite Company, and the Cambria Steel Company, the defendants herein respectively therein and thereby commanding them on a day certain therein to be named and under a certain penalty to be and appear before this honorable court then and there to answer (but not under oath, an answer under oath being hereby expressly waived), all and singular the premises, and to stand and perform and abide by such orders, directions or decrees as may be made in the premises, and as shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray.

S. W. MOORE &
T. R. MARKS,
Solicitors for Complainants.

——— ———,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

Edward F. Swinney, being first duly sworn, says that he is the Receiver of the Kansas City Suburban Belt Railroad Company, one of the complainants in the foregoing second amended supplemental ancillary bill; that he has read the said bill of complaint and knows the contents thereof and that the allegations therein contained
534 are true so far as they relate to his own acts and the acts of his co-receiver; that so far as they relate to the acts of others, he believes them to be true.

EDWARD F. SWINNEY.

Subscribed and sworn to before me, this 11th day of January, 1906.

[L. S.]

CLARENCE R. HALL,
Notary Public, Jackson County, Missouri.

My commission expires Oct. 10, 1908.

Afterwards, to-wit, on the 2nd day of July, 1906, the Answer and Pleas of the Guardian Trust Company to the Second Amended and Supplemental Ancillary Bill of Complaint was filed:

Said Answer and Pleas are in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2468.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City and Independence Air Line Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company et al., Complainant-,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittender, Its Receiver; Northern Townsite Company and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Answer and Pleas of the Guardian Trust Company to the Second Amended and Supplemental Ancillary Bill of Complaint.

Now comes the defendant, Guardian Trust Company, and now and at all times hereafter saving and reserving to itself all benefit

and advantage of exceptions, which can or may be taken to the many errors, uncertainties and other imperfections in the said bill contained, for its separate answer and pleas thereto, or to so
535 so much thereof and such portions thereof as this defendant is advised it is necessary or essential for it to answer or plead unto, and answering and pleading, says:

1. That as and for its answer and pleas to the second amended and supplemental ancillary bill of complaint, this defendant adopts its answer and pleas filed in this court and cause on the 1st day of June, 1905, to the first or original supplemental ancillary bill of complaint herein, as fully and to the same extent as if the same were set out herein in full (See foot note).*

2. Further answering said second amended and supplemental ancillary bill of complaint, defendant admits that since the filing of the original ancillary bill herein, Stuart R. Knott has resigned as receiver of the Kansas City Suburban Belt Railroad Company and that Edward F. Swinney has been continued as such receiver herein, and defendant denies that at any time it, in any wise, dominated and controlled the affairs of the Belt Company and its constituent railroad companies, and defendant denies that it at any time charged the Air Line with any items of interest on notes and over drafts of the Air Line due to this defendant, except such as this defendant was lawfully entitled to receive, and avers that any and all interest paid to this defendant by the Air Line was paid to it voluntarily, openly, in the ordinary course of business, and with the full knowledge of the officers, directors and stockholders of the Air Line, who have at all times acquiesced in the same, and the said Air Line and Belt Company are now estopped from questioning the same; denies that defendant made any charges against the Belt Company on account of interest accruing on first mortgage bonds of the Air Line except such as this defendant was lawfully entitled to make; avers that all payments of interest made by this defendant on first mortgage bonds of the Air Line, charged to the Belt Company, were paid at the special instance and request of the Belt Company and for its benefit, and with its full knowledge and consent; that the said Belt Company at all times during which any such charges were made was the owner of all of the outstanding capital stock of the Air Line and hence was the beneficial owner thereof, and the said Air Line was at all said times operated by the said Belt Company as part of its own system and the Belt Company collected and received the revenues derived from such operation; defendant denies that it at any time caused the Belt Company to go through the form
536 of selling any stocks or bonds to defendant at a price less than their value, but on the contrary states that all of said sales were actual bona fide sales, made in the usual and ordinary course of business, and for full value and that all of such transactions were fully known to and were acquiesced in and ratified by the

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* The original paging of the first amended and supplemental ancillary bill is shown in ink on the margins of the pages of the second amended ancillary bill.

officers, directors and stockholders of the Belt Company and of all its constituent railroad companies with which any such transactions were had; defendant admits that certain charges and credits set out in subdivision B, paragraph 21, of said second amended and supplemental ancillary bill of complaint appear on the open account due from the said Belt Company to this defendant and states that said credits and charges are correct and properly made, denies that said credits or charges were arbitrarily or unlawfully made, but on the contrary states that, as fully appears from said account, the net charge due to defendant from said Belt Company on account of the transactions therein set forth, represent money actually paid out by this defendant in payment of certain bills of exchange, drawn by said Belt Company, for its own benefit, which bills of exchange the said Belt Company was unwilling or unable to pay, and which this defendant by reason of its endorsement of said bills of exchange, was obliged to pay and defendant denies that the items charged by it against the Belt Company, set forth in sub-division C, of paragraph 21, of said second amended ancillary bill, have at any time been paid to this defendant; and defendant again states that all the charges made by it in its open account against the said Belt Company were fairly and justly made for full consideration received by the Belt Company, and that the said Belt Company is liable therefor.

3. And by way of addition to paragraph 54 of its answer to the amended and supplemental ancillary bill of complaint, herein adopted by defendant as its answer to the second amended supplemental ancillary bill of complaint, in relation to the Central Improvement Company, hereinafter called the Improvement Company, defendant states that said Improvement Company was a corporation organized and managed just as any other corporation is organized and managed; that it had its own treasury, collected and disbursed its own income; that the said Improvement Company and the Belt Company treated all real estate standing in the name of the Improvement Company as the property of the Improvement Company and not as the property of the Belt Company or any other of the stockholders of the Improvement Company; that all rentals or other income received by the Improvement Company went into its treasury and was disbursed out of said common fund for the general
537 corporate purposes of the Improvement Company; that as and when the said Improvement Company raised capital for its operations it issued to the person or corporation furnishing such capital its shares of stock covering dollar for dollar the amount of the capital so furnished; that said capital was used not only for the purpose of buying real estate but also for the expense of management and other legitimate expenses of the said Improvement Company; that it was not intended by the Belt Company that it should own or have any interest in any parcel of real estate owned by the said Improvement Company, but on the contrary it was intended by the Belt Company that its sole interest in the Improvement Company should be represented by stock of the Improvement Company purchased by the Belt Company from time to time as aforesaid.

4. And by way of supplement to the averment set forth in para-

graph 90 of defendant's answer to the said first amended and supplemental ancillary bill of complaint, this defendant states: That the Kansas City Southern Railway Company, hereinafter called the Southern Company, is a railroad corporation organized under the laws of the State of Missouri, on or about March 19, 1900, and still exists as such; that on or about March 19, 1900, and ever since, the said Southern Company was and is the owner and holder of substantially all of the capital stock and substantially all of the mortgage bonds issued by the Belt and its constituent companies, which securities had been acquired by the said Southern Company through and by the Reorganization Committee mentioned in said paragraph 90, pursuant to and in conformity with the reorganization plan referred to in said paragraph 90, which reorganization plan had been introduced in evidence before the master to whom the issues herein have been referred and for greater definiteness defendant prays leave to refer to said plan, and defendant states that all of said stock and all of said bonds were acquired by said committee for said Southern Company under and by virtue of certain reorganization agreements, made pursuant to said plan, in writing, with all of the stockholders and all of the bondholders of the Belt and its constituent companies, that all of said reorganization agreements are of the same tenor and effect, and that a true and correct copy of said reorganization agreement has been introduced in evidence before the said master and for greater definiteness defendant prays leave to refer thereto; and defendant states that on the 6th day of September, 1900, the said Southern Company, as the owner of all of the mortgage bonds issued by the said Belt and its constitutent companies, through the said committee, caused to be filed in this
538 court by the Provident Life and Trust Company, which was trustee in the said mortgages, securing the said bonds, four separate bills of foreclosure against the Belt Company, Union Terminal Company, The Consolidated Terminal Company and The Air Line Company, respectively, and that, afterward, said causes, were, by order of this court, consolidated, and that such proceedings were had in said causes that on the 6th day of November, 1901, a decree of foreclosure and sale was rendered in said causes, and thereafter, to-wit: on or about December 31, 1901, there was conveyed to the said Southern Company under the terms of said decree by the special master appointed to make sale in the said foreclosure suits, all of the property of the said Belt Company and its constituent companies, including all and singular the rents, tolls, income, issues and profits of the said railroad premises and properties, and all of the estate, right, title and interest, legal and equitable, and present and future, of the said Belt Company, in and to the same and every part thereof, also all the corporate and other rights, privileges, liberties and franchises of the said Belt Company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof, as well those thereafter acquired as those then held.

And defendant states that at the time said committee settled and compromised with J. De Goeijen, Jr., his claim of about three hundred thousand dollars ($300,000.00), against the Gulf Company as

in said paragraph 90 set forth, the said committee, pursuant to authority conferred on it by the said reorganization agreement made with the stockholders and bond holders of the Belt Company as aforesaid, was engaged in adjusting the floating indebtedness of the Belt Company and the Gulf Company, and that at the time the said committee settled and compromised the said claim with said De Goeijen, as in said paragraph 90 set forth, the said Southern Company was a party to said settlement and compromise; that said Southern Company then and there, and at all times prior thereto, claimed that said De Goeijen owed the Belt Company said sum of $89,333.33, being the balance due on account of the securities by him bought as in said paragraph 90 set forth, and being also the exact amount due on said depot mortgages in said paragraph 90 referred to, and said Southern Company further claimed and asserted that being the owner of all of the stocks and bonds of the Belt Company, and that having acquired all of the property and rights of the Belt Company, at foreclosure, as hereinabove set forth, it, the said Southern Company, was entitled to collect and receive the said sum of $89,333.33, from said De Goeijen; and thereupon a
539 general settlement and compromise was had of all controversies of all kinds then pending between the said Southern Company, the said committee, the Gulf Company, and the Belt Company, on the one hand, and the said De Goeijen on the other hand. and the said committee and the said Southern Company and the said Provident Life and Trust Company, the then holders of the said depot mortgages, and each of them, did on June 16th, 1902, execute releases under seal unto the said De Goeijen, forever discharging him from any further claim or claims on account of any matter or thing arising or resulting from their reorganization or ownership of the property, rights and franchises of the Belt Company including said claim of $89,333.33, and arising out of every other matter or thing or transaction whatsoever; and defendant states that said settlement and compromise was made and the said releases were executed by the said committee, and the said Southern Company with the full knowledge and consent of complainants Knott and Swinney, the then receivers of the Belt Company; that the said Knott, at the time said settlement was made, and the said releases were executed, was the president of the said Southern Company and its managing officer, and that the said releases were drawn and executed under the supervision of one Max Pam, counsel for the said receivers; that the claim and assertion made by the Southern Company that it was lawfully entitled to collect and receive from said De Goeijen, said sum of $89,333.33 was made with the full knowledge and consent of said complainants, and their said counsel, and they fully acquiesced in said claim; and so defendant says that the said committee, and the said Southern Company, it being through its ownership of all of the stocks and bonds issued by the Belt Company and of all the rights and property of the Belt Company the beneficial owner of said Belt Company, having with the full knowledge and approval of complainants once collected said claim of $89,333.33 from said De Goeijen, as aforesaid, the said Belt Com-

pany and its said receiver, ought not now be permitted to come into a court of equity and assert the same claim against defendant; for greater certainty defendant prays leave to refer to the said instruments of release passing between said De Goeijen, said committee and the said Southern Company, which are dated June 16th, 1902, and have been offered in evidence herein, before the master before whom the testimony has been taken on the issues herein; defendant states that by inadvertence and mistake it is averred by this defendant in said paragraph 90 of its said answer that the receivers of the said Belt Company paid to the Provident Life and Trust Company the real estate mortgage notes aggregating eighty-nine thou-
540 sand, three hundred thirty-three and thirty-three one-hundredths ($89,333.33) dollars, therein referred to; defendant states that it is not true that said real estate mortgage notes have been paid by the Belt Company or its receivers, but on the contrary states that the said Belt Company and its receivers have at no time paid the said notes and defendant further states that said notes after the said settlement between the Kansas City Southern Railway Company and De Goeijen were fully paid and satisfied by said Kansas City Southern Railway Company, as it was in duty bound to do, and said notes are not now an outstanding lien on any real estate now or at any time owned by the Belt Company.

5. And by way of supplement to defendant's answer to the said first amended and supplemental ancillary bill of complaint, defendant states that on March 27, 1905, it paid to the First National Bank of Kansas City, Missouri, the sum of $34,061.46, in satisfaction of a certain judgment rendered by the Circuit Court of Jackson County, Missouri, in cause No. 1604, entitled The First National Bank of Kansas City, Missouri, vs. The Guardian Trust Company, and affirmed by the Supreme Court of Missouri, on March 16, 1905, which said judgment was entered against this defendant on a certain promissory note made by the said Belt Company on March 26, 1900, in favor of said Bank for $25,000.00, due sixty days after date, with interest after maturity at the rate of seven per cent per annum until paid, which said note was endorsed by this defendant, solely for the accommodation of said Belt Company, the full proceeds of said note having been paid by said Bank to said Belt Company which derived the sole benefit thereof and this defendant prays that it may have judgment against the said Belt Company and its receivers for the said sum of $34,061.46, with interest thereon at the legal rate from said March 27th, 1905.

6. All of which matters and things hereinbefore stated this defendant is ready to aver, maintain and prove as this Honorable Court may direct, and hereby prays that judgment may be rendered by this Honorable Court against the Kansas City Suburban Belt Railway Company and the said Swinney, as its receiver, in favor of this defendant for the amount of each and all of the promissory notes together with interest thereon, mentioned and set forth in its answer aforesaid, for the amount of the open book account mentioned and set forth as "Exhibit A" of said answer with interest thereon from the first day of April, 1900, and that this defendant

may have judgment against the said Belt Company and its receiver for any and all further sums or amounts that may be found due this defendant; that the court may by proper order protect and
541 enforce the interests of this defendant in and to the stocks, bonds, accounts and property deposited with and held by this defendant as collateral and its said receiver may be ordered and directed to pay to this defendant whatever sums of money this defendant may be found entitled to herein, and this defendant have also judgment for its reasonable costs, charges and expenses in this behalf most wrongfully expended and sustained, and for such other and further relief as to the court shall seem meet and just in the premises.

GUARDIAN TRUST COMPANY,
By HARRY S. MECARTNEY AND
J. C. ROSENBERGER,
Its Solicitors.

Afterwards, to-wit, on the 2nd day of July, 1906, the following Stipulation was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Bill.

EDWARD F. SWINNEY, Receiver of the Kansas City Suburban Belt Railroad, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Ancillary Bill.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Intervenor, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Intervening Petition.

Stipulation.

It is hereby stipulated by and between the parties to the above entitled cause as follows:

I.

Making up the issues:

(a) Edward F. Swinney, as Receiver of the Kansas City Sub-

urban Belt Railroad Company and the Kansas City Suburban Belt Railroad Company, the complainants, shall have leave to file a second amended and supplemental ancillary bill of complaint as per printed copy thereof this day furnished to counsel for the Guardian Trust Company which, for identification has been labeled on the front cover thereof as follows:

"For identification. J. C. Rosenberger and S. W. Moore."

542 Thereupon and within ten (10) days from the filing thereof the Guardian Trust Company shall file its answer thereto in form for identification marked on the front cover thereof as follows:

"For identification. J. C. Rosenberger and S. W. Moore."

And thereupon the said complainants shall forthwith file their replication to said answer.

(*b*) The Kansas City Southern Railway Company agrees to forthwith withdrawn its exceptions filed to the answer of the Guardian Trust Company to the Intervening Petition of said Railway Company, and to forthwith file replication to said answer.

(*c*) Said pleading when so filed shall stand referred without further order to Hon. Shannon C. Douglass, Special Master, but the taking of proofs shall nevertheless be deemed to be closed by all the parties hereto.

In regard to depositions.

Whereas, the parties in the above entitled cause have taken depositions in said cause on December 9th, to 14th, 1905, of sundry witnesses, to be used as evidence in the said cause, to-wit: The deposition of R. B. Cone, in Detroit, Michigan, and the depositions of Herman Seilcken, William V. Rowe, McDougal Hawkes and Thomas L. Chadbourne, in the City of New York, and it appears from the depositions of said William V. Rowe and said Herman Seilcken, that the Guardian Trust Company offered in evidence certain documents which were identified by the respective notaries taking said depositions, and which are referred to in said depositions, and it further appears that said Notaries failed to attach to the said depositions either the original or a copy of said documents so referred to as exhibits.

Now, Therefore, it is accordingly stipulated:

1. That the paper hereto attached, marked "Exhibit 1" is a true copy of the paper referred to on page 15 of said Seilcken's deposition as "Exhibit No. 1," therein, as Trial Balance prepared by former Auditor Neal S. Doran.

2. That the paper set forth at page 30385 in Volume 50, as Heynecker's Exhibit "12" in the testimony heretofore taken in this cause before S. C. Douglass, Esquire, Special Master, is a true and correct copy of the paper referred to on page 26 of said Seilcken's deposition, as a certified copy of Report of Minutes of the Reorganization Committee of its meeting held July 10, 1900.

543 3. That the paper set forth at page 30411 in Volume 50 as Heynecker's "Exhibit 15" in said testimony taken before the master is a true and correct copy of the paper referred to as "Exhibit

No. 21" page 27, of said Seilcken's deposition, as the release signed by William F. Harrity, et al., members of the Reorganization Committee to De Goeijen, Jr., dated June 16th, 1902.

4. That the paper set forth at page 30388, in volume 50 of said testimony as Heynecker's "Exhibit 3" is a true and correct copy of the paper referred to as "Exhibits Nos. 3 and 4" on page 28 of said Seilcken's deposition, as a copy of contract of release dated June 16, 1902, between Arkansas Construction Company, Kansas City Southern Railway Company and J. De Goeijen, Jr.

5. That the paper hereto attached and marked "Exhibit 2" is a true and correct copy of the paper referred to on page 38 of said Seilcken's deposition, as certified copy of the Bill of Complaint filed in the Circuit Court of the United States for the Eastern District of Pennsylvania, by the Kansas City Southern Railway Company against the Provident Life and Trust Company et al.

6. That the papers hereinbefore referred to are true copies of the papers referred to and shown as offered in evidence on pages 12 and 13 of the said deposition of William V. Rowe.

7. The signature of said McDougal Hawkes to his deposition aforesaid may be and is waived.

8. That said papers hereinbefore referred to may be considered as in evidence as fully and to the same extent as if the same had been actually attached by the respective Notaries to the said depositions, and that all informalities in the certification by the respective Notaries of any of the depositions aforesaid and in the return thereof to and filing thereof with the Clerk of said court are hereby waived.

III.

Any party to this cause shall have the right, upon the hearing of this case to refer to any part of the record in the four consolidated causes of the Provident Life and Trust Company v. The Kansas Suburban Belt Railroad Company et al., Nos. 2464, 2465, 2466, and 2467, filed September 6th, 1900, in the Circuit Court of the United States for the Western Division of the Western District of Missouri, or in the cause of the State Trust Company v. Kansas City, Pittsburgh and Gulf Railroad Company, filed in the same court on or about April 28th, 1899.

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IV.

The Kansas City Southern Railway Company agrees to furnish without charge for the record of the master, one printed copy of the General Mortgage issued by it under date April 2, 1900, and recorded in the office of the Recorder of Deeds of Jackson County, Missouri, in Book B 747, at page 1. Also a like number of copies of instrument entitled Supplemental indenture, conveying terminal properties at Kansas City, executed by the Kansas City Southern Railway Company to the Mercantile Trust Company et al., trustees, dated January 15, 1902, and recorded in the office of the Recorder of Deeds of Jackson County, Missouri.

V.

Without prejudice to the right to object thereto for incompetency, irrelevancy or immateriality, the objections heretofore offered to the following documents offered in evidence before the master by the Guardian Trust Company, on the ground that same did not constitute the best evidence, and have not been proved to be correct copies of the originals, are hereby withdrawn.

(*a*) A certain statement in writing made to the Committee on stock list of the New York Stock Exchange on or about the 14th day of August, 1900, and signed by A. W. Krech, second Vice-president of the Kansas City Southern Railway Company making application for the listing of the securities issued by said Railway Company on the regular list of the New York Stock Exchange.

(*b*) A certain agreement purporting to be executed on the — day of October, A. D. 1900, by and between members of the Philadelphia Reorganization Committee so called, and the Kansas City Southern Railway Company, with the exhibits thereto attached, providing for a settlement of the accounts between the said committee and the said railway company, and for other matters or in lieu thereof the complainants may produce a copy thereof.

VI.

The Guardian Trust Company, subject to its right to object thereto on the ground of incompetency, irrelevancy or immateriality, withdraws its objection that the following copies of writings heretofore offered in evidence by the said Southern Railway Company or the said Complainants, are secondary evidence, and have not been proved to be correct copies of the originals:

545 A. The copies of letter impressions books of various let-ers introduced in evidence by the complainants upon the last recall examination of Neal S. Doran.

B. Copies of correspondence passing between the Guardian Trust Company and the Re-organization Committee.

C. Certain documentary evidence and copies of letters offered in evidence by the complainants at the hearing held on December 30th, 1905, including the letter of the Kansas City Southern by E. H. Harriman to the Provident Life & Trust Company, dated June 27th, 1901, and the attachments thereto; and the letter of W. F. Harrity to E. H. Harriman, dated July 11th, 1900; and the letter of J. de Goeijen Jr. to Wm. F. Harrity, dated April 23rd, 1900; and letter of Kansas City Southern by E. H. Harriman to Re-organization Committee, dated June 27th, 1901; and receipt of Sullivan-Cromwell for one hundred and fifty thousand dollars ($150,000.00).

VII.

No party hereto shall predicate upon anything in this stipulation contained any application for postponement or delay of the hearing

of this cause or in any setting thereof heretofore made by the Special Master.

S. W. MOORE &
T. R. MARKS,
For K. C. So. Ry. Co., Swinney, Rec., & Sub. Belt.
H. S. MECARTNEY AND
J. C. ROSENBERGER,
Solrs. for Guardian Trust Co.

6/30/06.

Afterwards, to-wit, on the 19th day of October, 1906, the Answer of the Central Improvement Company and T. T. Crittenden, its Receiver, to the Second Amended and Supplemental Ancillary Bill of Complaint of Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company and Kansas City Suburban Belt Railroad Company was filed. Said Answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

546 In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,
vs.
CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Answer of the Central Improvement Company and T. T. Crittenden, Its Receiver, to the Second Amended and Supplemental Ancillary Bill of Complaint of Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company and Kansas City Suburban Belt Railroad Company.

These defendants now and at all times hereafter saving to themselves all and all manner of benefit of exceptions or otherwise that

can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

1. That as and for their answer and pleas to the Second Amended and Supplemental Ancillary Bill of Complaint, these defendants adopt their answer and pleas filed in this Court and cause on the 9th day of June, 1905 to the amended and Supplemental Ancillary Bill of Complaint, of Stuart R. Knott and Edward F. Swinney, Receivers of the Kansas City Suburban Belt Railroad Company and Kansas City Suburban Belt Railroad Company, herein, as fully and to the same extent as if the same were set out here in full.

547 2. Further answering, these defendants admit that all the facts and matters alleged and set forth in pages 1, 2, 3, 4, 5, 6, and 7, of the Second Amended and Supplemental Ancillary Bill of Complaint of Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad and Kansas City Suburban Belt Railroad Company, are true.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged, without this, [—] there is any other matter, cause or thing in said complainants' Second Amended and Supplemental Ancillary Bill of Complaint material or necessary for these defendants to make answer to not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge and belief of these defendants, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

T. B. BUCKNER,
Solicitor for Defendants.

Afterwards, to-wit, on the 2nd day of July, 1906, the following Replication was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Bill.

No. 2468.

EDWARD F. SWINNEY, Receiver of the Kansas City Suburban Belt Railroad, et al., Complainants,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Ancillary Bill.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Intervenor, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Intervening Petition.

Replication of Edward F. Swinney, Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, to the Answer and Pleas of the Guardian Trust Company to the Second Amended and Supplemental Ancillary Bill of Complaint.

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These replicants saving and reserving to themselves all and all manner of advantage of exceptions which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant for replication thereunto saith that they do and will aver, maintain and prove their said bill to be true, certain, and sufficient in the law to be answered unto by said defendant and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly — as in and by their said bill they have already prayed.

S. W. MOORE &
T. R. MARKS,
Solicitors for Edward F. Swinney, Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company.

Afterwards, to-wit, on the 2nd day of July, 1906, the following Replication was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
v.
GUARDIAN TRUST COMPANY et al., Defendants.

Bill.

No. 2468.

EDWARD F. SWINNEY, Receiver of the Kansas City Suburban Belt Railroad, Complainants.
v.
GUARDIAN TRUST COMPANY et al., Defendants.

Ancillary Bill.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Intervenor, Complainant,
v.
GUARDIAN TRUST COMPANY et al., Defendants.

549 Intervening Petition.

Replication of the Kansas City Southern Railway Company, Intervenor, to the Answer and Pleas of the Guardian Trust Company to the Amended Intervening Petition of the Kansas City Southern Railway Company.

This replicant saving and reserving to itself all and all manner of advantage of exceptions which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereunto saith that it does and will ever maintain and prove its said bill to be true, certain, and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly — as in and by its said bill it has already prayed.

S. W. MOORE,
T. R. MARKS,
Solicitors for the Kansas City Southern Railway Company.

Afterwards, to-wit, on the 16th day of November, 1907, an Application for leave to file Supplemental Bill was filed.
Said Application is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

550 EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, Complainants.

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Comes now The Kansas City Southern Railway Company, Edward F. Swinney, as Receiver, and the Kansas City Suburban Belt
551 Railroad Company, and exhibit to the Court their supplemental bill against the Guardian Trust Company, one of the defendants, and pray that leave may be granted to file the same.

S. W. MOORE,
Their Solicitors.

Afterwards, to-wit, on the 16th day of November, 1907, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Order.

Leave is hereby granted to The Kansas City Southern Railroad Company, Edward F. Swinney, Receiver, and the Kansas City Suburban Belt Railroad Company to file their supplemental bill of complaint against the Guardian Trust Company.

(Signed) SMITH McPHERSON, *Judge.*

552 Afterwards, to-wit, on the 16th day of November, 1907, a Supplemental Bill of Edward F. Swinney, Kansas City Suburban Belt Railroad and the Kansas City Southern Railway Company against the Guardian Trust Company was filed:

Said Supplemental Bill is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Supplemental Bill of Edward F. Swinney, Kansas City Suburban Belt Railroad Company, and the Kansas City Southern Railway Company against the Guardian Trust Company.

To the Judges of the United States Circuit Court for the Western Division of the Western District of Missouri, sitting in Equity.

1. Your orators, Edward F. Swinney as Receiver of the Kansas City Suburban Belt Railroad Company, the Kansas City Suburban Belt Railroad Company, and The Kansas City Southern Railway Company, with leave of court, brings this supplemental bill of complaint against the Guardian Trust Company; each and all of
553 which said corporations, both complainant and defendant, are corporations organized and existing under and by virtue

of the laws of the state of Missouri and citizens and residents of said state and each of them being an inhabitant of the Western Division of the Western District there*to*.

(*a*) Your orators state that the original complainant in this action, the Cambria Steel Company, on September 6, 1900, exhibited to this Honorable Court its bill of complaint against the Kansas City Suburban Belt Railroad Company, Union Terminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, in and by which said bill of complaint said Cambria Steel Company as such complainant set up the recovery of a judgment by it against the Kansas City Suburban Belt Railroad Company in the sum of One Hundred Thousand Nine Hundred Sixty Two and 91/100ths Dollars ($100,962.91) and the issuance and delivery and return unsatisfied of an execution thereon, and in and by said bill of complaint sought to subject to the payment and satisfaction of said judgment certain rights, properties and assets belonging to the Kansas City Suburban Belt Railroad Company and the other defendants above named.

(*b*) The bill of the Cambria Steel Company was in the nature of a creditor's bill in which it was sought to reach certain assets and property of the Kansas City Suburban Belt Railroad Company (hereinafter for convenience referred to as the "Belt Company") and to subject them to the payment of the said judgment in favor of the Cambria Steel Company. It was alleged in said bill that the defendant, Guardian Trust Company (hereinafter for convenience referred to as the "Trust Company"), caused to be organized and incorporated all of its co-defendants, to-wit: the Belt Company, Union Terminal Railroad Company (hereinafter for convenience referred to as the "Terminal Company"), Kansas City and Independence Air Line (hereinafter for convenience referred to as the "Air Line"), Missouri Elevator & Terminal Company (hereinafter for convenience referred to as the "Elevator Company"), Central Improvement Company (hereinafter for convenience referred to as the "Central Company"), Second Street Improvement Company (hereinafter for convenience referred to as the "Second Street Company"), Fairmount Amusement Company (hereinafter for convenience referred to as the "Amusement Company"), and the Northern Townsite Company (hereinafter for convenience referred
554 to as the "Townsite Company"); that the Trust Company caused each and all of said companies so incorporated and organized by it to issue large amounts of stocks and bonds, as follows: That it caused the Terminal Company to execute mortgage bonds in the amount of Two Million Dollars ($2,000,000.00) and capital stock in an equal amount; the Belt Company to issue bonds to the amount of One Million Dollars ($1,000,000.00) and stock in the amount of Two Million Seven Hundred and Fifty Thousand Dollars ($2,750,000.00); the Consolidated Terminal Company to issue bonds in the amount of Seven Hundred and Fifty Thousand Dollars

($750,000.00) and stock in an equal amount; the Air Line to issue stock in the sum of Five Hundred Thousand Dollars ($500,000.00) and bonds in the sum of Three Hundred Thousand Dollars ($300,000.00); the Central Company to issue stock in the sum of One Hundred Forty-One Thousand Five Hundred Dollars ($141,500.00); the Elevator Company to issue stock in the sum of Forty-Two Thousand Dollars ($42,00-.00); the Amusement Company to issue stock in the sum of Twenty-Five Hundred Dollars ($2,500.00); that the Trust Company at all times dominated and controlled each and all of said companies by the election of its own officers and directors to the positions of officers and directors of said other companies and caused them to execute their official duties in the interest and for the benefit of the Trust Company; that the Trust Company caused all of said stocks and bonds so issued as aforesaid to be transferred to it and it proceeded to use said stocks and bond- nominally for the benefit and profit of the companies issuing them, but in reality for its own benefit and profit, and that it refused at all times to render any true or correct statement of account and to account to the said corporations and each of them for the disposition made of said stocks and bonds or the proceeds thereof. The said bill of complaint further alleged that, in various other and sundry ways, the Trust Company mismanaged the property and affairs of the said corporations and that at various times amounts were charged by the Trust Company to the Belt Company purporting to represent indebtedness from the other defendant companies to the Trust Company, and that, as a result of said transactions, there was a pretended indebtedness shown upon the books of the Belt Company and of the Trust Company in favor of the latter and against the former in a large amount, and that in 1899 it became apparent that the Belt Company and the other companies were about to become bankrupt and the Trust Company caused the officers of the Belt Company, who were also officers and interested in the Trust Company, to cause to be pledged to the Trust Company all of the bonds, stocks and other property or evidence of indebtedness possessed by the Bell Company and subject to pledge or hypothecation.

555 The promissory notes so alleged in said bill to have been executed by the Belt Company are more specifically described as follows:

Note dated March 31, 1899, payable on July 2, 1899, for $50,000, with interest at the rate of 6 per cent per annum.

Note dated July 26, 1899, payable on demand with 6 per cent interest for $203,900.

Note dated Sept. 21, 1899, payable on demand, with 8 per cent interest for $23,056.48.

Note dated Oct. 23, 1899, payable on demand, with 8 per cent interest, for $7,162.40.

Note dated November 7, 1899, due January 9, 1900, with 8 per cent interest, for $50,000.00.

Note dated January 25, 1900, due May 25, 1900, with 6 per cent interest for $25,000.

Note dated February 8, 1900, due May 12, 1900, with 6 per cent interest for $109,500.00.

Note dated February 9, 1900, due June 11, 1900, with 8 per cent interest, for $10,400.

The said bill of the Cambria Company further alleged that the stocks and bonds and other property which the Trust Company fraudulently caused its own officers and employes as officers and directors of the Belt Company to turn over to it for the purpose of securing the payment of the said pretended notes are as follows:

338 first mortgage, 30 year 5 per cent gold bonds of the Kansas City & Northern Connecting Railroad Company of the denomination of $1,000, dated January 1, 1897, being bonds numbered 1467, 1769 to 1703, both inclusive; 1799 to 1818, both inclusive; 1324 to 1331, both inclusive; 1756 to 1768, both inclusive; 1184 to 1216, both inclusive; 1466, 1369 to 1400, both inclusive; 1431 to 1440, both inclusive; 1609 to 1658, both inclusive; 1659 to 1708, both inclusive; 1819 to 1851, both inclusive; 1774 to 1798, both inclusive; 1301 to 1323, both inclusive, and 76 of said bonds the numbers of which are not known to your orators; also 50 of said bonds numbered 1129 to 1178, both inclusive.

67 and 9-10 second mortgage, 30 year 5 per cent income bonds of the Kansas City & Northern Connecting Railroad Company, of the denom-nation of $1,000 each, dated January 1st, 1897, being bonds numbered 1064 to 1098, both inclusive; 1149 to 1157,
556 both inclusive; 1162 to 1173, both inclusive; 1192 to 1202, both inclusive.

Certificate No. 227, entitling the holder to 250-1,000 of said mortgage income bonds.

Certificate No. 229, entitling the holder to 250-1,000 of said second mortgage income bonds.

Certificate No. 220, entitling the holder to 150-1,000 of said second mortgage income bonds.

25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100 each, as evidenced by certificates Nos. 9, 6, 5 and 4.

1,120 shares of the capital stock of the Central Improvement Company of the par value of $100 each, as evidenced by certificate Nos. 148, 149 and 147.

439 shares of the capital stock of the Northern Townsite Company of the par value of $100 each, as evidenced by certificate No. 11.

425 shares of the capital stock of the Missouri Elevator and Terminal Company of the par value of $100 each, as evidenced by certain certificates Nos. 36, 34, 37, 40 and 38.

19,997 shares of the 20,000 shares constituting the capital stock of the Union Terminal Railroad Company.

4,994 shares of the capital stock of the Kansas City and Independence Air Line.

15 Kansas City and Northern Connecting Railroad Company's second mortgage income bonds.

About 600 tons of new steel rails, theretofore purchased by, and then belonging to said Belt Company, and being stored in its yards.

It is further alleged that at or about the same time of the pretended pledging of the above security the Trust Company caused the Belt Company to assign to it an open account against the Kansas City, Pittsburg & Gulf Railroad Company in an amount of One Hundred Thirty-Three Thousand Fifty-Eight and 4-100ths Dollars ($133,058.04) to secure said alleged indebtedness.

Said bill of the Cambria Steel Company prayed that an accounting might be had between the Trust Company and the other defendants and that upon a true accounting it would be found that nothing would be justly due from the Belt Company to the
557 Trust Company, but that on the other hand a large sum would be found to be due from the Trust Company to the Belt Company, and the Cambria Company prayed that the collateral above mentioned should be decreed to be released from the alleged pledge and subject to the payment of complainant's judgmnt; that the assets of the Belt Company be marshalled for distribution in accordance with the practice of courts of equity and for an injunction against the Trust Company and all persons claiming through, by or under it, or each of them, enjoining and restraining it from in any manner directly or indirectly selling, transferring, assigning or pledging, or otherwise disposing of or parting with the possession of or control of any of the property, assets, notes, stocks, bonds and claims and demands above mentioned and also any of the notes above mentioned.

(*c*). Upon the filing of said bill and on September 6, 1900, this court made an order appointing Stuart R. Knott and Edward F. Swinney, Receivers, generally of all the assets, property, rights, titles and interests, legal or equitable, of the Belt Company; and the court further ordered that the Trust Comany and all persons claiming by, through or under it and each of them, and their several and respective officers, agents, employes and representatives, be restrained until the further order of the court from in any manner directly or indirectly selling, transferring, assigning, pledging or otherwise disposing of or parting with the possession or control of any of the property, assets, notes, stocks, bonds, claims and demands mentioned and referred to in the bill of complaint above set forth, and any of the said notes, bonds or other collateral above described. The Elevator Company, the Townsite Company, the Amusement Company, the Central Company, the Second Street Company and each of them, were restrained and enjoined from in any manner directly or indirectly selling, encumbrancing, pledging, transferring or assigning, or otherwise disposing of or parting with the possession or control of any part of the assets, property, moneys or demands of said companies respectively.

(*d*). Afterwards, and on the 8th day of November 1900, this court appointed a receiver for the Elevator Company, Central Company and Townsite Company; afterwards by order of this court the Elevator Company was turned over to the Trust Company as the mortgagees of its property for the purpose of the administration of the same; that the receivership of the Central Company has been continued and T. T. Crittenden is now the Receiver thereof and is in

charge of and is operating the property of that company; that the Receiver of the Townsite Company has been continued and com-
558 plainant Edward F. Swinney, is now the Receiver of said Company and in control of and in the administration of the assets of said company.

(*e*). All the defendants named in the bill of the Cambria Company filed their answers thereto and the issues have long since been made up and testimony taken as hereinafter stated.

(*f*). Your orators pray leave to refer to the bill of the Cambria Company and order *appearing* receivers thereunder to answers of the defendants to said bill, the reports of the receivers from time to time and the other orders made therein to the same extent and with like effect as if herein set forth at length.

2. Your orators further state that — the 20th day of November, 1901, your orator, Edward F. Swinney, together with Stuart R. Knott, the latter being at the time a co-receiver with your said orator, but since discharged of his trust, together with the Kansas City Suburban Belt Railroad Company acting under the authority of their appointment as receivers of the Belt Company as set forth in the foregoing paragraph, filed their ancillary bill of complaint against the Cambria Steel Company, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden its Receiver, Northern Townsite Company and the Fairmount Amusement Company; and afterwards, on the 26th day of March, 1905, filed their first amended and supplemental ancillary bill of complaint, and afterwards, on July 2, 1906, filed their second amended and supplemental and ancillary bill of complaint.

(*a*). In the original, as well as in the first and second amended and supplemental ancillary bill of complaint, the complainants therein averred that the Trust Company caused the organization and incorporation of the companies for the purposes and in the manner stated in the foregoing paragraph 1, sub paragraph "*b*"; also the execution by said companies of the bonds and stock as therein alleged; and domination and control by the Trust Company of each and all of said companies and the appropriation by the Trust Company of all of said stocks and bonds to its own benefit and profit and its refusal to render any true or correct statement of account and to account to said corporations and each of them for the disposition of said bonds and stocks or the proceeds thereof; that the Trust Company in various other and sundry ways mismanaged the property and affairs of said corporation and that at various times amounts were charged by the Trust Company to the Belt Company purporting to represent indebtedness from the other defendant companies to the Trust Com-
559 pany and that as a result of said transactions there was a pretended indebtedness shown upon the books of the Belt Company and of the Trust Company in favor of the latter and against the former in a large amount; that in 1899 it became apparent to the Trust Company that the Belt Company and other companies were about to become bankrupt and the Trust Company caused the officers of the Belt Company, who were also officers and interested in the Trust Company, to cause to be pledged to the Trust Company all of

the bonds, stocks and other property or evidence of indebtedness possessed by the Belt Company and subject to pledge or hypothecation; that the Trust Company caused the Belt Company to execute the promissory notes specifically described in said paragraph 1, sub paragraph "*b*", and that the Trust Company fraudulently and unlawfully caused its own officers and employes, as officers and directors of the Belt Company, to turn over to the Trust Company for the purpose of securing the payment of the pretended notes, the stocks and bonds specifically described in said paragraph 1, sub-paragraph "*b*", and to assign the account therein specifically set forth.

It is further alleged in the said amended and ancillary bill of complaint that the Trust Company caused to be organized the Central Improvement — a corporation under the laws of the State of Missouri, with a capital stock of $200,000.00, of which $141,500.00 par value has been issued; that said company was organized for the purpose of holding the title to various pieces of real estate in Kansas City, Missouri, and elsewhere, purchased for the use and benefit of the Belt Company, and other of the companies above mentioned so organized, dominated and controlled by the Trust Company; that the officers and employes of the Central Improvement Company, all of whom were officers, servants or employes of the Trust Company continued nominally in office and to control and to manage such company until about the month of April, 1900; that certain pieces of real estate of vital importance to the Belt Company are held in the name of the Central Improvement Company; that the Trust Company took upon itself the duty of purchasing the said pieces of property and using for that purpose funds of the Belt Company, that various sums of money were, during the period above mentioned, paid out by the Belt Company to the Trust Company for the purpose of purchasing such pieces of real estate; that the Trust Company has never truly accounted to the Belt Company, though often requested so to do, for the sums of money so received by it and the disposition made by it of such sums of money, and it has never accounted at all therefor, except as hereafter stated; that a large amount of property was purchased
560 with money advanced by the Belt Company, the title to which property, however, was taken in the name of the Improvement Company; that all of said property in truth and in fact belong to the Belt Company, and that the Belt Company has never been reimbursed for the money so advanced as aforesaid; that on the eighth day of November, 1900, a receiver was appointed for the Improvement Company and that T. T. Crittenden is now the duly qualified and acting receiver thereof; that another company organized by the Trust Company was the Northern Townsite Company, a Missouri corporation, with an authorized capital of $100,000.00, of which $92,800.00 has been issued; that said company was organized by the Trust Company in connection with the Construction of the Kansas City Northern Connecting Railroad for the purpose of acquiring property at or near townsites along the line of said road; that the Trust Company, in the same manner as it dominated the other corporations above named, caused its own servants and employes to be elected and maintained as officers and directors of said Townsite Com-

pany, and at all times dominated and controlled the affairs of said Townsite Company; and the Trust Company caused the Belt Company to advance to it upwards of $47,000.00, which it used in the purchase of property which was taken in the name of the Townsite Company; that the Trust Company furnished the Townsite Company the sum of $6,288.57 and no more; that the property standing in the name of the Townsite Company and the proceeds realized from the sale of such of the townsite properties as have been sold should be conveyed and turned over to the Belt Company.

The complainants in said amended and supplemental ancillary bill of complaint then proceed to specify a large number of particular instances wherein it is claimed that, by reason of the domination and control by the Trust Company over the Belt Company and the other companies above described and allied with it, the Trust Company caused improper charges to be made against the Belt Company and refused to allow credits which should have been allowed to it, so that if said accounts were properly sifted and adjusted the Belt Company would be entitled to a credit in excess of $1,500,000.00 and that said pretended notes would be entirely wiped out and the Belt Company would be entitled to a judgment for a large amount against the Trust Company. The prayer is as follows:

That an accounting be taken of the various transactions and dealings between the Trust Company and the Belt Company; or by the Trust Company for the use and benefit of and as trustee and agent for the Belt Company, and that the Trust Company be required to pay the balance found to be due by it, if any, upon such ac-
561 counting; that in taking such accounting all claims and demands alleged to be held by the Trust Company against the Belt Company in Kansas and Missouri, where the Trust Company used the Belt Company simply as an instrumentality and agency for its own use and benefit, be charged against the Trust Company and it be held liable for all losses incurred or claimed to have been incurred by the Belt Company about the same.

That the said notes hereinabove described may be found and decreed by this court to have been executed in the fraudulent manner and for the fraudulent purposes above set forth and without consideration; and that said notes may be by this court directed to be surrendered up and cancelled, and that each and all of the stocks, bonds and other securities, including the assigned account above mentioned, fraudulently delivered to the Trust Company by its officers and employes in the manner hereinabove set forth, may be ordered by this court surrendered and delivered up or reassigned to the Belt Company.

That each and all of the property purchased with the money of the Belt Company and belonging in equity to it, the legal title to which is held in the name of any of the companies hereinbefore set forth, may be required by the decree of this honorable court to be conveyed to the Belt Company, or to its receiver for it.

And your orators pray for a continuance of the writ of injunction herein against the Guardian Trust Company, its agents, servants and employes, restraining and enjoining them and each of

them from selling, transferring or in any wise disposing of the said notes above mentioned and so executed by the Belt Company to the Trust Company; and from selling, transferring or in any wise disposing of the said bonds and stocks and other property hereinabove described, delivered to said Trust Company as collateral security for said notes.

(*b*) The Trust Company duly answered the said amended and supplemental ancillary bill of complaint and by various allegations sought to justify the statement of accounts made between it and the Belt Company, averred the execution by the Belt Company of the promissory notes above described and the pledging and transfer to it of the account and collateral security above mentioned; averred that it had sold certain of said collateral security, and that as to the remaining collateral security it had been temporarily enjoined at the suit of the Cambria Steel Company from the selling or otherwise subjecting certain of the above named stocks and bonds to the payment of the alleged indebtedness of the Belt Company to it;
562 but that certain of said collateral security has under the order of this court been sold by the Trust Company and the proceeds of certain sales are now held by the Trust Company in accordance with the order of this court to await the final determination of this cause; that as to the claim and account of the Belt Company against the Kansas City, Pittsburg & Gulf Railroad Company it was averred that said account had been assigned to and was held by the Trust Company as collateral security and that the Trust Company had filed said statement of account by intervening petition in the suit of the State Trust Company, complainant, against the Kansas City, Pittsburg & Gulf Railroad Company and others, defendants, in this court, and that said intervention is still pending and undetermined; and the Trust Company prayed that judgment might be rendered by this court against the Belt Company and the complainants in said amended and supplemental ancillary bill in favor of the Trust Company for the amount of each and all of the said promissory notes, together with interest thereon, and for the amount of an open book account, with interest thereon, from April 1, 1900; that the court by proper order should protect and enforce the interest of the Trust Company in and to the stocks, bonds, accounts and property so held by the Trust Company as collateral security as aforesaid. The other defendants in said amended and supplemental ancillary bill filed their answers and the issues have long since been made up.

(*c*) The properties of the Central Improvement Company consist in a general way of parcels and tracts of land in and about Kansas City of the value of approximately $200,000.00; that nearly all of said lands were purchased with funds supplied by the Belt Company and the title thereto was taken in the Central Improvement Company as a matter of convenience; that T. T. Crittenden is now the duly qualified and acting receiver in charge of and administering said properties; that numerous orders have been heretofore made by this court respecting the properties of the Central Improvement Company.

(*d*) The properties of the Northern Townsite Company are still in the hands of Edward F. Swinney, Receiver, appointed by this court, and consist in a general way of a large number of town lots, except such as have been sold, in which event the proceeds are in the hands of the said Receiver awaiting disposition by this court. A number of orders have been made by this court directing the administration of said property and providing for such sales as have been made.

(*e*) In November, 1901, this court made an order in the case of Bierce vs. Guardian Trust Company upon the application of
563 the Trust Company and its Receiver, providing for the sale of ninety nine (99) bonds of the Kansas City & Northern Connecting Railroad Company, being a part of the collateral above named, together with coupons thereto attached, and the same were sold and the proceeds aggregating $40,000.00 were, in pursuance of said order of this court, received by the Guardian Trust Company and by its receiver to take the place of said bonds and held by them separate and apart from the other funds subject to any claim thereto which might thereafter be established by the Kansas City Suburban Belt Railroad Company and the Cambria Steel Company.

(*f*) All of the bills, answers, orders, reports and other proceedings mentioned in this paragraph are a part of the record in this case and your orators pray leave to refer to the same at any hearing of the same effect as though they were duly incorporated herein.

3. Your orators further state that on the 27th day of February, 1905, your orator The Kansas City Southern Railway Company, by leave of court and by stipulation of the parties, filed its intervening petition in this cause, in which it claimed certain of the collateral above described in paragraph one (1) and the proceeds of the same where any part thereof had been sold; the general nature of the claim of said intervenor is as follows:

(*a*) The intervenor, it was alleged in said intervening petition, was the purchaser at foreclosure sale in 1900 of the railroad properties of the Kansas City, Pittsburg & Gulf Railroad Company, and in 1902 of the Kansas City Suburban Belt Railroad Company and Kansas City and Independence Air Line. That each of said sales was made in the foreclosure proceeding to foreclose mortgages upon each of said properties; that said mortgages not only covered the specific railroad properties in existence at the time they were made, but also carried a broad after-acquired property clause sufficient in equity to include and embrace all other property acquired for railway purposes after the execution of said mortgages.

Intervenor then alleged the incorporation of the said Central Improvement Company for the purpose of holding the legal title to real estate that might be needed and required for right of way and other purposes necessary for and in connection with the operation of said various railroad companies; that all of the moneys used by said Improvement Company were contributed by the Belt Company, the Air Line and by the Gulf Company for the purchase of right of way and terminal properties necessary for the use and operation

of said railways respectively; that the amount contributed
564 by the Belt Company was $129,673.00; by the Air Line, $16,101.00, and by the Gulf Company $23,673.00; that as a matter of convenience when funds were provided by said companies, or any of them, for the purchase of right of way which such company might need for railroad purposes, that amount of stock subsantially equivalent thereto was issued by the Improvement Company to the railway company supplying the funds; that in this way 1407 shares of stock of the Improvement Company were issued and not otherwise, and said stock was appropriated by the Trust Company in 1899 for the fraudulent purpose of securing the pretended indebtedness aforesaid; that the Trust Company was a Trustee in each of said mortgages and actually and by operation of law charged with a notice that all of said properties in equity belonged to the various railway companies for which they were purchased and that the after-acquired property clause of the mortgages respectively attached to said properties, so that in equity they were covered by said mortgages and upon a foreclo-use sale the title thereto passed to and vested in said intervenor.

(*b.*) The intervenor further alleged that the steel rails which the Trust Company took possession of on or about February 1, 1900, being approximately 600 tons, more or less, as aforesaid, were charged with a lien of said after-acquired property in said mortgage of the Belt Company and that thereby the intervenor acquired title thereto at foreclosure sale and was entitled to recover the same or their proceeds from the Trust Company.

(*c.*) The intervenor further claims that the account of the Belt Company against the Gulf Company in the sum of $133,000.00 fraudulently transferred to the Trust Company as aforesaid, was likewise covered by the after-acquired property clause of the mortgage of the Belt Company so that the intervenor upon foreclosure sale became entitled thereto and entitled to have the pretended assignment thereof to the Trust Company cancelled.

(*d.*) The intervenor further claimed that the other collateral, consisting of stocks and bonds above described, were charged with a lien by virtue of said after-acquired property clause, and that the intervenor as purchaser at foreclosure sale became entitled to the same or to its proceeds where the same had been sold.

(*e.*) The prayer of the intervenor is as follows:

a. For the judgment, order and decree of this court requiring the Central Improvement Company and its Receiver to convey to
565 your intervenor all the real estate or other property standing in its name and to turn over to your intervenor all the moneys held by the Central Improvement Company, or its Receiver, or owing to it, or them, arising from the sale or the proceeds of said property.

b. That the defendant, Guardian Trust Company, be required to account for and pay to your intervenor the value of the steel rails and fastenings mentioned in paragraph seven (7), together with interest thereon.

c. That the defendant, Guardian Trust Company, be required to account for and pay to the intervenor the value of the five thousand

(5,000) shares of Union Terminal stock, together [woth] the value of four thousand nine hundred and ninety-four (4,994) shares of the capital stock of the Air Line and also the value of the fourteen thousand nine hundred and ninety-seven (14,997) shares of the capital stock of the Terminal Company, together with interest thereon.

d. That the defendant, Guardian Trust Company, be required to account for and pay to your intervenor the value of the bonds of the Kansas City and Northern Connecting Railroad Company mentioned in the preceding paragraph nine.

e. That the defendant, Guardian Trust Company, be required to assign to your intervenor the account of the Belt Company against the Gulf Company mentioned in the foregoing paragraph ten.

f. That the defendant, Guardian Trust Company, be required to release to your intervenor all of the capital stock of the Northern Townsite Company and that said Northern Townsite Company and its receivers be required to convey to your intervenor all of the property held by said Northern Townsite Company and its receivers, together with all the moneys in their possession or owing to them as the proceeds of the property formerly held by said Townsite Company upon repayment to the Trust Company for such sum as the court may find was contributed by said Trust Company for the purchase of property taken in the name of the Townsite Company.

g. That the defendant Guardian Trust Company be required to account for and pay to the intervenor the amount of the proceeds of the bonds of the Union Company diverted by it from the purposes for which said bonds were issued, as set forth in paragraph thirteen.

(*e.*) The Trust Company filed its answer to the intervening petition of The Kansas City Southern Railway Company in
566 which in a general way it denied that the properties mentioned in the intervening petition were covered by said after-acquired property clause and denied that it was liable to The Kansas City Southern Railway Company for any of the matters therein charged; the Trust Company in its answer referred to the said promissory notes above set forth as having been executed by the Belt Company and to its open account, and alleged that the intervenor The Kansas City Southern Railway Company by reason of the re-organization plan under which the Kansas City, Pittsburg & Gulf Railroad Company, the Belt Company, Air Line Company, and other companies, were re-organized, all of the floating debt of the Belt Company or other of the foreclosed companies have been assumed by The Kansas City Southern Railway Company, its allegations in that respect being as follows:

This respondent, the Guardian Trust Company, further shows that on or about the 14th day of June, A. D. 1899, William F. Harrity, B. M. Baker, August Hecksher, Edward Wagner, Samuel R. Shipley, Silas W. Pettit and Winthrop Smith entered into an agreement for the reorganization of the Kansas City, Pittsburg & Gulf Railroad Company, Kansas City Suburban Railroad Company, and the Port Arthur Channel and Dock Company and their so-called subsidiary or auxiliary companies, including said Kansas City Subur-

ban Belt Railroad Company, Union Terminal Railroad Company, Consolidated Terminal Railroad Company, and Kansas City and Independence Air Line Railroad Company; that said persons calling themselves a reorganization committee formed a so-called "plan of reorganization," which was promulgated under date of November 7, 1899, and invited all holders of bonds and stocks of said several companies above named, to deposit the same with said reorganization committee under said plan of re-organization which proposed to organize a new corporation to be known as the Kansas City Southern Railway Company, which should acquire the properties of all said above named corporations, and issue in payment therefor the bonds and stocks of said re-organized or new corporation in the proportions and on the terms and in the manner set out in the said plan of re-organization, which is hereby referred to and read to be produced upon the hearing of this cause.

That after the promulgation of said plan on November 7, 1899, there was deposited with said re-organization committee the proportion of bonds and stock required by said plan to make the same operative; and on the 20th day of December, 1899, said plan
567 was declared operative; that thereafter said committee caused to be organized and incorporated the Kansas City Southern Railway Company under the statutes of the State of Missouri for the purpose of acquiring title to the properties of said corporations named in the foregoing paragraph, and the stocks and bonds of said new corporation were thereafter exchanged for the stocks and bonds of said several corporations in the proportion and manner set out in said organization plan; that by means of said exchange said Kansas City Southern Railway Company came to be the owner of practically all the bonds and stocks of said corporations above mentioned, and particularly of the said Kansas City Suburban Belt Railroad Company, and said corporation caused to be elected directors and officers of said Belt Railroad Company, who conducted the same and managed and operated it in the interests of and as a component part of the railroad system of said Kansas City Southern Railway Company.

This respondent further shows that the organization of said Kansas City Southern Railway Company and exchange of its stocks and bonds above alleged for the stocks and bonds of said Belt Railroad Company, and the other steps taken in pursuance of said re-organization plan; effected a consolidation of said Kansas City Southern Railway Company and said Kansas City Suburban Belt Railroad Company under the statutes of the State of Missouri; or a consolidation de facto, and that said Kansas City Southern Company is estopped to deny such consolidation, or to claim that the same was not legally complete; and that said Kansas City Southern Railway Company thereby became and is liable for all the debts incurred by said Belt Railroad Company to the same extent as said last mentioned company, including the debts of this respondent heretofore mentioned and alleged in this answer.

Further answering this respondent shows that said re-organization committee, when working out said plant of re-organization expressly represented to this respondent that, in consideration of the debt due and owing from said Belt Company to this respondent,

said committee would provide for the payment of all debts and obligations due to this respondent from all of said corporations proposed to be included in said re-organization plan, and particularly said Belt Railroad Company, and expressly promised this respondent that said committee would pay or cause to be paid all debts of every character due to this respondent from said several corporations proposed to be consolidated, and particularly from said
568 Belt Railroad Company; and that the said new and reorganized company would pay such debts; that certain members of said reorganization committee constituting a so-called purchasing committee, purchased at the foreclosure sale of said Kansas City, Pittsburg and Gulf Railroad Company all its assets, right-of-way, rolling stock, etc., and thereafter assigned said bid to said Kansas City Southern Railway Company, which said company entered into a contract, with said reorganization committee, wherein and whereby it assumed and agreed to complete and carry out all the obligations undertaken and assumed by said re-organization committee; that under and by reason of said agreement and contract said Kansas City Southern became liable and agreed to pay all the obligations of said Belt Railroad Company to this respondent, and is still so liable.

That said Kansas City Southern was at the time of the foreclosure and sale of the Belt Company's assets the holder and owner of practically all the bonds and stock of said Belt Company; that, in order to obtain and control the stock of said Belt Company, said Kansas City Southern Railway Company exchanged its stock in the proportions and in the manner specified in said plan of re-organization, which is hereby referred to, for the stock of said Belt Company, and thereupon proceeded to secure a foreclosure of said bonds of said Belt Company; that said scheme of re-organization and exchange of stocks aforesaid resulted in the stockholders of the Belt Railroad Company securing a large amount of stock of said Kansas City Southern Railway Company, which was at that time and is yet very valuable, and was at that time and is yet of much greater market value than the total claims of this respondent against said Belt Railroad Company; that said scheme legally implied the payment by said Southern Company of all the claims of this respondent against said Belt Company.

This respondent therefore alleges and shows that if said scheme of re-organization and exchange of securities was intended by said re-organization committee and by said Kansas City Southern Railway Company and its officers to deprive this respondent of all security and opportunity of collecting its said claims against the Belt Railroad Company, while preserving and securing to the stockholders of said company said advantage and valuable interests through said scheme of transfer of stocks, that said foreclosure of said properties of said belt Company, would have been a fraudulent scheme, and in that case should be held void and invalid, so far as this relator is concerned, and the property thereby trans-
569 ferred to said Kansas City Southern Railway Company should be held subject to the debts and claims of this respondent and subjected to their payment, even if it should be held by the court that a legal consolidation, or actual or de facto consolidation, was

not brought about as hereinabove alleged, whereby said Kansas City Southern Railway Company became legally obligated to pay the claims of this respondent against said Belt Railroad Company.

The issues so made by said intervening petition and the answer thereto have long been made up.

(*f*). The intervening petition, answer thereto and other orders and proceedings made are a part of the record of this cause and your orators pray that they may be referred to and considered of the same effect as though actually incorporated herein.

4. The issues made by the various pleadings above recited were, by order of this court, referred to Honorable Shannon C. Douglass, and in 1903 the taking of testimony before him began and was continued until 1906. Testimony was taken by complainants in the bill of the Cambria Company, by complainants in the amended and supplemental ancillary bill of the Belt Company and its receivers, by the intervening petitioner, The Kansas City Southern Railway Company and by the Guardian Trust Company. The testimony covering all of the manifold issues in the case, involving a thorough investigation and sifting of all the accounts between the Trust Company and the Belt Company and the other corporations mentioned extending over a period of, in some cases, as much as ten years. All of the accounts, vouchers and other records of the parties are in evidence, as well as the oral testimony of every witness able to throw any light upon the subject of the controversy; the record of this testimony so taken before the Special Master, contains over thirty-four thousand (34,000) pages. Your orators further state that, in taking said testimony and preparing this cause for trial, they have expended in counsel fees, witness fees and court costs, more than $50,000.00. In the summer of 1906 the case was finally submitted to the Master by all parties and argued at length for many days. The complainants in the amended and supplemental ancillary bill, referred to in the foregoing paragraph numbered "2," and complainant in the intervening petition referred to in paragraph "3," have filed with the Master carefully prepared abstracts of testimony and also a brief of the facts, taking up each allegation in the bills mentioned in the foregoing paragraphs "2" and "3", with reference to the pages of the record where the testimony in support of such allegations are to be found. Both parties have filed elaborate
570 briefs with the Master; even since the hearing, additional printed briefs have been filed by the parties including the Trust Company; but the Trust Company has thus far failed and refused to prepare and file with the Special Master any abstract whatever of the testimony, or to aid the Special Master in any way in reaching a conclusion upon the matters of fact involved in the litigation.

5. Your orators further state that the ancillary bill of complaint and the supplemental and ancillary bills and the subsequent amendments thereto referred to in paragraph "2" hereof, were filed by agreement with the Trust Company in accordance with written stipulation which provided that there should be an accounting between the Trust Company and the Belt Company in this cause. Said stipulation, omitting the caption, is as follows:

It is hereby stipulated and agreed by and between Stuart R. Knott and Edward F. Swinney, Receivers of the Kansas City Suburban Belt Railroad Company, complainants in the cross bill in the above entitled cause, and the defendants the Guardian Trust Company and Francis M. Black, its Receiver, Second Street Improvement Company and Cambria Steel Company, as follows:

First: That the said complainants shall withdraw or dismiss their cross bill heretofore filed herein and shall file an amended cross bill, in the nature of an ancillary bill in this cause, making The Kansas City Suburban Belt Railroad Company a co-plaintiff with them in said amended ancillary cross bill, and also making the Cambria Steel Company, the complainant in the original bill herein, a defendant in said amended ancillary cross bill, and that said amended ancillary cross bill shall be filed on or before the 15th day of November, 1901, and that the defendants, the Guardian Trust Company and its receivers, and the Second Street Improvement Company and the Cambria Steel Company, shall have leave to plead or answer to said amended ancillary cross-bill, on or before the first Monday in December, 1901.

Second. That the accounting between the Kansas City Suburban Belt Railroad Company and its receivers, and the Guardian Trust Company, and its receiver, sought by the said amended ancillary cross bill, shall be expedited by all of the parties hereto, and whatever balance, if any, that may be found due to the said Guardian Trust Company or its receiver, from the said Kansas City Suburban Belt Railroad Company or its receivers shall be entered up in this cause as a judgment in favor of the said Trust Company and
571 its receiver and against the Suburban Belt Railroad Company and its receivers, without the necessity of presenting any claim therefor by way of cross bill; or other affirmative pleading; and whatever balance, if any, that may be found due to the said Suburban Belt Railroad Company, or its receivers, from said Guardian Trust Company, or its receivers shall be entered up in this cause as a judgment in favor of the said Kansas City Suburban Belt Railroad Company and its receivers and against the Guardian Trust Company and its receiver.

Dated this — day of November, 1901.

STUART R. KNOTT AND
EDWARD F. SWINNEY,
Receivers of the Kansas City Suburban Belt Railroad Company,

By THOMAS R. MORROW AND
S. W. MOORE, *Their Solicitors.*

GUARDIAN TRUST COMPANY AND
FRANCIS M. BLACK, *Its Receiver,*

By F. M. BLACK AND
TRIMBLE & BRALEY, *Its Solicitors.*

SECOND STREET IMPROVEMENT COMPANY,

By TRIMBLE & BRALEY, *Its Solicitors.*

CAMBRIA STEEL COMPANY,

By —— ——, *Its Solicitors.*

I consent and agree to the foregoing stipulation with the *the* understanding that it shall in no wise prejudice the right, if any, which the Cambria Steel Company has to subject any property debt found to be due from the Guardian Trust Company or to subject any property or collateral or proceeds thereof heretofore or now in the hands of the Guardian Trust Company or its receiver, or its or his assigns; and all the testimony introduced by any party herein shall be with the understanding that the Cambria Steel Company can, if it so desires, use the same upon final hearing of its bill in the case above entitled.

FRANK HAGERMAN,
Solicitor for Cambria Steel Company.

The intervening petition of The Kansas City Southern Railway Company was filed pursuant to a stipulation between that company and the Trust Company in this cause, which is as follows:

572 It is agreed between the parties to the intervening petition of The Kansas City Southern Railway Company that it may file its amended intervening petition setting up, in addition to the matters now contained in its intervening petition on file, its claim against the Guardian Trust Company for alleged breach of trust as trustee in the mortgage made by the Union Terminal Railroad Company alleged to be accruing to it as the owner of all the bonds issued by the Union Terminal Railroad Company; and the Guardian Trust Company consents that the issues so made shall be referred to Shannon C. Douglass, Special Master, and waives any objection it might make to said intervening petition on the ground of multifariousness or other formal matters; and the Guardian Trust Company further agrees to answer the said intervening petition within fifteen days from filing petition.

3. Your orators further state that notwithstanding the issues made and testimony taken in this cause and its final argument and submission to the Special Master, the Trust Company is now insisting upon trial in the Circuit Court of Jackson County, Missouri, of certain actions which it has there pending against the Kansas City Southern Railway Company, which said actions it has caused to be set down for hearing on December 2, 1907; and the Trust Company, unless restrained by order of this court, is threatening to proceed and will proceed to force a hearing of said causes, which are as follows:

(*a*) The petition of the Guardian Trust Company — filed in the Circuit Court of Jackson County, Missouri, on March 15, 1905, containing thirty-three (33) counts, thirty-one (31) of which are insisted upon, the last two (2) having been abandoned. The petition purports to set forth several causes of action, each one of which is stated in three different forms or three (3) separate counts. The petition is hereto attached and made a part hereof as Exhibit "A." The action is one at law, triable by a jury; in it the Trust Company seeks to recover against the Kansas City Southern Railway Company upon the notes set forth and described in paragraph one (1) hereof and also upon an open account. Inasmuch as the Allegations in reference to each note and the account are substantially the

same, the allegations in reference to the first note, consisting of three counts, are herein set forth and *is* as follows:

First Count.

1. Plaintiff states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was
573 at all times a railroad corporation organized under the laws of the State of Missouri; that the said Belt Company on the 25th day of January, 1900, by its negotiable promissory note of that date, by it duly executed, promised, for value received, to pay to plaintiff four months after said date, the sum of Twenty-five Thousand — ($25,000.00) a duly certified copy of which said note is herewith filed and marked Exhibit "A"; that said note has long since matured and no part thereof, except the interest thereon at the rate of six per cent per annum to September 1, 1901, has been paid, although payment of said note was demanded at the maturity thereof.

2. That on and prior to April 1, 1899, the Kansas City, Pittsburg & Gulf Railroad Company, hereinafter called the Gulf Company was a railroad corporation, organized under the laws of the state of Missouri; that the Gulf Company owned or controlled a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had trackage rights over the St. Louis & San Francisco Railway from said Grandview to a point in Jackson County, Missouri, called Belt Junction; that the said Belt Company owned and operated a line of railroad in Jackson County, Missouri, extending from a point in Kansas City on the State Line between Missouri and Kansas near the confluence of the Missouri and Kansas Rivers, thence east along the south bank of the Missouri River about five miles, thence southwest to said Belt Junction, so that when connected, the line of the Belt Company and the line of the Gulf Company formed in the main one continuous line of railroad running in the same general direction from Port Arthur, Texas, to Kansas City, Missouri; that on April 1, 1899, said Gulf Company made default in the payment of interest due on that date on its funded debt, and upon complaint filed by the Trustee named in the mortgage securing said debt, such proceedings were had that the property and affairs of said Gulf Company on or about said date passed into the hands of receivers appointed by the Circuit Court of the United States for the Western Division of the Western District of Missouri, which receivers assumed for the time being, the operation and control of said Gulf Read under the orders of said court; that shortly thereafter a committee, styled a "Reorganization Committee", was formed for the purpose of readjusting the funded debt of said Gulf Company and for other purposes, fully set forth in a prospectus published by said Committee called a "Reorganization Plan"; that said Gulf Company had no terminal facilities in Kansas City except such as it had by contract with said Belt Company and it became evident to said committee that it would be advantageous for said Gulf Com-

pany, when reorganized, to acquire the property of said Belt Company by consolidation or otherwise; that the expressed ob-
574 ject of said reorganization plan, as set forth in said prospectus, was to consolidate and unify the property of said Gulf Company with the property of the said Belt Company and to manage and control the same as one; that with this end in view said committee, under date of November 7, 1899, put forth and published a certain prospectus called a "Reorganization Plan", and circulated the same among the creditors, bondholders, and stockholders of said Belt Company, including plaintiff; that attached to said prospectus was a certain agreement which all the stockholders of the Belt — were invited to execute in favor of said committee; that it was provided in said published plan that same should be deemed a part of said agreement to the same extent as if copied in full therein; that a copy of said plan and agreement is hereto attached and marked exhibit No. 1; that all of the originals thereof are in defendant's possession or under its control; that in and by said published plan said committee made the following offer to all the stockholders of the Belt Company, that is to say, that it, the said Committee, would cause a new or successive corporation to be formed in which should be vested the title to all and singular the property and franchises of the Gulf Company, when acquired by said committee at such judicial sale thereof as might thereafter be had in said receivership proceedings; that to all such stockholders of the Belt Company as would deposit their stock with said committee under the terms of said written agreement, attached to and made a part of said prospectus, the said committee would cause to be issued a like amount of stock of equal par value by such new corporation to be formed as aforesaid, so that upon the consummation of said plan the stockholders would have the same amount of stock in such new corporation as they then held respectively in the Belt Company, and it was made a condition to participation in said scheme that all persons who should deposit their stock with said committee should enter into a binding agreement that said stock when issued should be vested irrevocably for a term of five years in certain trustees, who should have absolute power to vote the same and exercise all the prerogatives and franchises of the owners of said stock in the control and management of said new corporation to be formed as aforesaid; that all stockholders of said Gulf Company were required, as a condition to participation in said plan, to pay said committee the sum of $10.00 for each share of Gulf stock, deposited with said committee under said plan, which payment entitled them to one share of stock of the new company, but no such condition was imposed on stockholders of the Belt Company; that said prospectus was so contrived and framed as to lead, and did lead, plaintiff and such other corporations and per-
575 sons, who or which dealt with said committee on the faith thereof, to believe that the floating debt of the Belt Company, including said note, would be paid by said committee or by said successor corporation; that induced by the proposals made in said prospectus, the persons holding more than ninety-nine per cent of the total issue of the stock of the Belt Company then outstanding a

total of 47,500 shares, deposited the same with the said committee, to be held and used by said committee in the execution of said scheme as aforesaid; that afterwards such proceedings were had in the said Circuit Court of the United States that the said Gulf Road was on or about March 19, 1900, sold at foreclosure sale and was bid in by certain persons on behalf of said committee, and on March 19, 1900, said committee, pursuant to said scheme of reorganization caused defendant to be incorporated as a railroad corporation under the laws of the State of Missouri, and caused all the property and franchises of said Gulf Road to be conveyed to defendant and caused defendant to issue its shares of stock to said stockholders of the Belt Company, who then and there received in stock of defendant a like number of shares as they had before held in the Belt Company, respectively, and of equal par value as said Belt shares; that said scheme, as set forth in said prospectus, was carried into full force and effect and defendant then and there entered into possession and control and acquired unto itself all of the property and franchises of the Belt Company and still has the same; all with the result that after said scheme was carried out the said stockholders of the Belt Company had and still have the same interest in defendant, as they had before had in the Belt Company, and defendant has all of the property and assets of said Belt Company and is using the same for its own benefit and behoof; that pursuant to said plan the said stockholders of the Belt Company did enter into trust agreements with certain persons designated in said prospectus, as voting trustees, whereby the legal title to all of said new stock issued by defendant as aforesaid to the said stockholders of the Belt Company became and was vested in the said voting trustees for a period of five years, beginning on April 1, 1900, and ending April 1, 1905, and whereby the said voting trustees were vested with all and singular the rights, privileges and franchises of the owners of said stock, with full power to vote the same, and said stock has ever since been vested in the said voting trustees; and the said voting trustees have ever since elected the directors of defendant and of the said Belt Company, and have had sole control and management of the property and affairs of defendant; that it was provided in and by the terms of said Reorganization prospectus and the agreement
576 thereto attached, that the said committee should have the right to pay or obligate the said successor company to pay any debt in the nature of unsecured or floating debt, owing by the said Belt Company, or to settle or compromise such debt, and to negotiate with the creditors of said Belt Company for their assent to the carrying out of said plan, and also to make such contracts and arrangements with any and all persons and corporations, which in the judgment of said committee would tend to prevent or avoid opposition to or interference with the execution of said plan. It was further provided in and by said plan and agreement that of the new stocks and bonds to be issued by said successor company, three millions of dollars in bonds and three millions of dollars in preferred stock were to be sold by said committee, and that the said committee should have power to use the proceeds thereof in whole or in part in paying

the floating or unsecured debt of the said Belt Company, or in paying any other liabilities which the said committee might incur in and about the premises, and that said committee should have the right and power to liquidate and pay said floating debt; it was further thereby provided that said committee should cause defendant to issue its stocks and bonds to an extent greatly in excess of the amount needed for distribution among the stockholders of the old companies in conformity with this plan, all of which bonds were to be secured by defendant's mortgage on all the property of the Belt Company as well as other property, and that defendant should cause such excess of new securities to be sold to provide fresh capital for defendant and that as to all such securities as should not be distributed by said committee to depositors of old securities or as should not be sold by the committee as aforesaid, should be delivered by said committee to defendant to be held in its treasury and sold as and when defendant desired to use the same; that the said committee, pursuant to said plan, did sell bonds issued by defendant of the par value of $3,000,000, and its preferred stock of the par value of $3,000,000, and realized thereon over $3,000,000 in money; that out of the proceeds of said sale said committee paid such floating debt of the Belt Company as it chose to pay and made such disbursements as it saw fit to make, and paid over the balance to defendant, said balance amounting to several million dollars and being greatly in excess of the entire floating or unsecured debt of the Belt Company; and said committee did raise for defendant and pay over to it several millions of dollars of fresh capital through the sale of stocks and bonds issued by defendant under said plan not distributed among those who had deposited their securities with said committee,

577 and that several millions of dollars of stocks and bonds not distributed or sold by the committee were reserved in defendant's treasury for its future requirements; that all of said bonds issued by defendant and used by said committee and defendant as aforesaid, were and are secured by all the property and assets of the Belt Company; that said plan further provided that said committee should settle its accounts with the board of directors of said successor company within one year after the consummation of said plan and on the — day of October, 1900, this was done, said committee turning over to defendant the cash remaining on hand after making the disbursements aforesaid, the amount of which was greatly in excess of the entire floating or unsecured debt of the Belt Company, and defendant did then and there in writing ratify all the acts and doings of said committee in and about the premises and did in writing assume and agree to pay all obligations incurred by said committee in and about the promulgation and execution of said plan. Plaintiff states that the originals of all the writings herein above mentioned are in the defendant's possession and plaintiff is unable to more definitely plead the same.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay the said note.

4. Wherefore, plaintiff prays judgment for the sum of Twenty-five Thousand Dollars ($25,000) with interest thereon at the rate

of six per cent per annum from September 1, 1901, together with its costs.

Second Count.

Plaintiff for a second and further cause of action states that to avoid unnecessary repetition it adopts as part of this count of its petition all of the averments by it made in the first count thereof to the same extent as if set out in full herein, and plaintiff states that said reorganization committee, both before and after defendant acquired the possession of the property and assets of the Belt Co-pany as aforesaid, expressly promised and agreed to and with plaintiff that it or defendant would pay any and all indebtedness owing to plaintiff by the Belt Company, which indebtedness included said note.

Wherefore, plaintiff prays judgment as in the first count of this petition.

Third Count.

1. Plaintiff for third and further cause of action states that to avoid repetition it adopts all the averments of paragraph 1 of the first count of this petition, as to the execution of the note therein mentioned by the Belt Company, to the same extent as if set out in full herein.

578 2. Plaintiff further states that on or about the 20th day of March, 1900, defendant was the owner of a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had acquired lease hold rights from the St. Louis & San Francisco Railway from said Grandview to Belt Junction in said Jackson County, and that on said date the said Belt Company owned and operated a line of railroad in Jackson County, Missouri, beginning at a point in Kansas City, on the State Line between Kansas and Missouri, near the confluence of the Kaw and Missouri rivers, extending east along the south bank of the Missouri river to a point near the confluence of the Missouri and Blue rivers, thence south and west to a point about ten miles south, of Kansas City, called Belt Junction, where the said Belt Company connected with the said St. Louis & San Francisco Railroad Company; that the said line of railroad of the Belt Company and of defendant formed, when connected in the whole or in the main, one continuous line of railroad from Port Arthur, Texas, to Kansas City, Missouri; that defendant afterward, and the said Belt Company, with the written approval of the persons or parties holding and representing a majority of the stock of the said Belt Company, and of defendant, became consolidated under name of defendant, the Kansas City Southern Railway Company, and formed one company, and defendant acquired and took into possession all of the property of said Belt Company of every kind and description and has thereafter owned and controlled the same as one continuous line of railroad, running in the whole or in the main, in the same general direction, from Port Arthur, Texas, to Kansas City Missouri, as aforesaid; that the contracts and leases and agreements by which said consolidation

was effected, and under which defendant now operates and owns all of said railroad, are exclusively within the possession and control of defendant, and that plaintiff cannot more definitely prove the same; that by reason of such consolidation defendant became and is liable to pay the said note of said Belt Company.

3. Wherefore, plaintiff prays judgment as in its said first count.

(*b*) The Trust Company also, on March 15, 1905, filed its suit in the Circuit Court of Jackson County, Missouri, against The Kansas City Southern Railway Company, a copy of which is hereto attached, made a part hereof as Exhibit "B." In this action the Trust Company seeks to recover against the Kansas City Southern Railway Company the amount of a judgment obtained by the Trust Company against the Belt Company; the petition is in three
579 counts and, in its allegations is in substance the same as the three counts above set forth in the preceding sub paragraph.

(*c*) On the 2nd day of July, 1906, the Trust Company brought a third suit against The Kansas City Southern Railway Company in the Circuit Court of Jackson County, Missouri, a copy of which is hereto attached and made a part hereof as Exhibit "C." In this suit the Trust Company seeks to recover from The Kansas City Southern Railway Company on account of two notes, one for Ten Thousand Dollars ($10,000.00), the other for Twelve Thousand Five Hundred Dollars ($12,500.00) executed by the Kansas City Pittsburg & Gulf Railroad Company to the Missouri, Kansas & Texas Trust Company, the predecessor in name to the Guardian Trust Company, and also upon an alleged open account from the Kansas City, Pittsburg & Gulf Railroad Company to the said Missouri, Kansas & Texas Trust Company, showing an alleged balance of Seven Thousand Five Hundred and Forty Dollars ($7,548.00). The allegations with respect to the alleged liability of The Kansas City Southern Railway Company for the debts and obligations of the Kansas City, Pittsburg & Gulf Railroad Company are similar to the allegations above set forth in sub paragraph.

7. Your orators further state that by reason of the prior institution of this action and the filing of the various bills, answers and proceedings therein, and by the stipulation of counsel heretofore set forth, this court has acquired a prior and superior equitable jurisdiction over all the parties to the proceeding and of all the issues herein involved and its decree will be a final adjudication and determination of all the relations between the parties in accordance with the maxim of equity that where a court of equity has once acquired complete jurisdiction of the parties on the subject matter, it will retain the case and settle and adjust the rights of all parties before it. This court by its injunction heretofore issued, as well as by its subsequent proceedings, has taken possession of and impounded the notes set forth in paragraph one hereof, and has impliedly restrained and restricted the Trust Company to the assertion of any rights it may have under said notes to its proceedings in that behalf taken in this cause. This court has assumed possession and jurisdiction over the stocks, bonds, assigned account and other property heretofore enu-

merated held by the Trust Company as collateral security to its pretended indebtedness against the Belt Company, and such property is within the exclusive jurisdiction and control of this court. This court has also, by the appointment of a receiver and the continuance of such receivers assumed an exclusive jurisdiction
586 over the properties of the Central Improvement Company and of the Northern Townsite Company, the final disposition of whose properties are involved in this action. The said actions brought by the Trust Company in the state court are actions at law triable by a jury, to which The Kansas City Southern Railway Company is the sole defendant. Those actions involve an accounting between the Trust Company and the Belt Company and its allied corporations, which accounts are extremely complicated, difficult and intricate, and which in turn involve the disposition of the said collateral security consisting of bonds, stocks, notes, assigned account, etc., a disposition of the property and assets of the Central Improvement Company and a disposition of the property and assets of the Northern Townsite Company, as well (if your orator's claim is sustained) the cancellation of the said notes and account. In order that the suits in the state court may proceed, it is necessary that The Kansas City Southern Railway Company should file its answer or crossbill setting up substantially the same set of facts as are set up in the amended and supplemental ancillary bill of complaint referred to in paragraph two herein and the facts set forth in the supplemental petition of The Kansas City Southern Railway Company set forth in paragraph three hereof making parties to such answer and crossbill all of the parties to this proceeding, including the Cambria Steel Company, which is a non-resident of the State of Missouri and cannot be [or] served with process herein, and including the receivers appointed by this court for the Northern Townsite Company and Central Improvement Company, who cannot be sued except by the express consent of this court. Even if such an answer and crossbill could be filed and the parties thereto brought within the jurisdiction of this court, it would be necessary to retake at great expense the testimony already taken in this proceeding, and thus duplicate the vast and enormous amount of work that has already been done. Furthermore the Trust Company is now and has been for several years in process of liquidation and its assets have been almost entirely realized upon and distributed to its stockholders. If the charges of your orators against the Trust Company should be sustained to any substantial extent the Trust Company will be unable to respond to them and for such purposes it is to be regarded as insolvent. If the claims of the Belt Company and its receiver as set forth in paragraph two are sustained, then they are entitled to an order cancelling the notes and accounts sued upon and to a return of the collateral, neither of which can be done by the state court inasmuch as this court has assumed jurisdiction and control over them. If their claims or the claims of The Kansas City Southern Railway Company are sustained as to the Central Improve-
581 ment Company property or as to the Townsite property the state court is powerless to afford relief because those properties

are under the jurisdiction and control of this court. The state court is likewise powerless to apply said collateral or its proceeds to a reduction of the account of the Trust Company against the Belt Company or the Kansas City Southern Railway Company if that account should be sustained in whole or in part. The only issues raised in the state court in these proceedings are: first, the liability of the Belt Company to the Trust Company upon the notes, account and the judgment, the liability of the Gulf Company to the Trust Company; and, secondly, the question whether The Kansas City Southern Railway Company is responsible for the floating debt of the mortgagor companies. These issues are all raised in the proceedings in this case except the question of the liability of the Gulf Company to the Trust Company and that question the Trust Company can raise if it so desires.

8. In consideration whereof, and for as much as your orators are remediless in the premises at and by the strict rules of the common law, and are only relievable in a court of equity, where matters of this kind are properly cognizable, your orators therefore pray the aid of this Honorable Court that the said Guardian Trust Company may be restrained and enjoined from further prosecuting its said actions above named and that it may be directed to dismiss said actions; and that, pending a determination of this case, a temporary injunction may issue against the said Guardian Trust Company restraining and enjoining it, its agents and attorneys from prosecuting or continuing the said actions, and each of them, and that upon final hearing the said injunction be made perpetual.

And may it please your Honors a writ of subpœna to issue directed to the said Guardian Trust Company requiring and commanding it on a day certain therein to be named and under a certain penalty to appear herein and answer, but not under oath (an answer under oath being hereby expressly waived) to the several allegations in this supplemental bill; and to stand to, perform and abide by such orders, direction or decree as may be made against them in the premises and as shall seem meet and agreeable in equity and good conscience. And your orators as in duty bound will ever pray.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
EDWARD F. SWINNEY,
Receiver, and
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY,
By S. W. MOORE,
Their Solicitors.

582 STATE OF MISSOURI,
County of Jackson, ss:

S. W. Moore, of lawful age, being duly sworn, upon his oath states, that he is attorney for the complainants in the foregoing supplemental bill of complaint; that he has read the said bill and knows the contents thereof, and the matters and facts therein stated are true as he verily believes.

S. W. MOORE.

Subscribed and sworn to before me this 16th day of November, A. D. 1907.

[L. S.] CLARENCE R. HALL,
Notary Public in and for Jackson County, Missouri.

My commission expires October 10, 1908.

EXHIBIT "A."

In the Circuit Court of Jackson County, Missouri, at Kansas City, for the April Term, 1905.

No. —.

GUARDIAN TRUST COMPANY, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Petition.

Plaintiff, Guardian Trust Company, which is and was at all times herein mentioned a corporation organized under the laws of the State of Missouri, brings this action against the Kansas City Southern Railway Company, organized on March 19, 1900, as a railroad corporation under the laws of the State of Missouri and still existing as such, and for its causes of action against said defendant states:

First Count.

1. Plaintiff states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times a railroad corporation organized under the laws of the State of Missouri; that the said Belt Company on the 25th day of January, 1900, by its negotiable promissory note of that date, by it duly executed, promised, for value received, to pay to plaintiff four months after said date, the sum of Twenty-five Thousand ($25,000.00) a duly certified copy of which said note is herewith filed and marked Exhibit "A"; that said note has long since matured and no part thereof, except the interest thereon at the rate of six per cent per annum to September 1, 1901, has been paid, although payment of said note was demanded at the maturity thereof.

583 2. That on and prior to April 1, 1899, the Kansas City, Pittsburg & Gulf Railroad Company, hereinafter called the Gulf Company, was a railroad corporation, organized under the laws of the State of Missouri; that the Gulf Company owned and controlled a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had trackage rights over the St. Louis & San Francisco Railway from said Grandview to a point in Jackson County, Missouri, called Belt Junction; that the said Belt Company owned and operated a line of railroad in Jackson County, Missouri, extending from a point in Kansas City on the State

Line between Missouri and Kansas near the confluence of the Missouri and Kansas Rivers, thence east along the south bank of the Missouri River about five miles, thence southwest to said Belt Junction, so that when connected, the line of the Belt Company and the line of the Gulf Company formed in the main one continuous line of railroad running in the same general direction from Port Arthur, Texas, to Kansas City, Missouri; that on April 1, 1889, said Gulf Company made default in the payment of interest due on that date on its funded debt, and upon complaint filed by the Trustee named in the mortgage securing said debt, such proceedings were had that the property and affairs of said Gulf Company on or about said date passed into the hands of receivers appointed by the Circuit Court of the United States for the Western Division of the Western District of Missouri, which receivers assumed for the time being, the operation and control of said Gulf Road under the orders of said court; that shortly thereafter a committee, styled a "Reorganization Committee", was formed for the purpose of readjusting the funded debt of said Gulf Company and for other purposes, fully set forth in a prospectus published by said committee called a "Reorganization Plan"; that said Gulf Company had no terminal facilities in Kansas City except such as it had by contract with said Belt Company and it became evident to said committee that it would be advantageous for said Gulf Company, when reorganized, to acquire the property of said Belt Company by consolidation or otherwise, that the expressed object of said reorganization plan, as set forth in said prospectus, was to consolidate and unify the property of said Gulf Company, with the property of the said Belt Company and to manage and control the same as one; that with this end in view said committee, under date of November 7, 1899, put forth and published a certain prospectus called a "Reorganization Plan" and circulated the same among the
584 creditors, bondholders and stockholders of said Company, including plaintiff; that attached to said prospectus was a certain agreement which all the stockholders of the Belt were invited to execute in favor of said committee; that it was provided in said published plan that same should be deemed a part of said agreement to the same extent as if copied in full therein; that a copy of said plan and agreement is hereto attached and marked Exhibit No. 1; that all of the originals thereof are in defendant's possession or under its control; that in and by said published plan said committee made the following offer to all the stockholders of the Belt Company, that is to say, that it, the said Committee would cause a new or successive corporation to be formed in which should be vested the title to all and singular the property and franchises of the Gulf Company, when acquired by said committee at such judicial sale thereof as might thereafter be had in said receivership proceedings; that to all such stockholders of the Belt Company as would deposit their stock with said committee under the terms of said written agreement, attached to and made a part of said prospectus, the said committee would cause to be issued a like amount of stock of equal par value by such new corporation to be formed as aforesaid, so that upon the consummation of said plan the stockholders would have the same amount of stock in such

new corporation as they then held respectively in the Belt Company and it was made a condition to participation in said scheme that all persons who should deposit their stock with said committee should enter into a binding agreement that said stock when issued should be vested irrevocably for a term of five years in certain trustees, who should have absolute power to vote the same and exercise all the prerogatives and franchises of the owners of said stock in the control and management of said new corporation to be formed as aforesaid; that all stockholders of said Gulf Company were required, as a condition to participation in said plan, to pay said committee the sum of $10.00 for each share of Gulf Stock, deposited with said committee under said plan, which payment entitled them to one share of stock of the new company, but no such condition was imposed on stockholders of the Belt Company; that said prospectus was so contrived and framed as to lead, and did lead, plaintiff and such other corporations and persons who or which dealt with said committee on the faith thereof, to believe that the floating debt of the Belt Company, including said note, would be paid by said committee or by said successor corporation; that induced by the proposals made in said prospectus, the persons holding more than ninety-nine per cent of the total issue of the stock of the Belt Company then outstanding, a total of 47,500 shares, deposited the same with the said committee, to be held and used by said committee in the execution of said
585 scheme as aforesaid; that afterwards such proceedings were had in the said Circuit Court of the United States that the said Gulf Road was on or about March 19, 1900, sold at foreclosure sale and was bid in by certain persons on behalf of said committee, and on March 19, 1900, said committee pursuant to said scheme of reorganization caused defendant to be incorporated as a railroad corporation under the laws of the State of Missouri, and caused all the property and franchises of said Gulf Road to be conveyed to defendant and caused defendant to issue its shares of stock to said stockholders of the Belt Company who then and there received in stock of defendant a like number of shares as they had before held in the Belt Company, respectively and of equal par value as said Belt shares; that said scheme as set forth in said prospectus, was carried into full force and effect and defendant then and there entered into possession and control and acquired unto itself all of the property and franchises of the Belt Company and still has the same; all with the result that after said scheme was carried out the said stockholders of the Belt Company had and still have the same interest in defendant, as they had before had in the Belt Company, and defendant has all of the property and assets of said Belt Company and is using the same for its own benefit and behoof; that pursuant to said plan the said stockholders of the Belt Company did enter into trust agreements with certain persons designated in said prospectus, as voting trustees, whereby the legal title to all of said new stock issued by defendant as aforesaid to the said stockholders of the Belt Company became and was vested in the said voting trustees for a period of five years, beginning on April 1, 1900, and ending April 1, 1905, and whereby the said voting trustees were vested with all and singular the rights,

privileges and franchises of the owners of said stock, with full power to vote the same, and said stock has ever since been vested in the said voting trustees and the said voting trustees have ever since elected the directors of defendant and of the said Belt Company, and have had sole control and management of the property and affairs of defendant; that it was provided in and by the terms of said Reorganization prospectus and the agreement thereto attached, that the said committee should have the right to pay or obligate the said successor company to pay any debt in the nature of unsecured or floating debt, owing by the said Belt Company, or to settle or compromise such debt, and to negotiate with the creditors of said Belt Company for their assent to the carrying out of said plan, and also to make such contracts and arrangements with any and all persons and corporations which in the judgment of said committee would tend to prevent or avoid opposition to or interference with the execution of said plan.

It was further provided in and by said plan and agreement
586 that of the new stocks and bonds to be issued by said successor company, three millions of dollars in bonds and three millions of dollars in preferred stock were to be sold by said committee, and that the said committee should have power to use the proceeds thereof in whole or in part in paying the floating or unsecured debt of the said Belt Company, or in paying any other liabilities which the said committee might incur in and about the premises, and that said committee should have the right and power to liquidate and pay said floating debt; it was further thereby provided that said committee should cause defendant to issue its stocks and bonds to an extent greatly in excess of the amount needed for distribution among the stockholders of the old companies in conformity with this plan, all of which bonds were to be secured by defendant's mortgage on all the property of the Belt Company as well as other property and that defendant should cause such excess of new securities to be sold to provide fresh capital for defendant and that as to all such securities as should not be distributed by said committee to depositors of old securities or as should not be sold by the committee as aforesaid, should be delivered by said committee to defendant to be held in its treasury and sold as and when defendant desired to use the same; that the said committee, pursuant to said plan, did sell bonds issued by defendant of the par value of $3,000,000 and its preferred stock of the par value of $3,000,000 and realize thereon over $3,000,000 in money; that out of the proceeds of said sale said committee paid such floating debt of the Belt Company as it chose to pay and made such disbursements as it saw fit to make, and paid over the balance to defendant said balance amounting to several million dollars and being greatly in excess of the entire floating or unsecured debt of the Belt Company; and said committee did raise for defendant and pay over to it several millions of dollars of fresh capital through the sale of stocks and bonds issued by defendant under said plan not distributed among those who had deposited their securities with said committee, and that several millions of dollars of stock and bonds not distributed or sold by the committee were reserved in defendant's treasury for its future requirements; that all of said bonds issued by defendant and used

by said committee and defendant as aforesaid, were and are secured by all the property and assets of the Belt Company; that said plan further provided that said committee should settle its accounts with the Board of Directors of said successor company within one year after the consummation of said plan and on the — day of October, 1900, this was done, said committee turning over to defendant
587 the cash remaining on hand after making the disbursements aforesaid, the amount of which was greatly in excess of the entire floating or unsecured debt of the Belt Company, and defendant did then and there in writing ratify all the acts and doings of said committee in and about the premises and did in writing assume and agree to pay all obligations incurred by said committee in and about the promulgation and execution of said plan. Plaintiff states that the originals of all the writings herein above mentioned are in the defendant's possession and plaintiff is unable to more definitely plead the same.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay the said note.

4. Wherefore, plaintiff prays judgment for the sum of Twenty-five Thousand Dollars ($25,000) with interest thereon at the rate of six per cent per annum from September 1, 1901, together with its costs.

Second Count.

Plaintiff for a second and further cause of action states that to avoid unnecessary repetition it adopts as part of this count of its petition all the averments by it made in the first count thereof to the same extent as if set out in full herein, and plaintiff states that said Reorganization Committee, both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, expressly promised and agreed to and with plaintiff that it or defendant would pay any and all indebtedness owing to plaintiff by the Belt Company, which indebtedness included said note.

Wherefore, plaintiff prays judgment as in the first count of this petition.

Third Count.

1. Plaintiff for third and further cause of action states that to avoid repetition it adopts all the averments of paragraph 1 of the first count of this petition, as to the execution of the note therein mentioned by the Belt Company, to the same extent as if set out in full herein.

2. Plaintiff further states that on or about the 20th day of March, 1900, defendant was the owner of a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had acquired lease hold rights from the St. Louis & San Francisco Railway from said Grandview to Belt Junction in said Jackson County, and that on said date the said Belt Company owned and operated a line of railroad in Jackson County, Missouri,
588 beginning at a point in Kansas City, on the State Line between Kansas and Missouri, near the confluence of the Kaw

and Missouri Rivers, extending east along the south bank of the Missouri River to a point near the confluence of the Missouri and Blue Rivers, thence south and west to a point about ten miles south of Kansas City, called Belt Junction, where the said Belt Company connected with the said St. Louis & San Francisco Railroad Company; that the said line of railroad of the Belt Company and of defendant formed when connected in the whole or in the main, one continuous line of railroad from Port Arthur, Texas, to Kansas City, Missouri; that defendant afterward, and the said Belt Company, with the written approval of the persons or parties holding and representing a majority of the stock of the said Belt Company and of defendant, became consolidated under the name of defendant, the Kansas City Southern Railway Company, and formed one company, and defendant acquired and took into possession all of the property of said Belt Company of every kind and description, and has thereafter owned and controlled the same as one continuous line of railroad, running in the whole or in the main, in the same general direction, from Port Arthur, Texas, to Kansas City, Missouri, as aforesaid; that the contracts and leases and agreements by which said consolidation was effected, and under which defendant now operates and owns all of said railroad, are exclusively within the possession and control of defendant, and that plaintiff cannot more definitely prove the same; that by reason of such consolidation defendant became and is liable to pay the said note of said Belt Company.

3. Wherefore, plaintiff prays judgment as in its said first count.

Fourth Count.

1. Plaintiff states that the Kansas City Suburban Belt Railroad Company, herinafter called the Belt Company, is and was at all times herein mentioned, a railroad corporation organized under the laws of the State of Missouri; that the said Belt Company on the 21st day of September, 1899, by its negotiable promissory note of that date by it duly executed, promised for value received to pay to plaintiff on demand, the sum of Twenty-three Thousand and Fifty-six Dollars and forty-eight cents ($23,056.48) with interest at the rate of eight per cent (8%) per annum; a duly verified copy of said note is herewith filed and marked Exhibit "B" Payment of said note has long since been demanded and no part thereof, principal or interest has been paid.

2. Plaintiff states that to avoid repetition, it adopts as part of this count of its petition, all he averments by it made in paragraph number 2 of the first count hereof, to the same extent as if set out in full herein.

589

3. Plaintiff states that by reason of the premises defendant became and is liable to pay the said note.

4. Wherefore, plaintiff prays judgment against the defendant for the sum of Twenty-three Thousand and Fifty-six Dollars and forty-eight cents ($23,056.48) with interest thereon at the rate of eight per cent per annum after date from September 21, 1899, together with its costs in this behalf expended.

Fifth Count.

Plaintiff for its fifth and further cause of action states that to avoid repetition it adopts as a part of this count of its petition all the averments by it made in the fourth count thereof, and all the averments made a part of the fourth count by reference, to the same extent as if said averments were set out in full herein; and plaintiff states that said Reorganization Committee, both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, expressly promised and agreed to and with plaintiff that it or defendant would pay any and all indebtedness owing to the plaintiff by the Belt Company, which indebtedness included said note.

Wherefore, plaintiff prays judgment as in the fourth count of this petition.

Sixth Count.

1. Plaintiff for its sixth and further cause of action states that to avoid repetition it adopts all the averments in paragraph 1 of the fourth count of this petition as to the execution of the note therein mentioned, by the Belt Company, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts as part of this count of its petition all the averments made in paragraph 2 of the third count of this petition, wherein plaintiff avers that defendant and said Belt Company became and are consolidated and said averments are adopted to the same extent as if set out in full herein.

3. Wherefore, plaintiff prays judgment as in the fourth count of its petition.

Seventh Count.

1. Plaintiff states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was
590 at all times herein mentioned, a railroad corporation organized under the laws of the States of Missouri; that on the 9th day of February, 1900, the said Belt Company, by its negotiable promissory note of that date by it duly executed, promised for value received to pay to plaintiff four months after date, the sum of Ten Thousand Four Hundred Dollars ($10,400) with interest thereon at the rate of six per cent (6%) per annum after maturity of said note, a duly verified copy of which said note is herewith filed and marked Exhibit "C;" that said note has long since matured and no part thereof, principal or interest, had been paid.

2. Plaintiff states that to avoid repetition it adopts as part of this count of its petition all the averments by it made in paragraph 2 of the first count hereof, to the same extent as if said averments were set out in full herein.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay the said note.

4. Wherefore, plaintiff prays judgment for the sum of Ten Thousand Four Hundred Dollars ($10,400) with interest thereon at the

rate of six per cent (6%) per annum from the maturity of said note, together with its costs in this behalf expended.

Eighth Count.

1. Plaintiff for its eighth and further cause of action states that to avoid repetition it adopts as part of this count of its petition all the averments by it made in paragraph 1 of the seventh count thereof, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts as part of this count of its petition all of the averments by it made in paragraph 2 of the first count thereof, to the same extent as if said averments were set out in full herein, and plaintiff states that said Reorganization Committee therein mentioned expressly promised and agreed to and with plaintiff both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, that it or defendant would pay any and all indebtedness owing to plaintiff by the said Belt Company, which indebtedness included said note.

3. Wherefore, plaintiff prays judgment as in the 7th count of this petition.

Ninth Count.

1. Plaintiff for a ninth and further cause of action states that to avoid repetition it adopts all the averments of paragraph 1 of the seventh count of this petition, to the same extent as if said averments were set out in full herein.

591 2. Plaintiff also adopts as part of this count of its petition, all the averments made by it in paragraph 2 of the third count of this petition, to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment as in its said seventh count of this petition.

Tenth Count.

Plaintiff for a tenth and further cause of action states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein mentioned, a railroad corporation organized under the laws of the State of Missouri; that the Belt Company on the 23rd day of October, 1899, by its negotiable promissory note of that date by it duly executed, promised, for value received to pay to plaintiff on demand the sum of Seventy-one Hundred and Sixty-two dollars and forty cents ($7,162.40) with interest thereon after date thereof at the rate of eight per cent (8%) per annum, a duly verified copy of which said note is herewith filed and marked Exhibit "D;" that payment of said note has long since been demanded and no part thereof, principal or interest, has been paid.

2. Plaintiff states that to avoid repetition it adopts as part of this count on its petition, all he averments by it made in paragraph 2 of the first count thereof, to the same extent as if said averments were set out in full herein.

3. Plaintiff states that by reason of the premises, defendant became and is liable to pay said note.
note.

4. Wherefore, plaintiff prays judgment in the sum of Seventy-one Hundred and Sixty-two dollars and forty cents ($7,162.40) with interest thereon at the rate of eight per cent (8%) per annum from October 23, 1899, and for its costs in this behalf expended.

Eleventh Count.

1. Plaintiff for its eleventh and further cause of action states that to avoid repetition it adopts as part of this count of its petition, all the averments by it made in paragraph 1 of the tenth count thereof, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts as part of this count of its petition all the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein; and plaintiff states that said Reorganization Com-
592 mittee therein mentioned expressly promised and agreed to and with plaintiff, both before and after defendant acquired possession of the property and assets of the Belt Comapny aforesaid, that it or defendant would pay any and all indebtedness owing to plaintiff by the Belt Company, which indebtedness included said note.

3. Wherefore, plaintiff prays judgment as to the tenth count of this petition.

Twelfth Count.

1. Plaintiff for a twelfth and further cause of action states that to avoid repetition it adopts all the averments of paragraph 1 of the tenth count of this petition, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts all the averments by it made in paragraph 2 of the third count of this petition, to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment as in the tenth count of this petition.

Thirteenth Count.

1. Plaintiff for its thirteenth cause of action states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company is and was at all times herein mentioned, a railroad corporation, organized under the laws of the State of Missouri; that said Belt Company on the 26th day of July, 1899, by its promissory note of that date by its duly executed, promised for value received, to pay to plaintiff on demand, the sum of Two Hundred and Three Thousand Nine Hundred Dollars ($203,900) with interest thereon after date thereof, at the rate of six per cent (6%) per annum, a duly verified copy of which said note is herewith filed and marked Exhibit "E"; that payment of said note has long since been demanded; that on June 11th, 1900, there was paid on said note the sum of Ninety-nine Hundred and Ninety-six dollars and sixty-

five cents ($9,996.65) but the balance of said note has not been paid in whole or in part and said balance still remains due and unpaid.

2. Plaintiff states that to avoid repetition it adopts as a part of this count of its petition, all the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay the balance due on said note.

4. Wherefore, plaintiff prays judgment for the sum of Two Hundred Four Thousand, Six Hundred Eight Dollars and ten
593 cents ($204,608.10) with interest thereon at the rate of six per cent (6%) per annum from June 11th, 1900, together with its costs.

Fourteenth Count.

1. Plaintiff for a fourteenth and further cause of action states that to avoid repetition it adopts as part of this count of its petition, all the averments made by it in paragraph 1 of the thirteenth count thereof, to the same extent as if set out in full herein.

2. Plaintiff also adopts as part of this count of its petition, all the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein; and plaintiff states that said Reorganization Committee therein mentioned expressly promised and agreed to and with plaintiff, both before and after defendant acquired possession of the property and assets of the Belt Company as aforesaid, that it or defendant would pay any and all indebtedness owing to the plaintiff by the Belt Company, which indebtedness included said note.

3. Wherefore, plaintiff prays judgment as in the said thirteenth count of this petition.

Fifteenth Count.

1. Plaintiff for a fifteenth and further cause of action states that to avoid repetition it adopts all the averments of paragraph 1 of the thirteenth count of this petition, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts as part of this count of its petition all the averments made by it in paragraph 2 of the third count of this petition, as fully — to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment against defendant as in its said thirteenth count of this petition.

Sixteenth Count.

1. Plaintiff for its sixteenth and further cause of action states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein mentioned, a railroad corporation organized under the laws of the State of Missouri; that the said Belt Company on the eighth day of February, 1900, by its negotiable promissory note of that date, by it duly

executed, promised for value received to pay plaintiff ninety
594 days after date, the sum of One Hundred Nine Thousand Five Hundred Dollars ($109,500) with interest thereon from maturity of said note at the rate of eight per cent (8%) per annum until paid, a duly verified copy of which said note is herewith filed and marked Exhibit "F;" that said note has long since matured; that there was paid on said note on the 23rd day of October, 1900, the sum of One Hundred Ten Thousand Two Hundred Fifty Dollars ($110,250) leaving a balance due thereon on said date amounting to Thirty-one hundred Ninety one dollars and ninety cents ($3,191.90) and that no part of said balance has since been paid.

2. Plaintiff states that to avoid repetition it adopts as part of this count of its petition, all of the averments made by it in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein.

3. That by reason of the premises defendant became and is liable to pay the said note.

4. Wherefore plaintiff prays judgment in the sum of Thirty-one Hundred Ninety-one Dollars and ninety cents, ($3,191.90) with interest thereon at the rate of eight per cent per annum from October, 23rd, 1900, and for its costs in this behalf expended.

Seventeenth Count.

1. Plaintiff for its seventeenth and further cause of action states that to avoid repetition it adopts as a part of this count of its petition, all the averments made by it in paragraph 1 of the sixteenth count of this petition, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts as part of this count of its petition, all of the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein; and plaintiff states that said Reorganization Committee therein mentioned expressly promised and agreed to and with plaintiff, both before and after defendant acquired possession of the property and assets of the Belt Company, as aforesaid, that it or defendant would pay any and all indebtedness owing to the plaintiff by the Belt Company, which indebtedness included said note.

3. Wherefore, plaintiff prays judgment as in the sixteenth count of this petition.

Eighteenth Count.

1. Plaintiff states for its eighteenth cause of action that to avoid repetition it adopts all the averments of paragraph 1 of the
595 sixteenth count of this petition, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts as part of this petition, all of the averments by it made in paragraph 2 of the third count of this petition to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment as in the sixteenth count of this petition.

Nineteenth Count.

1. Plaintiff for its nineteenth cause of action states that the Suburban Belt Railroad Company, hereinafter called the Belt Company is and was at all times herein mentioned a railroad corporation organized under the laws of the State of Missouri; that the said Belt Company on the 31st day of March, 1899, by its promissory note of that date by it duly executed, promised for value received, to pay to plaintiff ninety days after date thereof, the sum of Fifty Thousand Dollars ($50,000) with interest thereon after date thereof at the rate of six per cent (6%) per annum, a duly verified copy of which said note is herewith filed and marked Exhibit "G" that said note has long since matured; that there was paid on said note on the 14th day of June, 1900, the sum of Twelve Thousand Five Hundred Dollars ($12,500) leaving a balance due thereon on said date amounting to the sum of Forty-one Thousand One Hundred Eight Dollars and thirty cents ($41,108.30) no part of which said balance has since been paid and said balance still remains due and unpaid.

2. Plaintiff states that it adopts as part of this count of this petition, all of the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein.

3. That by reason of the premises defendant became and is liable to pay the said balance due on said note.

4. Wherefore, plaintiff prays judgment against defendant for the sum of Forty one Thousand One Hundred Eight Dollars and thirty cents (-41,108.30) with interest thereon at the rate of six per cent (6%) per annum from June 14, 1900 and for its costs in this behalf expended.

Twentieth Count.

1. For its twentieth and further cause of action plaintiff states that it adopts as part of this count of its petition, all of the averments made by it in paragraph 1 of the nineteenth count of this petition, to the same extent as if said averments were set out in full herein.

596 2. That plaintiff also adopts all of the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein and plaintiff states that the said Reorganization Committee therein mentioned expressly promised and agreed to and with the plaintiff, both before and after defendant acquired possession of the property and assets of the Belt Company as aforesaid, that it or defendant would pay any and all indebtedness owing to plaintiff by the Belt Company which indebtedness included said note.

3. Wherefore, plaintiff prays judgment as in the nineteenth count of this petition.

Twenty first Count.

1. Plaintiff for its twenty-first cause of action states that it adopts and makes a part hereof all the averments by it made in paragraph

1 of the nineteenth count of this petition, to the same extent as if said averments were set out in full herein.

2. That it also adopts and makes a part of this count of its petition all of the averments by it made in paragraph 2 of the third count of this petition, to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment as in the said nineteenth count of the petition.

Twenty second Count.

1. Plaintiff for its twenty second cause of action states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein mentioned, a railroad corporation organized under the laws of the State of Missouri; that the Belt Company on the 7th day of November, 1899, by its negotiable promissory note of that date by it duly executed promised for value received to pay to plaintiff sixty days after date thereof the sum of Fifty Thousand Dollars ($50,000) with interest thereon after maturity at the rate of eight per cent (8%) per annum, a duly verified copy of which said note is herewith filed and marked Exhibit "H"; that said note has long since matured; that there was paid on said note on the 14th day of June, 1900, the sum of Twelve Thousand Five Hundred Dollars ($12,500) leaving a balance due thereon on said date amonuting to $38,783.30; that no part of said balance has since been paid and same remains due and unpaid.

2. Plaintiff also adopts and makes a part hereof all the averments by it made in paragraph 2 of the first count of this petition,
597 to the same extent as if said averments were set out in full herein.

3. That by reason of the premises defendant became and is liable to pay said note.

4. Wherefore, plaintiff prays judgment for the sum of Thirty-eight Thousand Seven Hundred Eighty-three Dollars and thirty cents, the balance due on said note, with interest thereon from June 14th, 1900, at the rate of eight (8) per cent per annum together with its costs in this behalf expended.

Twenty third Count.

1. Plaintiff for its twenty-third cause of action states that it adopts and makes a part hereof all of the averments made by it in paragraph 1 of the twenty-second count of this petition to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts and makes a part hereof all the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein; and plaintiff states that the said Reorganization Committee therein referred to expressly promised and agreed to and with plaintiff both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, that it or defendant

would pay any and all indebtedness owing to plaintiff by the Belt Company, which indebtedness included said note.

3. Wherefore, plaintiff prays judgment as in the twenty-second count of this petition.

Twenty-fourth Count.

Plaintiff for its twenty-fourth cause of action states that it adopts and makes a part hereof all of the averments by it made in paragraph 1 of the twenty second count of this petition, to the same extent as if said averments were set out in full herein.

2. That it also adopts and makes a part hereof all the averments made by it in paragraph 2 of the third count of this petition, to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment as in the twenty-second count of this petition.

Twenty-fifth Count.

1. Plaintiff for a twenty-fifth and further cause of action states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein men-
598 tioned a railroad corporation, organized under the laws of the State of Missouri; that at the special instance and request of said Belt Company plaintiff advanced certain moneys to said Belt Company and rendered certain services to said Belt Company and made certain other charges against said Belt Company, all on open account, the items of which charges as well as the dates when the same were made and all the particulars thereof appear on the bill of items hereto annexed and marked Exhibit "1"; that the aggregate amount of said charges is the sum of One Hundred Two Thousand Seven Hundred Forty-four and thirty-four cents $102,744.34 that there were paid on the said account at diverse and sundry times various sums of money, the said credits aggregating the sum of Seventy Thousand Nine Hundred and Thirty-four Dollars and eighty-five cents ($70,934.85); said credits and the dates when entered and the particulars thereof being set out on the said bill of items hereto annexed; that the balance due on said open account after allowing said Belt Company and defendant all just credits and offsets in the sum of Thirty-one Thousand Eight Hundred Nine Dollars and forty-nine cents ($31,809.49) which balance remains wholly due and unpaid; that the said charges appearing on said bill of items are true and correct and said Belt Company has frequently promised and agreed to pay the said balance but though often requested it and [*and*] defendant have refused and still fail and refuse to pay the said balance and every part thereof.

Plaintiff says that it made demand for payment of said account of said Belt Company on the 25th day of September, 1899, and on each date on which any charge appearing on said bill of items was entered

2. Plaintiff states that it adopts as a part of this count of its petition all of the averments by it made in paragraph 2 of the first count

of this petition, to the same extent as if said averments were set out in full herein.

3. That by reason of the premises defendant became and is liable to pay the said balance due on said account.

4. Wherefore, plaintiff prays judgment against defendant for the sum of Thirty-one Thousand Eight Hundred Nine Dollars and forty-nine cents ($31,809.49) with interest thereon at the rate of six per cent (6%) per annum from September 25th, 1899, and for its costs in this behalf expended.

Twenty-sixth Count.

1. For a twenty-sixth and further cause of action plaintiff states that it adopts as a part of this count of its petition, all of the averments by it made in paragraph 1 of the twenty-fifth count of
599 this petition, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts and makes a part hereof all the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein; and plaintiff states that the said Reorganization Committee therein referred to expressly promised and agreed to and with plaintiff, both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, that it or defendant would pay any and all indebtedness owing to plaintiff by the Belt Company, which indebtedness included said account.

3. Wherefore, plaintiff prays judgment as in the twenty-fifth count of this petition.

Twenty-seventh Count.

1. Plaintiff for a twenty-seventh and further cause of action states that it adopts and makes a part hereof all of the averments by it made in paragraph 1 of the twenty-fifth count of this petition to the same extent as if said averments were set out in full herein.

2. That it also adopts and makes a part hereof all the averments by it made in paragraph 2 of the third count of this petition, to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment as in the twenty-fifth count of this petition.

Twenty-eighth Count.

1. Plaintiff states for its twenty-eighth cause of action that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein mentioned, a railroad corporation organized and existing under the laws of the State of Missouri; that on the 2nd day of February, 1900, an account was stated between plaintiff and the said Belt Company and upon said statement it was found and agreed by and between plaintiff and said Belt Company that there was due from said Belt Company to plaintiff a balance of Forty-two Thousand One Hundred Forty-three

Dollars and fifty-eight cents ($42,143.58), which said balance said Belt Company then and there promised and agreed to pay; that afterward, to-wit, on September 26th, 1900, plaintiff received on said stated account the sum of Eleven Thousand One Hundred Thirty-three Dollars and six cents ($11,133.06) leaving a
600 balance due on said September 26th, 1900, including interest from February 2, 1900, amounting to the sum of Thirty-two Thousand Six Hundred *Forty*-four Dollars and ten cents ($32,-654.10) no part of which said balance has been paid.

2. Plaintiff states that it adopts and makes a part hereof all of the averments made by it in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein.

3. That by reason of the premises defendant became and is liable to pay said stated account.

4. Wherefore, plaintiff prays judgment in the sum of Thirty-two Thousand Six Hundred Fifty-four Dollars and ten cents ($32,-654.10) the balance due on said stated account with interest thereon from September 26th, 1900, at the rate of six per cent (6%) per annum, together with its costs in this behalf expended.

Twenty-ninth Count.

1. Plaintiff for its twenty-ninth cause of action states that it adopts and makes a part hereof all of the averments by it made in paragraph 1 of the 28th count of this petition, to the same extent as if said averments were set out in full herein.

2. Plaintiff adopts and makes a part hereof all of the averments by it made in paragraph 2 of the first count of this petition to the same extent as if said averments were set out in full herein and plaintiff states that the said Reorganization Committee therein referred to expressly promised and agreed to and with plaintiff, both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, that it or defendant would pay any and all indebtedness owing to plaintiff by the said Belt Company, which indebtedness included said stated account.

3. Wherefore, plaintiff prays judgment as in said twenty-eighth count of this petition.

Thirtieth Count.

1. Plaintiff for its thirtieth cause of action states that it adopts and makes a part hereof all of the averments by it made in paragraph 1 of the twenty-eighth count of this petition to the same extent as if said averments were set out in full herein.

2. That it also adopts and makes a part hereof all the averments by it made in paragraph 2 of the third count of this petition
601 to the same extent as if said averments were set out in full herein, and that by reason of the premises defendant became and is liable to pay the said stated account.

3. Wherefore, plaintiff prays judgment as in the twenty-eighth count of this petition.

Thirty-first Count.

1. Plaintiff for its thirty-first and further cause of action states that it hereby adopts and makes part hereof all of the averments by it made in paragraph 2 of the first count of this petition to the same extent as if said averments were set out in full herein.

2. Plaintiff further states that on or about the 2nd day of February, 1900, an account was stated between the plaintiff and the said Reorganization Committee; and upon said statement it was found and agreed by and between the plaintiff and the said committee that there was due from said Belt Company to plaintiff, a balance of Forty-two Thousand One Hundred and Forty-three Dollars and fifty-eight cents ($42,143.58) which said balance said committee then and there promised and agreed to pay; that afterward, to-wit, on September 26, 1900, plaintiff received on said stated account the sum of Eleven Thousand One Hundred Thirty-three Dollars and six cents ($11,133.06), leaving a balance due on said September 26th, 1900, including interest from February 2nd, 1900, amounting to the sum of Thirty-two Thousand Six Hundred and Fifty-four Dollars and ten cents ($32,654.10) no part of which said balance has been paid.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay said stated account.

4. Wherefore, plaintiff prays judgment for the sum of Thirty-two Thousand Six hundred Fifty-four Dollars and ten cents ($32,654.10) the balance due on said stated account with interest thereon from September 26th, 1900, at the rate of six per cent (6%) per annum, together with its costs in this behalf expended.

Thirty-second Count.

1. For a thirty second and further cause of action plaintiff states that the Port Arthur Channel & Dock Company, herein after called the Dock Company, is and was at all times herein mentioned, a corporation organized under the laws of the State of Texas; that the said Dock Company on the 21st day of September, 1899, by its negotiable promissory note of that date, duly executed, promised
602 for value received to pay to plaintiff sixty days after date thereof, the sum of Fifty Thousand Five Hundred Seventy-five Dollars and eighty cents ($50,575.80) with interest thereon at the rate of eight per cent (8%) per annum from date thereof, a duly verified copy of which said note is herewith filed and marked Exhibit "J"; that said note has long since matured; that there was paid on said note on August 11th, 1900, the sum of Twenty-five Thousand Nine Hundred Seventy-five Dollars and forty-five cents ($25,975.45), leaving a balance due on said note on the date of said payment amounting to the sum of Twenty-eight Thousand One Hundred Ninety-six Dollars and seventy-six cents ($28,196.76); that there was paid on said note on August 13th, 1900, the sum of Three Hundred and Three Dollars and forty-eight cents ($303.48), leaving a balance due on said note on the date of said

payment amounting to the sum of Twenty-seven Thousand Nine Hundred Fifteen Dollars and eighty-three cents ($27,915.83); that there was paid on said note on September 26th, 1900, the sum of Thirty-three Hundred and Eighty Dollars and forty-three cents ($3380.43), leaving a balance due on the date of said last payment amounting to the sum of Twenty-five Thousand Eight Hundred Two Dollars and sixteen cents ($25,802.16) which balance still remains due and unpaid.

2. That on and prior to April 1, 1899, the Kansas City, Pittsburg & Gulf Railroad Company hereinafter called the Gulf Company was a railroad corporation, organized under the laws of the State of Missouri; that the Gulf Company owned or controlled a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had trackage rights over the St. Louis & San Francisco Railway from said Grandview to a point in Jackson County, Missouri, called Belt Junction; that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, owned and operated a line of railroad in Jackson County, Missouri, extending from a point in Kansas City on the State line between Missouri and Kansas near the confluence of the Missouri and Kansas Rivers, thence East along the South bank of the Missouri River about five miles, thence Southwest to said Belt Junction, so that when connected the line of the Belt Company and the line of the Gulf Company formed in the main one continuous line of railroad running in the same general direction from Port Arthur, Texas, to Kansas City, Missouri; that the Dock Company at all times herein mentioned owned and operated docks, wharves and warehouses at Port Arthur, Texas, and a certain ship canal leading from Port Arthur, via Sabine pass, to the tidewater of the Gulf of Mexico; that at said Port Arthur the tracks of the Gulf Company connected with the railroad tracks owned by the Dock Company and leading to said wharves
603 and elevators so that when connected said ship canal and the line of the Gulf Company formed one continuous transportation line running from Kansas City, Missouri, to the sea; that on April 1, 1889, said Gulf Company made default in the payment of interest due on that date on its funded debt, and upon complaint filed by the Trustee named in the mortgage securing said debt, such proceedings were had that the property and affairs of said Gulf Company on said date passed into the hands of receivers appointed by the Circuit Court of the United States for the Western Division of the Western District of Missouri; which receivers assumed for the time being the operation and control of said Gulf road under the orders of said court; that shortly thereafter a committee, styled a "Reorganization Committee" was formed for the purpose of readjusting the funded debt of said Gulf Company and for other purposes, fully set forth in a prospectus published by said committee called a "Reorganization Plan"; that the said Gulf Company had no terminal facilities in Kansas City, except such as it had by contract with the said Belt Company and it became evident to said committee that it would be advantageous for said Gulf Company when reorganized to acquire the property of said Belt and said Dock

Companies by consolidation or otherwise; that the Gulf Company had no means of reaching tidewater except by means of said ship canal under such contract rights as it had acquired from the Dock Company; that the expressed object of said reorganization plan, as set forth in said prospectus was to consolidate and unify the property of the said Gulf Company with the property of said Belt Company and said Dock Company and to manage, own and control the same as one; that with this end in view said committee under date November 7, 1899, put forth and published a certain prospectus called a "Reorganization Plan" and circulated the same among the creditors, bondholders and stockholders of the said Belt Company, and of said Dock Company, including plaintiff; that attached to said prospectus was a certain agreement which all the stockholders of the Belt were invited to execute in favor of said committee; that it was provided in said published plan that same should be deemed a part of said agreement to the same extent as if copied in full herein; that a copy of said plan and agreement is hereto attached and marked Exhibit No. 1; that all of the originals thereof are in defendant's possession or under its control; that in and by said published plan said committee made the following offer to all the stockholders of the Dock Company, that is to say, that it, the said Committee, would cause a new or successor corporation to be formed in which should be vested the title to all and singular the property and franchises of the Gulf Company, when acquired by said Committee at
604 such judicial sale thereof as might thereafter be had in said receivership proceedings, that to all such stockholders of the Dock Company as would deposit their stock with said committee under the terms of said written agreement attached to and made a part of said prospectus the said committee for each One Hundred Dollars ($100) share of Dock stock deposited with it would cause to be issued three-fourths (¾) of a share of new stock of equal par value to be used by such new corporation to be formed as aforesaid, so that upon the consummation of said plan the Dock Company's stockholders would have three-fourths (¾) as much stock in said new corporation as they then held respectively in the Dock Company, and it was made a condition to participation in said scheme that all persons who should deposit their stock with said committee should enter into a binding agreement that said new stock when issued should be vested irrevocably for a term of five years in certain trustees, who should have absolute power to vote the same and exercise all the prerogatives and franchises of the owners of said stock in the control and management of said new corporation to be formed as aforesaid; that all stockholders of said Gulf Company were required as a condition to participation in said plan, to *any* said committee the sum of $10.00 for each share of Gulf stock, deposited with said committee under said plan, which payment entitled them to one share of stock of the new company, but no such condition was imposed on stockholders of the Dock Company; that said prospectus was so contrived and framed as to lead, and did lead, plaintiff and such other corporations and persons, who or which dealt with said committee on the faith thereof to believe that the floating debt of

the Dock Company, including said note, would be paid by said committee or by said successor corporation; that induced by the proposals made in said prospectus the persons holding substantially all of the total issue of the stock of the Dock Company then outstanding, a total of sixteen thousand (16,000) shares of the par value of One Hundred Dollars ($100.00) each, deposited the same with said committee, to be held and used by said committee in the execution of said scheme as aforesaid; that afterward such proceedings were had in the said Circuit Court of the United States that the said Gulf Road was on or about March 19, 1900, sold at foreclosure sale and was bid in by certain persons on behalf of said committee, and on March 19, 1900, said committee, pursuant to said scheme of reorganization, caused defendant to be incorporated as a railroad corporation under the laws of the State of Missouri, and caused all the property and franchises of said Gulf Road to be conveyed to defendant and caused defendant to issue its shares of stock to said stockholders of the Dock Company who then and there received in exchange therefor respectively, stock of defendant in accordance with said plan as
605 above set forth; that said scheme, as set forth in said prospectus, was carried into full force and effect and defendant then and there entered into possession and control, and acquired unto itself all of the property and franchises of the Dock Company and still has the same; all with the result that after said scheme was carried out the said stockholders of the Dock Company had and still have a large and substantial interest in defendant and defendant has all of the property and assets of said Dock Company and is using the same for its own benefit and behoof; that pursuant to said plan the said stockholders of the Dock Company did enter into trust agreement with certain persons designated in said prospectus, as voting trustees, whereby the legal title to all of said new stock issued by defendant as aforesaid to the said stockholders of the Dock Company became and was vested in the said voting trustees for a period of five years, beginning on April 1, 1905, and whereby the said voting trustees were vested with all and singular, the rights, privileges and franchises of the owners of said stock, with full power to vote the same, and said stock has ever since been vested in the said voting trustees; and the said voting trustees have ever since elected the directors of defendant and of the said Dock Company, and have had sole control and management of the property and affairs of defendant; that as a part and parcel of the same scheme by which defendant acquired the property and assets of the Dock Company, defendant also in substantially the same manner acquired the property and assets of the Belt Company as set out in paragraph 2 of the first count of this petition; that it was provided in and by the terms of said Reorganization prospectus and the agreement thereto attached, that the said committee should have the right to pay or obligate the said successor company to pay any debt in the nature of unsecured or floating debt, owing by the said Belt Company, or the Dock Company, or to settle or compromise such debt, and to negotiate with the creditors of said Belt and Dock Companies for their assent to the carrying out of said plan, and also to make such contracts and

arrangements with any and all persons and corporations, which in the judgment of said committee would tend to prevent or avoid opposition to or interfere with the execution of said plan. It was further provided in and by said plan and agreement that of the new stock and bonds to be issued by said successor company, three millions of dollars in bonds and three millions of dollars in preferred stock were to be sold by said committee, and that the said committee should have power to use the proceeds thereof in whole or in part in paying the floating or unsecured debt of the said Belt and Dock Companies or in paying any other liabiilties which the said
606 committee might incur in and about the premises, and that said committee should have the right and power to liquidate and pay said floating debt; it was further thereby provided that said committee should cause defendant to issue its stocks and bonds to an extent greatly in excess of the amount needed for distribution among the stockholders of the old companies in conformity with said plan, all of which bonds were to be secured by defendant's mortgage on all the property of the Belt and Dock Companies as well as other property, and that defendant should cause such excess of new securities to be sold to provide fresh capital for defendant and that as to all such securities as should not be distributed by said committee to depositors of old securities or as should not be sold by the committee as aforesaid should be delivered by said committee to defendant to be held in its treasury and sold as and when defendant desired to use the same; that the said committee, pursuant to said plan did sell bonds issued by defendant of the par value of $3,000,000, and its preferred stock of the par value of $3,000.000, and realized thereon over $3,000,000 in money; that out of the proceeds of said sales said committee paid such floating debt of the Belt and Dock Companies as it chose to pay and made such disbursements as it saw fit to make and paid over the balance to defendant, said balance amounting to several million dollars and being greatly in excess of the entire floating and unsecured debt of the Belt and Dock Companies; and said committee did raise for defendant and pay over to it several millions of dollars of fresh capital through the sale of stocks and bonds issued by defendant under said plan not distributed among those who had deposited their securities with said committee, and that several millions of dollars of stocks and bonds not distributed or sold by the committee were reserved in defendant's treasury for its future requirements; that all of said bonds issued by defendant and used by said committee and defendant as aforesaid, were and are secured by all the property and assets of the Belt and Dock Companies; that said plan further provided that said committee should settle its accounts with the Board of Directors of said successor company within one year after the consummation of said plan and on the — day of October, 1900, this was done, said committee turning over to defendant the cash remaining on hand after making the disbursements aforesaid, the amount of which was greatly in excess of the entire floating or unsecured debt of the Belt and Dock Companies and defendant did then and there in writing ratify all the acts and doings of said committee in and

about the premises and did in writing assume and agree to pay all obligations incurred by said committee in and about the promulgation and execution of said plan. Plaintiff states that the originals of all the writings hereinabove mentioned are in defendant's possession and plaintiff is unable to more definitely plead the same.

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3. Plaintiff states that by reason of the premises defendant became and is liable to pay the said note.

4. Wherefore, plaintiff prays judgment for the sum of Twenty-five Thousand Eight Hundred and Two Dollars and sixteen cents ($25,802.16) the balance due on said note with interest thereon at the rate of eight (8) per cent per annum from September 26th, 1900, and for its costs.

Thirty-third Count.

Plaintiff for a thirty-third and further cause of action states that it adopts as part of this count all of the averments made by it in the thirty-second count of this petition to the same extent as if said averments were set out in full herein, and states that the said Reorganization Commitee expressly promised and agreed to and with plaintiff before and after settling its account with defendant as aforesaid, that it or defendant would pay any and all indebtedness owing to plaintiff by said Dock Company which indebtedness included said note.

Wherefore plaintiff prays judgment as in the thirty second count of this petition.

HARRY S. MECARTNEY,
J. C. ROSENBERGER,
Attorneys for Plaintiff.

STATE OF MISSOURI,
County of Jackson, ss:

Clarence W. Hastings, being duly sworn on oath states that he is the Treasurer of the Guardian Trust Company, plaintiff herein; that exhibits "A" to "H" inclusive, hereto attached and Exhibit "J" hereto attached are full, true and correct copies of the promissory notes mentioned in the foregoing petition and that Exhibit "I" hereto attached is a full, true and correct statement of the account mentioned in the 25th count of said petition and that the balance due from defendant as shown by said statement is justly due after allowing defendant all just credits and offsets.

CLARENCE W. HASTINGS.

Subscribed and sworn to before me this 15th day of March, 1905. My commission expires October 21st, 1906.

ALBERT F. DRAKE,
Notary Public within and for Jackson County, Missouri.

608 EXHIBIT I.

Kansas City Suburban Belt Railroad Company, Debtor, to Guardian Trust Company.

1899.		
Sept. 25.	To payment of draft of W. S. Taylor dated Sept. 23, 1899, for payment of 20 coupons Union Term'l Ry., due Aug., 1899	$500.00
26.	To payment draft of W. S. Taylor dated Sept. 26, 1899, for payment of 40 coupons Union Terminal Ry., due Aug. 1/99	1,000.00
	To expressage on 65 coupons Union Term'l Ry. from New York to Philadelphia.....	.50
	To proportion of Philadelphia office expense for month of August, 1899	4.50
27.	To interest on note for $25,000, dated Sept. 25, 1899, from that date to Jan. 25, 1900, 122 days at 6%.....	508.33
	To revenue stamps on note of $23,058.48 given by them to Trust Co., dated Sept. 21, 1899	4.62
	To telegrams	2.38
	To telegrams	.59
29.	To revenue stamps on note of $25,000, given to Trust Co., dated 9/25/99	5.00
	To revenue stamps on note for $25,000., given First National Bank, K. C.....	5.00
	To payment of semi-annual interest due Oct. 4, 1899, to the Provident Life & Trust Co., on 2 notes of $5,000 each at 6% held by them, dated Ap. 4, 1890.....	300.00
30.	To payment to Nat. Bank of Commerce for draft on New York remitted for coupon interest	40,000.00
	By proceeds of sale of draft by K. C. Suburban Belt R. R. Co. at 30 days on J. de	

		Goeijen, Jr., for florins 100,000 draft endorsed by Trust Co. amount to apply as credit to above charge of $40,000	.....	$39,437.50
Oct.	3.	To revenue stamps on draft on J. de Goeijen, Jr., and Telegrams regarding draft..	19.58	
	3.	By collection from J. de Goeijen, Jr. acct. interest on $89,333.33 for the month of September	.....	521.10
	4.	To payment of 20 coupons Union Term'l Railway, due Aug. 1, 1899.....	500.00	
1899. Oct.	10.	To revenue stamps on 13,920 shares stock K. C. & N. C. R. R. Co. transferred.....	279.40	
	11.	To clerical services, October, 1899	17.00	
		To funds deposited with Drexel & Co. for payment of coupons of Union Term'l Rail-Road and Consolidated Terminal Railway Co.	1,000.00	
	14.	To telegrams	5.76	
	19.	To expressage N. Y. to Philadelphia, on 20 coupons Union Term'l r'y.....	.13	
Nov.	7.	To interest on note of $50,000, dated March 31, 1899, renewed by note maturing Jan. 9, 1900— Interest Mar. 31, 1899, to Jan. 9, 1900, and 6%.....	2,366.67	
609	8.	By collection from J. de Goeijen, Jr. of interest on $89,-333.33 month of October, 1899	.....	538.48
	29.	To interest on daily balances, September, 1899	22.72	
		To interest on daily balances, October, 1899	22.74	
Dec.	1.	To interest on daily balances, November, 1899	33.35	
	6.	By collection from J. de Goeijen, Jr., of interest on $89,-333.33 for month of November, 1899	.....	521.10

1900.				
Jan.	2.	By proceeds of sale of draft by K. C. Suburban Belt R. R. Co. on J. de Goeijen, Jr., bearing endorsement of Trust Co. draft for florins 37,735.84, sold at 39¾....	.....	15,000.00
	2.	To drafts of Kuhn & Co. of London, dated Dec. 20, 1899, on Trust Co., as endorser, to take up drafts on de Goeijen, Jr., Sept. 30, 1899, for $39,437.50 not paid by him. Less allowance by Kuhn & Co., acc't excess in exchange, $667.40	40,332.60	
Jan.	4.	By collection of interest from J. de Goeijen, Jr. on $89,333.33, month of December, 1899	.....	538.48
	25.	To draft of Kuhn & Co., London, dated Jan. 12, 1900, on Trust Co. as endorser to take up draft on J. de Goeijen, Jr., Jan. 2, 1900, not paid by him	15,000.00	
Feb.	2.	By cash on hand account.....	.....	3,245.13
May	17.	To clerical services, months of November and December, 1899, January, February and March, 1900, five months at $17.00	85.00	
June	4.	To interest on daily balances:		
		Month of Dec., 1899 ..... $34.95		
		Month of Jan., 1900 ..... 200.65		
		Month of Feb., 1900 ..... 224.36		
		Month of Mar., 1900 ..... 254.01		
			713.97	
Sept.	26.	By net proceeds of sale of rails and fastenings turned over to Trust Co. under bill of sale:		
		343 1940/2240 tons rails at $33.00 ..... 11,347.58		
		16 1712/2000 tons fastenings at $33.00 ... 556.25		
			11,903.83	

Less expenses:			
Premium paid on bond given in replevin suit ..	$300.00		
Commission paid A. G. Hay—			
343 1940/2240 tons rails at 25c	85.06		
16 1712 / 2000 tons fastenings at 25c	4.21		
Loading cars ...	17.85		
Demurrage on cars	194.00		
Switching	81.25		
Expenses of A. J. Singer from Chicago to St. Louis acc't sale	87.50		
		770.77	11,133.06
		102,744.34	$70,934.85
Balance due Trust Co.....		.....	$31,809.49

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EXHIBIT J.

"C #45.

Missouri, Kansas & Texas Trust Co.

No. 6.

$50,575.80. KANSAS CITY, MO., Sept. 21, 1899.

"Sixty days after date, we promise to pay to the order of Guardian Trust Company, Fifty Thousand five hundred & seventy five & 80/100 Dollars without defalcation, for value received, with interest after date at the rate of 8 per cent per annum, and have delivered as collateral security 99 1st Mtge. 30 yr. $1,000 5% Gold Bonds Port Arthur Channel & Dock Co. and do agree upon demand, to deposit with the holders such additional security as they may from time to time require, and in default thereof this note shall instantly become due and payable as though it had actually matured, and upon default of payment at maturity, whether such maturity occurs by expiration of time or default in depositing additional security as above agreed, do hereby authorize and empower the holders thereof for the purpose of liquidation of this note, and of all interest and costs thereon, to sell, transfer and deliver the whole or any part of such security or any additions thereto, or substitute therefor without any previous demand, advertisement or notice, either at brokers' board or public or private sale, at any time or times there-

after, with the right upon the part of such holders to become the purchaser and absolute owner thereof, free of all trusts and claims, and it is further agreed that the securities hereby pledged, together with any that may be pledged hereafter, shall be applicable in like manner to secure the payment or any part or for any future obligations of the undersigned held by the holders of this obligation, and all such securities in their hands shall stand as one general continuing collateral security for the whole of said obligations so that the deficiency on any one shall be made good from the collaterals for the rest, hereby remaining responsible for any deficiency in payment and waiving any benefit, exemption or privilege under any law now or hereafter to be in force.

"PORT ARTHUR CHANNEL & DOCK CO.
"By F. B. WILCOX, *Ass't Treas.*"

"Payable at Guardian Trust Company.

Due 11/22/99 Reg. No. 185 #2138.

(Endorsed on back as follows:)

"U. S. I. R. Stamps to the amount of $10.12 duly affixed and cancelled. 11/4/99 Only 54 bonds held under this note. Wm. S. Taylor, Treas. Aug. 11/1900 Received on the within note Twenty-five Thousand nine hundred seventy-five and 45/100 611 — being proceeds of sale of part collateral on within note. $25,975.45.

Aug. 13, 1900.—Received on the within note Three hundred three & 48/100 — being interest received from Reorganization Committee under terms of their circular. $303.48.

9/26/1900.—Received on the within note thirty-three hundred and eighty 43/100 Dolls., proceeds sale of 270 shrs. Comm. sk. K. C. S. B. R. R. Co. collateral to this note. $2,380.40."

EXHIBIT B.

In the Circuit Court of Jackson County, Missouri, at Kansas City, for the April, 1905, Term.

No. —.

GUARDIAN TRUST COMPANY, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Petition.

Plaintiff, Guardian Trust Company, which is and was at all times herein mentioned, a corporation, organized under the laws of the State of Missouri, brings this action against The Kansas City Southern Railway Company, organized on March 19, 1900, as a railroad

corporation under the laws of the State of Missouri, and still existing as such, and for its causes of action against this defendant states:

First Count.

1. Plaintiff states that The Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein mentioned a railroad corporation organized under the laws of the State of Missouri; that on September 22, 1899, plaintiff and said Belt Company made and delivered to First National Bank of Kansas City, Missouri, hereinafter called the Bank, their promissory note in writing, whereby they promised to pay to said Bank or to its order Ninety days after the date of said note Twenty-five Thousand Dollars ($25,000.00), together with interest thereon from the maturity thereof at the rate of eight (8) per cent per annum; that thereafter and on December 23, 1899, for the purpose of renewing said last named note, plaintiff and said Belt Company made and delivered to said Bank their certain other promissory note in writing, whereby they promised to pay to said Bank or to its order Ninety days after the date of said last named note Twenty-five Thousand Dol-
612 lars ($25,000), together with interest thereon from the maturity thereof at the rate of eight (8) per cent per annum; that thereafter and on the 26th day of March, 1900, for the purpost of renewing said last named note, plaintiff and said Belt Company made and delivered to said Bank their certain other promissory note in writing, whereby they promised to pay to said Bank or to its order Ninety days after the date of said last named note Twenty-five Thousand Dollars ($25,000), together with interest thereon from the maturity thereof at the rate of seven (7) per cent per annum; that at the time said first note was made as aforesaid, to-wit, on September 22, 1889, said Belt Company received from the Bank in consideration therefor a valuable consideration, to-wit, the sum of Twenty-five Thousand Dollars ($25,000); that plaintiff made said notes and each of them at the special instance and request, and for the sole benefit of said Belt Company, and plaintiff received no consideration for making said notes or any of them; that by reason of the premises said Belt Company was in law bound to pay said notes and each of them as and when they became due respectively, but to pay the same or any part thereof the said Belt Company failed and refused to do; that thereafter, to-wit, on September 29, 1900, an action on said note, dated March 26, 1900, was brought by said Bank against plaintiff in the Circuit Court in and for Jackson County, Missouri; that thereafter such proceedings were had and taken in said action that on the 23rd day of November, 1901, a judgment was rendered in said Circuit Court in favor of said Bank and against Plaintiff for the sum of Twenty-seven Thousand Six Hundred Dollars ($27,600), together with interest thereon from the date of said judgment at the rate of seven (7) per cent per annum, and also for the costs of said suit; that on the 27th day of March, 1905, plaintiff was compelled to pay and did pay the sum of Thirty-four Thousand

and Eighty-nine 66/100 Dollars ($34,089.66/100) in satisfaction of any judgment, interest and costs as aforesaid.

2. That on and prior to April 1, 1899, the Kansas City, Pittsburg and Gulf Railroad Company, hereinafter called the Gulf Company, was a railroad corporation, organized under the laws of the State of Missouri; that the Gulf Comapny owned or controlled a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had trackage rights over the St. Louis & San Francisco Railway from said Grandview to a point in Jackson County, Missouri, called Belt Junction; that the said Belt Company owned and operated a railroad in Jackson County, Missouri, extending from a point in Kansas City on the State line between
613 Missouri and Kansas near the confluence of the Missouri and Kansas Rivers, thence east along the south bank of the Missouri River about five miles, thence southwest to said Belt Junction, so that when connected with the line of the Belt Comapny and the line of the Gulf Company formed in the main one continuous line of railroad running in the same general direction from Port Arthur, to Kansas City, Missouri; that on April 1, 1899, said Gulf Comapny made default in the payment of interest due on that date on its funded debt, and upon complaint filed by the Trustee named in the mortgage securing said debt, such proceedings were had that the property and affairs of said Gulf Company on or about said date passed into the hands of receivers appointed by the Circuit Court of the United States for the Western Division of the Western District of Missouri, Which receivers assumed for the time being the operation and control of said Gulf Road under the orders of said court; that shortly thereafter a committee styled a "Reorganization Committee" was formed for the purpose of readjusting the funded debt of said Gulf Company and for other purposes fully set forth in a prospectus published by said committee called a "Reorganization Plan"; that said Gulf Company had no terminal facilities in Kansas City, except such as it had by contract with the said Belt Company and it became evident to said committee that it would be advantageous for said Gulf Company, when reorganized to acquire the property of said Belt Comapny by consolidation or otherwise; that the expressed object of said reorganization plan, as set forth in said prospectus, was to consolidate and unify the property of said Gulf Company with the property of the said Belt Company and to manage and control the same as one; that with this end in view said committee, under date of November 7, 1889, put forth and published a certain prospectus called a "Reorganization Plan", and circulated the same among the creditors, bondholders and stockholders of said Belt Company, including plaintiff; that attached to said prospectus was a certain agreement which all the stockholders of the Belt were invited to execute in favor of said committee; that it was provided in said published plan that same should be deemed a part of said agreement to the same extent as if copied in full therein; that a copy of said plan and agreement is hereto attached and marked Exhibit No. 1; that all of the originals thereof are in defendant's possession or under its control; that in and by said published plan said committee made the follow-

ing offer to all the stockholders of the Belt Comapny, that is to say, that it, the said Committee, would cause a new or successor corporation to be formed in which should be vested the title to all and singular the property and franchises of the Gulf Company, when
614 acquired by said committee at such judicial sale thereof as might thereafter be had in said receivership proceedings; that to all such stockholders of the Belt Company as would deposit their stock with said committee under the terms of said written agreement, attached to and made a part of said prospectus, the said committee would cause to be issued a like amount of stock of equal par value by such new corporation to be formed as aforesaid, so that upon the consummation of said plan the stockholders would have the same amount of stock in such new corporation as they then held respectively in the Belt Company, and it was made a condition to participation in said scheme that all persons who should deposit their stock with said committee should enter into a binding contract that said stock when issued should be vested irrevocably for a term of five years in certain trustees, who should have absolute power to vote the same and exercise all the prerogatives and franchises of the owners of said stock in the control and management of said new corporation to be formed as aforesaid; that all stockholders of said Gulf Company were required, as a condition to participation in said plan to pay said committee the sum of $10.00 for each share of Gulf stock, deposited with said committee under said plan, which payment entitled them to one share of stock of the new company, but no such condition was imposed on stockholders of the Belt Company; that said prospectus was so contrived and framed as to lead, and did lead, plaintiff and such other corporations and persons, who or which dealt with said committee on the faith thereof, to believe that the floating debt of the Belt Company including said note, dated September 26, 1899, as well as any renewal thereof and judgment thereon, would be paid by said committee or by said successor corporation; that induced by the proposals made in said prospectus, the persons holding more than ninety-nine per cent of the total issue of stock of the Belt Comapny then outstanding, a total of 47,500 shares, deposited the same with the said committee to be held and used by said committee in the execution of said scheme as aforesaid; that afterwards such proceedings were had in the said Circuit Court of the United States that the said Gulf Road was on or about March 19, 1900, sold at foreclosure sale and was bid in by certain persons on behalf of said committee, and on March 19, 1900, said committee, pursuant to said scheme of reorganization, caused defendant to be incorporated as a railroad corporation under the laws of the State of Missouri, and caused all the property and franchises of said Gulf Road to be conveyed to defendant and caused defendant to issue its shares of stock to said stockholders of the Belt Company, who then and there received in
615 stock of defendant a like number of shares as they had before held in the Belt Company, respectively, and of equal par value as said Belt shares; that said scheme, as set forth in said prospectus, was carried into full force and effect and defendant then and there entered into possession and control, and acquired unto itself all of the

property and franchises of the Belt Company and still has the same, all with the result that after said scheme was carried out the said stockholders of the Belt Company had and still have the same interest in defendant as they had before had in the Belt Company, and defendant has all of the property and assets of said Belt Company and is using the same for its own benefit and behoof; that pursuant to said plan the said stockholders of the Belt Company did enter into trust agreements with certain persons designated in said prospectus, as voting trustees, whereby the legal title to all of said new stock issued by defendant as aforesaid to the said stockholders of the Belt Company became and was vested in the said voting trustees for a period of five years, beginning on April 1, 1900, and ending on April 1, 1905, and whereby the said voting trustees were vested with all and singular the rights, privileges and franchises of the owners of said stock, with full power to vote the same, and said stock has ever since been vested in the said voting trustees; and the said voting trustees have ever since elected the directors of defendant and of the said Belt Company, and have had sole control and management of the property and affairs of defendant; that it was provided in and by the terms of said Reorganization prospectus and the agreement thereto attached, that the said committee should have the right to pay or obligate the said successor company to pay any debt in the nature of unsecured or floating debt, owing by the said Belt Company, or to settle or compromise such debt and to negotiate with the creditors of said Belt Company for their assent to the carrying out of said plan, and also to make such contracts and arrangements with any and all persons and corporations, which in the judgment of said committee would tend to prevent or avoid opposition to or interference with the execution of said plan. It was further provided in and by said plan and agreement that of the new stocks and bonds to be issued by said successor company, three millions of dollars in bonds and three millions of dollars in preferred stock were to be sold by said committee, and that the said committee should have power to use the proceeds thereof in whole or in part in paying the floating or unsecured debt of the said Belt Company, or in paying any other liabilities which the
616 said committee might incur in and about the premises, and that said committee should have the right and power to liquidate and pay said floating debt; it was further thereby provided that said committee should cause defendant to issue its stocks and bonds to an extent greatly in excess of the amount needed for distribution among the stockholders of the old companies in conformity with said plan, all of which bonds were to be secured by defendant's mortgage on all the property of the Belt Company as well as other property, and that defendant should cause such excess of new securities to be sold to provide fresh capital for defendant and that as to all such securities as should not be distributed by said committee to depositors of old securities or as should not be sold by the committee as aforesaid, should be delivered by said committee to defendant to be held in its treasury and sold as and when defendant desired to use the same; that the said committee, pursuant to said plan, did sell bonds issued by defendant of the par value of $3,000,000, and its preferred

stock of the par value of $3,000,000, and realized thereon over $3,000,000 in money; that out of the proceeds of said sales said committee paid such floating debt of the Belt Company as it chose to pay and made such disbursements as it saw fit to make, and paid over the balance to defendant, said balance amounting to several million dollars and being greatly in excess of the entire floating or unsecured debt of the Belt Company, and said committee did raise for defendant and pay over to it several millions of dollars of fresh capital through the sale of stocks and bonds issued by defendant under said plan not distributed among those who had deposited their securities with said committee, and that several millions of dollars of stocks and bonds not distributed or sold by the committee were reserved in defendant's treasury for its future requirements; that all of said bonds issued by defendant and used by said committee and defendant as aforesaid, were and are secured by all the property and assets of the Belt Company; that said plan further provided that said committee should settle its account with the Board of Directors of said successor within one year after the consummation of said plan and on the — day of October, 1900, this was done, said committee turning over to defendant the cash remaining on hand after making the disbursements aforesaid, the amount of which was greatly in excess of the entire floating or unsecured debt of the Belt Company, and defendant did then and there in writing ratify all the acts and doings of said committee in and about the premises and did in writing assume and agree to pay all obligations incurred by said committee in and about the promulgation and execution of said plan.

617 Plaintiff states that the originals of all the writings herein above mentioned are in defendant's possession and plaintiff is unable to more definitely plead the same.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay said sum of Thirty-four Thousand and Eighty-nine 66-100 Dollars ($34,089 66-100), paid by plaintiff as aforesaid to satisfy said judgment, and that although plaintiff has requested defendant to pay said sum so due, defendant refuses to pay the same or any part thereof.

4. Wherefore plaintiff prays judgment for the sum of Thirty--our Thousand and Eighty-nine 66-100 Dollars ($34,089 66-100), with interest thereon at the rate of six per cent per annum from March 27th, 1905, together with its costs.

Second Count.

Plaintiff for a second and further cause of action states that to avoid unnecessary repetition it adopts as part of this count of its petition all the averments made by it, in the first count thereof, to the same extent as if set out in full herein, and plaintiff states that said Reorganization Committee, both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, expressly promised and agreed to and with plaintiff that either said Reorganization Committee or defendant would pay any and all indebtedness owing by the Belt Company, and which as between plaintiff and any third person plaintiff was bound to pay,

which indebtedness included the debt evidenced successively by said notes and judgment.

Wherefore plaintiff prays judgment as in the first count of this petition.

Third Count.

1. Plaintiff for a third and further cause of action states that to avoid repetition it adopts all the averments of paragraph 1 of the first count of this petition, to the same extent as if set out in full herein.

2. Plaintiff further states that on or about the 20th day of March, 1900, defendant was the owner of a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had acquired lease hold rights from the St. Louis and San Francisco Railway from said Grandview to Belt Junction, in said Jackson County, and that on said date the said Belt Company owned and operated a line of railroad in Jackson County, Missouri, beginning at a point in Kansas City on the State line between Kansas and Missouri, near the confluence of the Kaw and Missouri Rivers, extending east along the south bank of the Missouri river to
618 a point near the confluence of the Missouri and Blue Rivers, thence south and west to a point about ten miles south of Kansas City, called Belt Junction, where the said Belt Company connected with the said St. Louis and San Francisco Railroad Company; that the said line of railroad of the Belt Company and of defendant formed, when connected in the whole or in the main, one continuous line of railroad from Port Arthur, Texas, to Kansas City, Missouri; that defendant afterward, and the said Belt Company, with the written approval of the persons or parties holding and representing a majority of the stock of the said Belt Company and of defendant, became consolidated under the name of defendant, The Kansas City Southern Railway Company, and formed one company, and defendant acquired and took into possession all of the property of said Belt Company of every kind and description and has thereafter owned and controlled the same as one continuous line of railroad, running in the whole or in the main, in the same general direction, from Port Arthur, Texas, to Kansas City, Missouri, as aforesaid; that the contracts and leases and agreements by which said consolidation was effected, and under which defendant now operates and owns all of said railroad, are exclusively within the possession and control of defendant; and that plaintiff cannot more definitely prove the same; that by reason of such consolidation defendant became and is liable to pay the said sum of Thirty-four Thousand and Eighty-nine 66-100 Dollars ($34,089 66-100), paid by plaintiff as aforesaid to satisfy said judgment, and that although plaintiff has requested defendant to pay said sum so due, defendant refuses to pay the same or any part thereof.

3. Wherefore, plaintiff prays judgment as in its first count aforesaid.

H. S. MECARTNEY AND
J. C. ROSENBERGER,
Attorneys for Plaintiff.

EXHIBIT C.

In the Circuit Court of Jackson County, Missouri, at Kansas City, for the October, 1906, Term.

GUARDIAN TRUST COMPANY, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Petition.

Plaintiff, Guardian Trust Company, which is and was at all times herein mentioned, a corporation organized under the laws of the State of Missouri, brings this action against The Kansas City Southern Railway Company, organized on March 19th, 1900, as a
619 railroad corporation under the laws of the State of Missouri, and still existing as such, and for its causes of action against said defendant, states:

First Count.

1. Plaintiff states that the Kansas City, Pittsburg and Gulf Railroad Company, hereinafter called the Gulf Company a corporation organized under the laws of the State of Missouri, did, on the 14th day of January, 1899, by its negotiable, promissory note of that date, by it duly executed, promise, for value received, to pay to plaintiff, or to its order, on demand, the sum of Ten Thousand Dollars ($10,000.00), with interest after date of said note at the rate of eight per cent (8%) per annum, until paid, a duly verified copy of which said note is herewith filed and marked "Exhibit 1." That payment of said note has long since been demanded and no part thereof has been paid. On the date of said note the name of plaintiff was Missouri, Kansas and Texas Trust Company, and said note is made payable to plaintiff, or its order, by the latter name. Afterward, the name of plaintiff was changed, in accordance with law to Guardian Trust Company.

2. For several years prior and up to March, 1900, the Gulf Company owned and operated a railroad from Grand View, in Jackson County, Missouri, to Mena, Arkansas, and by means of the ownership of the stock and bonds thereof, controlled and operated the Texarkana and Ft. Smith Railroad, and the Shreveport and Gulf Railroad, which, in connection with the said line of road owned by the said Gulf Company, formed a continuous line of railroad from the said town of Grand View, in Jackson County, Missouri, to Port Arthur, in Jefferson County, Texas. The Gulf Company had outstanding Twenty-three million dollars ($23,000,000) of stock, divided into shares of the par value of One hundred dollars ($100) each, and Twenty-three million dollars, ($23,000,000) of its first mortgage bonds, bearing interest at the rate of five per cent (5%) per annum, which bonds were of the d-omination of One thousand dollars ($1,000) each, and which interest was payable semi-annu-

ally on the first day of April, and the first day of October, in each year.

3. For several years prior and up to March, 1900, the Kansas City Suburban Belt Railroad Company, a Missouri corporation, hereinafter called the Belt Company, owned and operated a belt and terminal railroad from a point called Belt Junction, Southeast of Kansas City, Jackson County, Missouri, to its depots and terminal yards at Second and Wyandotte Streets, in said Kansas City, and on to a point on the State Line between Kansas and Missouri, in what is known as the West Bottoms of Kansas City, near the Mis-
620 souri River, and by virtue of leases and stock ownership, operated and controlled the Union Terminal Railroad, which extended from said point on the State Line to Argentine, Kansas, and also another line called the Kansas City and Independence Air Line, running from a point in what is known as the East Bottoms in Kansas City, to the City of Independence, Missouri, which said lines so owned, leased, controlled and operated by the Belt Company, are, for the sake of brevity, hereinafter referred to and called the Kansas City Terminals.

4. The Belt Company, prior to March, 1900, had outstanding, capital stock to the amount of Four Million seven hundred and fifty-thousand dollars ($4,750,000), divided into shares of the par value of One hundred Dollars ($100) each, and the said Kansas City Terminals had outstanding, prior to March, 1900, first mortgage bonds to the aggregate principal amount of Four million and Fifty thousand dollars ($4,050,000).

5. The said town of Port Arthur, in Jefferson County, Texas, which was the Southern terminus of the line of road owned and controlled by the Gulf Company, prior to March, 1900, as aforesaid, was a small village of, say, eight hundred or a thousand inhabitants, and was of no commercial importance situated inland about ten miles from the deep waters of the Gulf of Mexico.

6. For several years prior and up to March, 1900, the Port Arthur Channel and Dock Company, hereinafter called the Dock Company, a Texas corporation, owned and operated a large, deep-water, ship canal, extending from the town of Port Arthur to the deep waters of the Gulf of Mexico, through which canal, ocean steamers and other sea-going vessels passed to and fro from Port Arthur to the open sea, and also owned and operated wharves, docks, and warehouses, and a grain elevator at the Northern end of its said canal at Port Arthur, and also owned and operated railroad tracks and yards which extended from its said wharves, docks, warehouses and grain elevator, to and connected with the tracks of the railroad so operated by the Gulf Company at Port Arthur, as aforesaid.

7. The said Dock Company, prior to March, 1900, had outstanding, one million five hundred seventy-five thousand dollars ($1,575,000) of its capital stock, divided into shares of the par value of One hundred dollars ($100) each, and its first mortgage five per cent (5%) bonds to the amount of One million six hundred and fifty-five thousand dollars ($1,655,000).

8. The Gulf Company did not own or have the control of any

terminal facilities in or near Kansas City, Missouri, its
621 Northern terminus being at Grand View, Missouri, as aforesaid, some twenty miles away, and from said Grand View, Missouri, it had trackage rights over a part of the line of the St. Louis and San Francisco Railroad Company to said Belt Junction, at which point it connected with the tracks of said Belt Company. Neither did said Gulf Company own or control any tracks or other facilities for getting nearer to the waters of the Gulf of Mexico, than the town of Port Arthur, which was some ten miles away, but by virtue of certain contracts and traffic arrangements, it had the right to use the Kansas City Terminals as a means of entering into Kansas City, together with their yards, depots and repair shops, and the right to use the said ship canal of the Dock Company, as a means of receiving and sending its passengers and freight from and to the sea, for all of which the Gulf Company was obliged to pay such rentals, charges and tolls as were found to be burdensome and beyond its ability to earn and pay.

9. The persons who owned and held the bulk of the stocks and bonds of the Belt Company and the Dock Company, were, in the main, persons who also owned nearly all of the capital stock and bonds of the Gulf Company.

10. In the latter part of 1898, and in the fore part of 1899, it was shown and became known to the said stockholders and bondholders of the various companies hereinbefore referred to, that by reason of the excessive expenses of operation and the heavy interest charges of the Gulf Company, it, the said Gulf Company, would not be able to further pay the interest on its said bonds and that it would necessarily make default in the payment of the installment of interest which would mature on April 1st, 1899, and that the ownership of said Gulf Company would consequently pass into other hands, unless some steps should be taken to reorganize the property and reduce the operating expenses and interest, and other fixed charges. And it was recognized that on account of the said Gulf Company owning no terminal facilities at Kansas City, or at Port Arthur, its northern and southern termini, the success of any reorganization of the Gulf Company would be impossible, or at least, doubtful, unless said Dock Company and said Kansas City Terminals could be included in such reorganization. Afterward, in the year 1899, a committee, styled a "Reorganization Committee" was formed for the purpose of unifying and consolidating all of the said companies and their properties, namely: The companies owning the Kansas City Terminals, the Gulf Company and the Dock Company, into one new company or
corporation, so that said new company would own, control and
622 operate, under its sole corporate management, the whole system from Kansas City to the shipside at Port Arthur, and to readjust the capital and fixed charges of all of said companies, so that, when said properties were so consolidated and unified, the fixed expenses for rentals, terminal charges, and other expenses, incident to the separate management of the various properties, would be avoided, and the interest charges so diminished that the operating

expenses and the interest would be brought clearly within and below the earning capacity of the system when so consolidated, unified and placed under one corporate management and control.

11. With this end in view, said Committee, under date of November 7th, 1899, put forth and published a certain document or prospectus, called a "Reorganization Plan," and circulated the same among the creditors, bondholders and stockholders of said Companies, including plaintiff; attached to said prospectus and made a part thereof was a ce-tain "Reorganization Agreement" which each of the holders of stocks and bonds of said companies were invited to execute. In and by said published plan of reorganization said Committee made the following offer to all the stockholders of said Companies, that is to say, that it, the said Committee, would cause a new or successor corporation to be formed in which should be vested the title to all and singular of the property and franchises of said Companies when acquired by said Committee, and that to all such stockholders of said Companies, as would deposit their stock with said Committee under the terms of said written agreement and plan, said plan being a part of the agreement, the said Committee would cause the stock of such new or successor corporation to be issued in the proportions and to the amounts specified in said plan and agreement.

12. Said plan was so drawn and contrived as to lead the stockholders, bondholders and creditors of said companies, including plaintiff, to believe that the floating debt of the said Companies, including said note, would be paid by the said Committee or by said successor corporation and that such payment would result from the consummation of said scheme and was one of the purposes thereof; and plaintiff, so believing and relying thereon, did assist and cooperate with said Committee in carrying said plan into effect. Induced by the proposals made in said plan, the holders of substantially all of the stock and all of the bonds issued by said Companies, became parties to said scheme of reorganization and severally executed said reorganization agreement of which said plan was expressly made a part thereof, and pursuant to said agreement deposited with the said Committee, substantially all of the stocks and bonds
623 issued by the said Companies, to be held and used by said Committee in the execution of said scheme aforesaid.

13. The stockholders and bondholders of all of the said Companies, acting by and through their agents, the said Committee, for the purpose of carrying out the said agreement for consolidation and reorganization, did, on the 19th day of March, 1900, cause the said new company to be incorporated under the laws of the state of Missouri, under the name of The Kansas City Southern Railway Company, which is the defendant in this suit. The persons who were so incorporated as the Kansas City Southern Railway Company were either members of the said Companies, their attorneys, or employees.

14. Pursuant to said plan and agreement, the stockholders and bondholders of said old companies, through their agents, the said Committee, caused the defendant, as soon as it was incorporated, to authorize the issuance of its fifty year, three per cent, gold bonds, to

the aggregate amount of Thirty Million dollars ($30,000,000), divided into Thirty thousand bonds of the denomination of One Thousand Dollars ($1,000) each, and to secure said bonds, to execute and deliver a deed of trust in the nature of a mortgage conveying, and intended to convey, and which is now a first lien upon all of the property and assets of all of the said old or constituent companies.

15. Afterwards to-wit: On the — day of March, 1900, said stockholders and bondholders of the said old companies, acting by and through their agents, the said Committee, in the further execution of said Reorganization Plan, caused all of the railroad, property, assets and franchises of the Gulf Company to be duly conveyed by deed or deeds to defendant, who has ever since held, and still holds, the title thereto, and afterward caused the railroads, property, assets and franchises of all of the other old or constituent companies to be duly conveyed to defendant, who now holds, and for a long time has held, title to all of the property of all the said old companies, and their constituent companies, subject to the lien of the said mortgage of defendant, and has been and still is in possession thereof and operating the same as one consolidated line or system of railroad, and the defendant, in part payment for the said property, did issue to the holders of the bonds of said old companies, new bonds of defendant to the amount specified in said plan, and did issue and deliver to the stockholders of the said old companies, in exchange for their said stock, new stock of the new company of the defendant to the amounts and in the proportions specified in said plan.

624 The stock of defendant delivered to the stockholders of the Gulf Company in exchange for their stock of the Gulf Company was of great value and of value in excess of the amount of the entire floating or unsecured debt of the Gulf Company, all with the result that after the said scheme was carried out, the said stockholders of the Gulf Company had new stock of the defendant, and the defendant had all of the property and assets of the Gulf Company and still has the same and is using the same for its own benefit and behoof.

16. It was provided in and by the terms of said Reorganization Plan and the agreements aforesaid, of which it formed a part, that the said Committee should have the right to pay or obligate the defendant to pay any debt in the nature of unsecured or floating debt, owing by the said old Companies, and that said Committee should have the right and power to liquidate and pay said floating debt. On or about the — day of October, 1900, said Committee settled its accounts with defendant and defendant did then and there, in writing, ratify all the acts and doings of said Committee in and about the premises, and did, then and there, for and in consideration of the delivery by said Committee to defendant of substantially all of the stocks and bonds issued by the old companies aforesaid, and which had been acquired by said Committee pursuant to and under the terms and conditions of said Plan, and in consideration of the delivery by said Committee to defendant of all the monies, securities and property then in the hands of the Committee, except certain

sums reserved by said Committee for certain purposes therein specified, and for other good and valuable considerations received by defendant it (defendant) did agree in writing that it did and would assume and agree to pay all obligations incurred by said Committee in the performance and execution of the powers upon it conferred by said stockholders and bondholders, and in and about the premises. The originals of said Agreement and the Originals of all the said Reorganization Agreements are in the possession or under the control of defendant, and plaintiff is unable to more specifically plead the same.

17. The Gulf Company is wholly insolvent and has no property subject to execution out of which the debt arising from the promissory note aforesaid, or any part thereof, could be collected.

18. By reason of the premises defendant became and is liable to pay the said note.

19. Wherefore, plaintiff prays judgment in the sum of Ten Thousand Dollars ($10,000) with interest thereon at the rate of eight per cent (8%), per annum, from January 4th, 1899, together with its costs.

625 Second Count.

1. For a second and further cause of action against defendant, plaintiff states that to avoid unnecessary repetition and for the sake of brevity it adopts, as a part of this count of its petition, all the averments made by it in the first count thereof, to the same extent as if the same were set out in full herein.

2. That it was expressly provided and promised, in and by the said Reorganization Plan and Agreement that the floating debt of the Gulf Company would be paid.

3. Wherefore, plaintiff prays judgment as in the first count of this petition.

Third Count.

1. For a third and further cause of action against defendant, plaintiff states that it adopts, as a part of this count of its petition, all of the averments made by it in the first count thereof, to the same extent as if the same were set out in full herein.

2. Said Committee, in and about the execution of its said Plan of consolidation and unification of said properties, at various times expressly promised to pay the said note, and that it, the said Committee, or defendant, would pay said notes.

At the request of said Committee plaintiff furnished the said Committee with a statement of all the indebtedness due plaintiff from the Gulf Company, including said note, and said Committee, then and there, and from time to time thereafter, promised and agreed to pay the same, or that defendant would pay the same. By arrangement with plaintiff the Committee appointed a special expert or auditor, to go over all the accounts and transactions between plaintiff and the Gulf Company and examine the entire book accounts existing between them. Plaintiff placed at the disposal of the said auditor or expert, its books and correspondence, and files and data

in connection with said transactions. The same were thoroughly examined by said auditor or expert and a report was made by him to said Committee; that said report was to the effect that the book accounts between the said Companies were correct and that the amount due plaintiff as shown by said note was in fact due the plaintiff. The Committee thereupon fixed a day for the payment of said note to plaintiff, but a few days before the time fixed for said payment, to-wit: On the — day of July, 1900, the said Committee repudiated said promise and refused to pay said note.

3. Wherefore, plaintiff prays judgment as in its first count.

626 Fourth Count.

1. Plaintiff, for a third and further cause of action states that, to avoid repetition, it adopts all of the averments of paragraph No. 1 of the first count of this petition, to the same extent as if set out in full herein.

2. Plaintiff further states that prior to the 20th day of March, 1900, the Gulf Company was the owner of a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had acquired leasehold rights over the St. Louis and San Francisco Railway from said Grandview to Belt Junction, in said Jackson County, and that prior to the 20th day of March, 1900, the Kansas City Suburban Belt Railroad Company, a Missouri corporation, hereinafter called the Belt Company, owned and operated a line of railroad in Jackson County, Missouri, beginning at a point in Kansas City, on the State line between Kansas and Missouri, near the confluence of the Kaw and Missouri Rivers, extending East along the South bank of the Missouri River, to a point near the confluence of the Missouri and Blue Rivers, thence South and West to a point about ten miles South of Kansas City, called Belt Junction, where the Belt Company connected with the said St. Louis and San Francisco Railway Company. That prior to March 20th, 1900, the said Dock Company owned and operated a line of railroad in Jefferson County, Texas, at Port Arthur, in said County, to a connection with the line of said Gulf Company. That said line of railroad of the Belt Company and of the Dock Company and of the Gulf Company, aforesaid, when connected, formed, in the whole or in the main, one continuous line of railroad from Port Arthur, Texas, to Kansas City, Missouri. That on or about March 20th, 1900, the said Gulf, Dock and Belt Companies, with the written approval of the persons or parties holding and representing a majority of the stock of all of the said companies, and of defendant, became consolidated under the name of defendant, The Kansas City Southern Railway Company, and formed one company and defendant acquired and took into its possession, all of the railroads, properties and assets of the said Belt, Gulf and Dock Companies, of every kind and description, and has owned and controlled the same as one continuous line of railroad, running, in the whole or in the main, in the same general direction, from Port Arthur, Texas, to Kansas City, Missouri, as aforesaid. That the contracts and leases and agreements by which said consoli-

dation was effected and under which defendant now operates, and owns, all of said railroads, are exclusively within the possession and control of defendant and plaintiff cannot more definitely plead the same. That by reason of such consolidation, defendant became and is liable to pay unto plaintiff the said note of the said Gulf Company.

627 3. Wherefore, plaintiff prays judgment as in its said first count.

Fifth Count.

1. For a fifth and further cause of action against defendant, plaintiff states that the Kansas City Pittsburg and Gulf Railway Company, hereinafter called the Gulf Company, a corporation organized under the laws of the State of Missouri, did, on the 16th day of January, 1899, by its negotiable promissory note of that date, by it duly executed, promise for value received, to pay to plaintiff, or to its order, on demand, the sum of Twelve Thousand, five hundred dollars ($12,500) with interest after date of said note at the rate of eight per cent (8%) per annum, until paid, a duly verified copy of which said note is herewith attached and marked "Exhibit 2." Said Gulf Company paid on said note on the 20th day of February, 1899, the sum of Eleven Thousand dollars ($11,000), leaving a balance due on said note on the date of said payment of the sum of One thousand five hundred and ninety-five dollars and eighty-nine cents ($1,595.89), no part of which said balance has since been paid. Said note was made payable to plaintiff under its then corporate name, Missouri, Kansas and Texas Trust Comp-ny. Afterward the corporate name of plaintiff was changed, in accordance with law, to its present name of Guardian Trust Company.

2. Plaintiff, for the sake of brevity, adopts as part of this count of its petition, all of the averments by it made in paragraphs numbered 2 to 18, inclusive, of the first count of this petition, as fully and to the same extent as if set out in full herein.

3. Wherefore, plaintiff prays judgment against defendant in the sum of One thousand five hundred and ninety-five dollars and eighty-nine cents ($1,595.89), with interest thereon at the rate of eight per cent (8%) per annum from February 20th, 1899, together with its costs.

Sixth Count.

1. For a sixth and further cause of action against defendant plaintiff, for the sake of brevity, adopts as a part of this count of its petition, all the averments made by it in paragraph No. 1 of the Fifth count hereof, to the same extent as if copied in full herein.

2. Plaintiff adopts as part of this count of its petition, all of the averments made by it in paragraph- 2 to 18 inclusive of the first count of this petition.

628 3. That it was expressly provided and promised, in and by the said Reorganization Plan and Agreement that the floating debt of the Gulf Company would be paid.

4. Wherefore, plaintiff prays judgment as in the Fifth Count of this petition.

Seventh Count.

1. For a seventh and further cause of action against defendant, plaintiff, for the sake of brevity, adopts as a part of this count of its petition, all the averments made by it in paragraph No. 1 of the Fifth count hereof, to the same extent as if copied in full herein.

2. Plaintiff adopts as part of this count of its petition, all of the averments made by it in paragraph 2 to 18 inclusive of the first count of this petition.

3. Plaintiff adopts paragraph No. 2 of the Third count of this petition as fully and to the same extent as if set out in full herein.

4. Wherefore, plaintiff prays judgment as in the Fifth Count of this petition.

Eighth Count.

1. Plaintiff for an eighth and further cause of action states that to avoid repetition it adopts all of the averments of paragraph No. 1 of the Fifth Count of this petition, to the same extent as if set out in full herein.

2. Plaintiff further adopts as part of this count of its petition, all of the averments made by it in paragraph No. 2 of the Fourth Count of this petition, to the same extent as if copied in full herein.

3. Wherefore, plaintiff prays judgment as in its said Fifth Count of this petition.

Ninth Count.

1. Plaintiff for a ninth and further cause of action against defendant states that at the special instance and request of the Kansas City, Pittsburg and Gulf Railroad Company, a Missouri corporation, hereinafter called the Gulf Company, plaintiff advanced certain monies to said Gulf Company and rendered certain services to said Gulf Company and made certain other charges against said Gulf Company, all in open account, the items of which charges, as well as the date when the same were made and all the particulars thereof, appear on the Bill of Items hereto attached and marked "Exhibit 3."

That the aggregate amount of said charges is the sum of
629 Forty-three thousand six dollars and twelve cents ($43,-006.12). That there were paid on the said account at divers and sundry times by said Gulf Company various sums of money, the said credits aggregating Thirty-five thousand four hundred and fifty-eight dollars and four cents ($35,458.04). Said credits and the dates when entered and the particulars thereof being set out on the said Bill of Items hereinabove mentioned. That the balance due on said open account unto plaintiff, after allowing said Gulf Company and defendant, all just credits and setoffs, is the sum of Seven Thousand five hundred and forty-eight dollars and eight cents ($7,548.08), which balance remains wholly due and unpaid. That the said charges appearing on said Bill of Items are true and correct and said Gulf Company has frequently promised and agreed to pay the said balance, but though often requested, it and defendant have refused and still fail and refuse to pay the said balance or any part thereof. Plaintiff states that it made demand for payment of said

account of said Gulf Company on the 19th day of April, 1899, and on each date on which any charge appearing on said Bill of Items was entered.

2. Plaintiff states that it adopts as a part of this count of its petition all of the averments made by it in paragraphs numbered 2 to 18, inclusive, of the First count of this petition, to the same extent as if said averments were set out in full herein.

3. That by reason of the premises defendant became and is liable to pay the said balance due on said account.

4. Wherefore, plaintiff prays judgment against defendant for the sum of Seven Thousand Five hundred and forty-eight dollars and eight cents ($7,548.08), with interest thereon at the rate of six per cent (6%) per annum from April 19th, 1899, and for its costs in this behalf expended.

Tenth Count.

1. For a Tenth and further cause of action against defendant, plaintiff states that it adopts as part of this count of its petition, all of the averments by it made in paragraph No. 1 of the Ninth Count of this petition, and all of the averments of paragraphs numbered 2 to 18 inclusive, of the First Count of its petition, to the same extent as if the said averments were set out in full herein.

2. That it was expressly provided and promised, in and by the said Reorganization Plan and Agreement that the floating debt of the Gulf Company would be paid.

3. Wherefore, plaintiff prays judgment as in the Ninth Count of this petition.

630 Eleventh Count.

1. For an Eleventh and further cause of action against defendant, plaintiff states that it adopts as part of this count of its petition, all of the averments by it made in paragraph No. 1 of the Ninth Count of this petition, and all of the averments of paragraphs numbered 2 to 18 inclusive, of the First Count of its petition, to the same extent as if the said averments were set out in full herein.

2. Said Committee, in and about the execution of its said Plan of consolidation and unification of said properties at various times expressly promised to pay the said account, and that it, the said Committee, or defendant, would pay said account. At the request of said Committee, plaintiff furnished the said Committee with a statement of all the indebtedness due plaintiff from the Gulf Company, including said account, and said Committee, then and there, and from time to time thereafter, promised and agreed to pay the same, or that defendant would pay the same. By arrangement with plaintiff the Committee appointed a special expert or auditor to go over all the accounts and transactions between plaintiff and the Gulf Company and examine the entire book accounts existing between them. Plaintiff placed at the disposal of the said auditor or expert, its books and correspondence, and files and data, in connection with said transactions. The same were thoroughly examined by said auditor or expert and a report was made by him to said Committee;

that said report was to the effect that the book accounts between the said companies were correct and that the amount due plaintiff as shown by said account was in fact due the plaintiff. The Committee thereupon fixed a day for the payment of said note to plaintiff, but a few days before the time fixed for said payment, to-wit: On the — day of July, 1900, the said Committee repudiated said promise and refused to pay said account.

3. Wherefore, plaintiff prays judgment as in its Ninth Count of this petition.

Twelfth Count.

1. Plaintiff for a Twelfth and further cause of action states that it adopts all of the averments of paragraph No. 1 of the Ninth Count of this petition, to the same extent as if the same were set out in full herein.

2. Plaintiff further adopts as part of this count of its petition, all of the averments made by it in paragraph No. 2 of the Fourth count of this petition, to the same extent as if copied in full herein.

631 3. Wherefore, plaintiff prays judgment as in its said Ninth Count of this petition.

GUARDIAN TRUST COMPANY,
By HARRY S. MECARTNEY AND
J. C. ROSENBERGER,
Its Attorneys.

STATE OF MISSOURI,
County of Jackson, ss:

John A. Prescott, being duly sworn, on oath states that he is the Treasurer of the Guardian Trust Company, the plaintiff herein; that Exhibits No. 1 and No. 2, hereto attached are full, true and correct copies of the promissory notes mentioned in the foregoing petition, and that Exhibit No. 3, hereto attached, is a full, true and correct statement of the account mentioned in the seventh Count of said petition, and that the balance due from The Kansas City, Pittsburg and Gulf Railroad Company, as shown by said statement, is justly due, after allowing said Company all just credits and offsets.

(Sig.) JOHN PRESCOTT.

Subscribed and sworn to before me this 2nd day of July, 1906.
My Commission expires, Oct. 7, 1907.

[L. S.] EDWARD C. WRIGHT,
Notary Public, Jackson County, Missouri.

"EXHIBIT 1."

$10,000. KANSAS CITY, MO., Jan. 14", 1899.

On demand after date for value received, we promise to pay to Missouri, Kansas & Texas Trust Company, or order, Ten Thousand and

no/100 dollars, at the office of said Trust Co., at Kansas City, Mo., with interest after date at 8 per cent per annum, until paid.

KANSAS CITY, PITTSBURG & GULF R. R.
A. L. HOWE, *Ass't Treas.*

No. 190. C #1.
Due. Demand.

Attached to the back of above are two (2) one dollar revenue stamps cancelled as follows in ink—"A. L. H. 1/14/99."
(No indorsements.)

632 "EXHIBIT 2."

$12,500. KANSAS CITY, Mo., Jan. "16", 1899.

On demand after date, for value received we promise to pay to Missouri, Kansas & Texas Trust Company, or order, Twelve thousand five hundred & no/100 dollars, at the office of said Trust Co., at Kansas City, Mo., with interest after date at 8 per cent per annum, until paid.

KANSAS CITY, PITTSBURG & GULF R. R.
By A. L. HOWE, *Ass't Treas.*

No. 1951. C #2.
Due. Demand.

Attached to the back of above are two (2) one dollar revenue stamps and one (1) fifty cent revenue stamp, cancelled as follows: "A. L. H. 1/16/99."
Also bearing the following endorsement: "Paid $11,000. Feb. 20/1899."

"EXHIBIT 3."

KANSAS CITY, MO., May 4th, 1899.

Kansas City, Pittsburg & Gulf R. R. Co., in Account with Missouri, Kansas & Texas Trust Company.

Dr. 1898.			1898.		Cr.
July 15.	To salary and commission on sundry ticket sales per bills rendered by land department, as follows:		Nov. 22.	By proceeds sale of 50 Gulf bonds..	$35,450.00
	Oct. 1897	$179.02	1899. Apr. 10.	By amount overcharged 2-19-'99 acct. Feb. rent M. K. & T. building, $45. 5 days at $45.00 per month.....	8.04
	Nov. 1897	174.77			
Oct. 11.	To building dept. bill No. 2238 acct. railway men's Restaurant	1,898.37			
Oct. 29.	To Coates House Co. bill 10-28-98 against W. S. Taylor and party	27.37			
Nov. 5.	To balance due on 2 cars of wood from Janssen Fruit Farm.....	19.20			
Nov. 22.	To draft Wm. S. Taylor Tr. 11-22-98 acct. P. & G. coupon acct. No. 3, due 10-1-98...	3,000.00			
Nov. 22.	To payment of note at Am. Ex. Nat. Bank N. Y. for $30,000 due 1-9-99, less unearned interest, $127.00.	29,873.00			
633					
Nov. 30.	To 3 pcs. 24 sewer pipe at 80 cts. ft. shipped 11-28-98 from Mena, Ark., to F. F. Robertson, Pickering, La., per order of I. C. Hubbell purchasing agent	6.00			
Dec. 1.	To sundry telegrams paid.....	3.28			
Dec. 1.	To trustees fees for Dec. 98.....	17.00			
Dec. 8.	To postage used at Phil. office from March, '98 to Nov. 98.....	9.93			

1898.					
Dec.	14.	To sundry telegrams paid.....	15.91		
Dec.	15.	To pay roll 1st 1-2 Dec. '98.....	12.50		
Dec.	15.	To proportion salary of land dept. for Nov. 1898...	150.00		
Dec.	15.	To proportion commission on ticket sales land dept. for Nov. 1898...	27.01		
Dec.	20.	To payment for cablegram to Absterdam, 2-9-98	3.28		
Dec.	21.	To amount paid John Scott for services, 12-19-98	200.00		
Dec.	22.	To John Scott, July '98, salary.	200.00		
Dec.	22.	To John Scott, Aug. '98, salary.	200.00		
			36,016.64		35,458.04

Dr. Cr.

1898.					
Dec.	22.	Forward	36,016.64	Forward	$35,458.04
Dec.	22.	To John Scott, Sept. 98, salary.	200.00		
Dec.	22.	To John Scott, Oct. 98, salary.....	200.00		
Dec.	23.	To sundry telegrams, paid.....	2.87		
Dec.	31.	To pay roll ast 1-2 Dec. '98.....	12.50		
Dec.	31.	To sundry amounts paid out by Phila. office, as as follows: Adv. Gulf coupons, notice in 3 papers, $8.40, $18.00 and $6.00	32.40		
		Express charges, 50c; lunches, overtime and carfare, $5.16....	5.66		
		Wm. F. Murphy Sons sundry office supplies.....	26.00		
1899.					
Jan.	4.	To sundry telegrams paid.....	16.11		
Jan.	4.	To Jan. '99, rent, 106 W. 9th St...	150.00		
Jan.	4.	To Jan. '99 rent, 200 and 201 Lyceum Bldg.....	00.00		

Jan.	4.	To cable expense on mesage to Robt. Gillham, Gen. Mgr., by Kuhn & Co., London	11.34
634			
Jan.	4.	To trustees' fees, Jan. '99.....	17.00
Jan.	4.	To Jan. '99 rent long back room M. K. & T. Bldg.	30.00
Jan.	4.	To Jan. '99 rent skylight room, M. K. & T. Bldg.	25.00
Jan.	4.	To Jan. '99 rent claim dept. M. K. & T. Bldg...	10.00
Jan.	4.	To Jan. '99 rent Howe's room, M. K. & T. Bldg....	15.00
Jan.	4.	To Jan. '99 rent Phila. office.....	35.00
Jan.	4.	To Jan. '99 rent, Syndicate Bldg..	320.00
Jan.	4.	To following amounts paid out by N. Y. office; L. Lombard, R. R. fare, $8.50; entertaining Mr. Flory, $4.75	13.25
Jan.	4.	To Subn. to "Railway Economica" 12-10-98 to 12-10-99	5.00
Jan.	4.	To following amounts paid out by Phila. office; Express charges for Dec. 98, Revenue.....	.25
		Stamps on draft $25,000, Amsterdam	10.24
Jan.	6.	To following amounts paid out by N. Y. office; Revenue stamps on $25,000 draft on Kuhn & Co. acct J. de Goeijen's payments to K. C. P. & G. R. R. Co.	10.08
		Expenditures, acct. P. & G. statements, sent them P. & G. Voucher No. 588, Dec....	12.09

Jan.	12.	To sundry telegrams paid.....	15.58		
Jan.	14.	To pay roll 1st ½ Jan. 99.....	12.50		
		Forward, ...	37,244.51		35,458.04
Dr.					Cr.
1899.					
Jan.	14.	Forward	37,244.51	Forward	35,458.04
Jan.	14.	To amount sent "U. S. Investor" by N. Norton, Mgr., 1-11-99....	285.00		
Jan.	16.	To John Scott, Dec. 99, salary..	200.00		
Jan.	18.	To payment of telegrams	3.28		
Jan.	31.	To pay roll last ½ Jan. 99.....	12.50		
Feb.	1.	To Feb. 99, rent long back room, M. K. & T. Bldg.	30.00		
Feb.	1.	To Feb. 99, rent Skylight room, M. K. & T. Bldg.	25.00		
Feb.	1.	To Feb. 99, rent, claim dept. room, M. K. & T. Bldg.	10.00		
635					
Feb.	1.	To Feb. 99, rent Asst. Treas. room, M. K. & T. Bldg.	30.00		
Feb.	1.	To Feb. 99, rent Phila. Office, M. K. & T. Bldg...	35.00		
Feb.	1.	To trustees' fees, Feb. 99.....	17.00		
Feb.	1.	To Feb. 99, rent Syndicate Bldg..	320.00		
Feb.	2.	To Feb. 99 rent 106 W. 9th St. Lyceum	150.00		
Feb.	2.	To Feb. 99 rent, 200 and 201 Lyceum	40.00		
Feb.	3.	To 67 13-16 cords of wood at $1.20 per cord from Janssen Fruit farm	81.37		
Feb.	6.	To postage used at Phila. office Dec. 98, and Jan. 99.	.54		
Feb.	6.	To express charges for Jan. 99 paid out by Phila. Office	.25		
Feb.	7.	To draft Wm. S. Taylor, Tr. 2-6-99, acct. of coupon, acct. No. 3, due 10-1-98.....	1,000.00		

Feb. 8.	To amount paid Burnham, Williams & Co. by Wm. S. Taylor, Tr. for revenue nue stamps on Gulf notes, under contract lease, 11-26-98, 35 notes, at 96c each	33.60		
Feb. 10.	To rent 3 rooms M. K. & T. Bldg., for Feb. 99....	45.00		
Feb. 14.	To pay roll, 1st ½ Feb.	12.50		
Feb. 20.	To sundry cablegrams paid by N. Norton, Mgr., N. Y. office, acct. reorganization of P. & G. securities	326.28		
Feb. 20.	To interest on bills rec. 1946, 10,000.00, 1-12 to 1-30-99, 18d. at 8 per cent.....	40.00		
Feb. 20.	To interest on bal. bills rec. 1946, $4,000.00 1-30 to to 2-20-99, 21 ds. 8 per cent.....	18.66		
Feb. 20.	To interest on bills rec., 1979, $5,000 from 2-10 to 2-20, 99, 10 ds. at 8 per cent...	11.11		
	Forward	39,971.60	Forward	35,458.04

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Dr.				Cr.
1899.				
Feb. 23.	To Forward.....	39,971.60	Forward	35,458.04
Feb. 23.	To John Scott, Jan. salary.....	200.00		
Feb. 23.	To funds advanced Wm. S. Taylor, Tr. to pay Gulf coupons due 10-1-98	1,000.00		
Feb. 28.	To pay roll last ½ Feb.	12.50		
Feb. 28.	To proportion salary Land dept. Dec. 1898.....	150.00		
Feb. 8.	To commission on on ticket sales land dept. Dec. 1898	19.00		
Feb. 28.	To proportion salary land dept. Jan. 1899.....	150.00		

Feb. 28.	To commission on ticket sales, land dept. Jan. 99...	33.65
Mch. 1.	To Trustee's fees March, 99.....	17.00
Mch. 1.	To Mch. 99 rent 106 W. 9th St., Lyceum	150.00
Mch. 1.	To Mch. 99 rent, 200 and 201 Lyceum	40.00
Mch. 1.	To Mch. 99 rent, Phila. office.....	35.00
Mch. 1.	To Mch. 11 rent Syndicate Bldg..	320.00
Mch. 1.	To Mch, 99, rent, long back room, M. K. & T. Bldg.	30.00
Mch. 1.	To Mch. 99 rent, skylight room, M. K. & T. Bldg.	25.00
Mch. 1.	To Mch. 99 rent, claim dept. room, M. K. & T. Bldg.	10.00
Mch. 1.	To Mch. 99 rent, Asst. Treas. room, M. K. & T. Bldg.	30.00
Mch. 1.	To Mch. 99 rent, 3 rooms M. K. & T. Bldg.....	45.00
Mch. 6.	To amount paid by N. Norton, to French Consulate for certification of sundry papers in reorganization of P. & G.....	8.19
Mch. 10.	To draft Wm. S. Taylor, Tr. 3-8-99, for P. & G. R. R. Coupon acct. due 10-1-98.	75.00
Mch. 11.	To express charges for Feb. 99 paid by Phila. office..	.50
Mch. 13.	To Feb. 99 cable and telegraph bills paid by N. Norton, Mgr., N. Y. Office.....	179.97
Mch. 15.	To pay roll 1st ½ March	12.50
Mch. 16.	To proportion salary land dept. Feb. 1899.....	150.00
Mch. 16.	To commission ticket sales Land Deut. Feb. 1899.	24.38

Mch. 18.	To draft Wm. S. Taylor 3-16-99 for K. C. P. & G. R. R. coupons due 10-1-98.....	100.00		
Mch. 31.	To pay roll last ½ Mch. 99.....	12.50		
	Forward	42,801.79	Forward	35,458.04

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Dr. Cr.

1899.			1899.	
April 19.	Forward, ...	42,801.79	Forward	35,458.04
April 19.	To following amounts paid out by Phila. office: Rev- stamps on $10,000 draft J. De Goeljen, Jr.	4.08	May 4, By balance.....	7,548.08
	Express charges for Mch.....	.25		
	May 1, to Jno. Scott, March, salary	200.00		
		$43,006.12		$43,006.12
	May 4, To balance.	7,548.08		

(Filed May 20, 1889)

Afterwards, to-wit, on the 16th day of November, 1907, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Upon reading the verified bill of Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, the Kansas City Suburban Belt Railroad Company and The Kansas
638 City Southern Railway Company, it is ordered that until the further order of this court the defendant in said bill, the Guardian Trust Company, its agents and attorneys be and the same are hereby restrained from further prosecuting or attempting to prosecute or try the three actions and each of them filed by the Guardian Trust Company and now pending in the Circuit Court of Jackson County, Missouri, two of said actions having been filed in the said court on March 15, 1905, and the other of said actions having been filed on July 2, 1906. Each of said three actions being in the name of the Guardian Trust Company, plaintiff and against the The Kansas City Southern Railway Company. And that the de-

fendant Guardian Trust Company be and appear before the Judge of this Court at Chambers at ten o'clock A. M. on the 16th day of December, 1907, to show cause, if any there be, why a temporary injunction should not issue against it.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 16th day of December, 1907, an Answer of the Guardian Trust Company on Rule to Show Cause was filed. Said Answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of Western District of Missouri.

In Equity.

CAMBRIA STEEL CO.
vs.
KANSAS CITY SUBURBAN BELT R. R. CO., GUARDIAN TRUST CO., et al.

Bill.

KANSAS CITY SUBURBAN BELT R. R. CO.
vs.
GUARDIAN TRUST COMPANY et al.; KANSAS CITY SOUTHERN RAILWAY CO., Intervenor.

Ancillary Bill.

KANSAS CITY SUBURBAN BELT RAILWAY CO. and KANSAS CITY SOUTHERN RAILWAY CO.
vs.
GUARDIAN TRUST CO.

Supplemental Bill.

Answer of Guardian Trust Co. on Rule to Show Cause.

And now comes the Guardian Trust Company and protesting against the jurisdiction of this court in the premises, in answer to the rule to show cause why a temporary injunction should not issue against it, restraining it from prosecuting three certain suits at law now pending in the Circuit Court of Jackson County, Missouri, and without prejudice to its demurrer on file herein and in response only to said rule to show cause hereby showeth cause and avers as follows:

639 1. This court is without jurisdiction to entertain the supplemental bill and to issue the said restraining order or to issue the said temporary injunction prayed for.

1. (*a*) Leave was improvidently granted by this court to file said supplemental bill without any notice whatsoever to this defendant

and contrary to the rules and practice of this court, as prescribed by Equity Rule #57, and said Bill should be dismissed for this reason alone.

1. (*b*) Leave to file said supplemental bill was improvidently given by this court because on its face said bill discloses that the matters therein complained of are not in any case the proper subject of a supplemental bill, but are matters which were necessarily within the knowledge of the complainants at the time they filed their last amended intervening petition and their amended ancillary bill, respectively, in this cause, and were necessarily known to them before this cause was finally submitted to the Master, and hence said matter should have been introduced into this cause, if at all, before that time, and it is too late to do so now.

2. No notice of the application for the restraining order entered herein was given by the said complainants to this defendant and no sufficient reason given for not doing so; although it is a local company and the office of one of its counsel is but a block or two distant from the office of the counsel for the complainants. The court should therefore, for this reason alone, restore the status quo, dissolve the restraining order and discharge the rule to show cause.

3. It appears from the face of the supplemental bill that no case is stated entitling the said complainants therein to any such relief as it thereby sought or prayed for from or against this defendant.

4. As to the third and last of the three cases pending in the said Circuit Court of Jackson County, commenced July 2, 1906, the subject-matter of said suit is not only personal in its nature, but is not even in anywise involved in this cause or causes, but the same is entirely foreign to and independent of the issues herein; and in addition thereto the Belt Company, a joint complainant here, can have no interest of any kind therein.

5. The Belt Company and the Southern Company claim to be independent corporations and such as cannot join in a bill for an injunction of the nature of said supplemental bill. If they are independent corporations, their alleged rights are distinct; while
640 if the Southern Company is a consolidation of the Belt Company, the state suits are of necessity well brought. The interests of each of said joint complainants in the said ancillary cause are each hostile and adverse to the other.

6. The Belt Company is no party to the said state court cases, and therefore cannot validly join in such a supplemental bill, and hence such bill by reason alone of the Belt Company being a joint complainant is bad. While,

7. As to the Southern Company, the other joint complainant, it is barred and estopped from maintaining any such supplemental bill upon the following grounds and for the following reasons, viz:

(*a*) Because it obtained a prior injunction against this defendant in the month of August, 1905, restraining the prosecution of the first two of said suits, which injunctionary order was upon appeal by this defendant reversed by the United States Court of Appeals in and for this district in June, 1906, and the said order was set aside, the said Court of Appeals finding that there was no right upon the part

of the said Southern Company to enjoin the prosecution of said suits at law. Said subject-matter is now res adjudicata and the Southern Company is now estopped and precluded from obtaining any further injunction to the same end. Said decision of said Court of Appeals is reported in 146 Federal Reporter, page 337, to which defendant hereby refers.

(*b*) The said Southern Company filed a demurrer and tendered an issue in said state court suits.

(*c*) After the reversal of the said injunctionary order the said Southern Company withdrew its demurrer in said state court suits, and filed answers therein, to which answers replications were filed by this defendant about June 1, 1907.

(*d*) Afterwards and in June, 1906, said Southern Company filed in said three causes in said state court a motion for a stay of proceedings therein, which motion the court heard in each instance, and the said motions were on or about June —, 1907, formally denied by that court.

(*e*) After the said motions were denied this defendant gave formal notice to the said Southern Company that it would move the said state court for an early setting of said causes for trial before the summer vacation, and said motion was made and heard and denied; the said court, however giving notice to the counsel for the Southern Company that the said causes should be tried early in the fall of the present year.

641 In September this defendant gave notice to the said Southern Company to have the court set said causes for an early date, and upon the protest of the said Southern Company against an earlier trial the said causes were set for trial as late as December 2, 1907.

The said Southern Company has therefore not sought its relief at the earliest, or even an early opportunity, and has also waived any alleged right to enjoin the due prosecution of said state court suits.

8. Between this cause or causes and the said state court cases there is

(*a*) No identity of parties.

(*b*) No identity of the cause of action.

(*c*) No identity in the relief sought.

(*d*) No identity of the jurisdiction in which said causes are pending.

9. The said state court actions are each and all actions in personam, and do not involve any tangible property, or the title thereto, which is under the control or in the custody of this court; nor do said suits or the due prosecution thereof constitute any interference with the present suits in this court or the due prosecution thereof.

Nor has this court the possession of the said notes and open account held by the Trust Company against the Belt Company; nor has it impounded the same or any part thereof; and this appears also upon the face of said supplemental bill.

10. Complainants have been guilty of laches in applying for relief from the prosecution of said state court cases.

11. The said stocks, bonds and other property which defendant holds as collateral to said notes and open accounts were on September 6, 1900, of the reasonable value of over $300,000, and are now of the reasonable value of over $400,000; while the bond given by said Cambria Company, being the only bond given therefor, was in the penal sum of but $10,000. The said complainants have already unjustly interfered with defendant's prosecution of its claims and a realization thereon. And the issuance of said injunction order being, as defendant asserts, unwarranted in law, cannot validly be made the basis or excuse for a further interference with the Trust Company's legal right.

12. As to the original cause herein, in which the Cambria Steel Company is complainant,

642 (*a*) It is a bill to wind up the said Belt Company, and various other Missouri companies, each of which is independent of the other. The bill is not merely multifarious, but it and the proceedings taken under it, amount to an attempt to join in one cause a series of administration of estates, and such estates being those of independent corporations. The court is without jurisdiction in the premises, and the said proceedings ought not only be stayed, they ought not be and cannot validly be the basis for any further appeals for equity interference.

(*b*) Said Cambria bill is bad also for want of any equitable cause of action or right to relief appearing on the face thereof, against any of the defendants thereto, and particularly as against this defendant.

13. There is no valid cause of action against this defendant set up in the said ancillary bill of complaint; no actual fraud is charged therein and said bill presents a legally meaningless theory and an impossible case.

14. There is no valid cause of action or basis of complaint set forth in said intervening petition of the Southern Company; and the same has nothing whatever to do with the personal liability of the Southern Company on which said state court suits are based.

15. It appears from the face of each of said pleadings, viz., the Cambria Company's bill of complaint, the ancillary bill and said intervening petition, that the alleged causes of action are and each of them is barred by limitations and laches appearing on the face thereof, and the same are in fact so barred.

16. If the said original bill, ancillary bill and intervening petition are each without equity and show no cause of action, as defendant avers is the fact, there can be no valid ground for injunction revealed by an attempt to join all three of said causes in such supplemental bill and said application for injunction.

17. As to the said alleged stipulation set out in said bill of complaint,—

(*a*) The same was not a consent to an accounting; in it there is expressly reserved the right to plead or answer said bill and thus to deny the right of complainants to any accounting in respect to the subject-matter of said ancillary bill;

(*b*) The answer filed subsequent thereto contained express denials

of the right of complainants to any accounting in the way of pleas of accounts stated and settled, laches and limitations, and said pleas have never been withdrawn;

643 (*c*) Even if said stipulation could be treated as any consent to an accounting, it could only have supported the filing of a bill which set forth a legal and practical basis for an accounting; there is no intelligent basis of account tendered by the ancillary bill and the stipulation so far as it pertains to an account is functus officio and useless.

(*d*) This defendant has repeatedly and formally protested against the making of the abnormal record in the above causes, and denied and repudiated any such construction of said stipulation by its motions to have the testimony closed and to have the ancillary bill and intervening petition held to be without equity and dismissed.

(*e*) The said stipulation even if treated as a consent to an accounting, has been grossly abused by the complainants creating the abnormal record in said cause or causes, and the same cannot equitably be made the basis for any appeal upon the part of Complainants for further attacks upon this Trust Company.

(*f*) Said stipulation could not in any event be treated as extending beyond the scope of said accounting case, or as giving any pretense for enjoining the prosecution of defendant's legal rights which were outside of the scope of said accounting case.

18. There is no sufficient showing that the Trust Company is insolvent; and the reverse is true, as it has over $600,000 of net assets, exclusive of its claims against the Southern and Belt Companies and the collateral thereto.

19. On the other hand the Belt Company appears from the record in said cause to be totally insolvent, and to have lost all its tangible property upon foreclosure sale to the Southern Company as purchaser thereof.

19. It appears from the record in this cause that the complainants have oppressed, annoyed and heavily damaged this defendant by making the abnormal record in this case, and in its dilatory steps taken therein and in soliciting and obtaining the former injunction against the prosecution of two of said State Court suits; and complainants do not come into court with their present application with clean hands.

Wherefore defendant Guardian Trust Company prays that the restraining order heretofore issued herein be dissolved forthwith; that the rule to show cause why a temporary injunction should not issue herein be discharged, and the application for the same denied, and that the said supplemental bill shall be dismissed; and

644 that the costs, expenses, outlays and attorney's fees incurred by this defendant in resisting such application shall be adjudicated upon the final hearing of said cause or causes.

GUARDIAN TRUST COMPANY,
By HARRY S. MECARTNEY AND
JULES C. ROSENBERGER,
Solicitors and of Counsel.

STATE OF ILLINOIS,
County of Cook, ss:

Harry S. Mecartney, being duly sworn, deposes and says that he is one of the solicitors of the Guardian Trust Company in the foregoing and above entitled causes; that he has read the answer of the Guardian Trust Company to the rule to show cause above, and that the same, and the facts set forth therein, are true, as he verily believes.

HARRY S. MECARTNEY.

Subscribed and sworn to before me this 18th day of December, A. D. 1907.

[SEAL.] JAMES H. CLARK,
Notary Public.

Afterwards, to-wit, on the 22nd day of February, 1908, an Order granting temporary injunction against Guardian Trust Company *against The Guardian Trust Company* was filed and entered of record. Said Order is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittendon, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

645 EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company; The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Supplemental Bill of Edward F. Swinney, Kansas City Suburban Belt Railroad Company, and The Kansas City Southern Railway Company Against The Guardian Trust Company.

Order.

The supplemental bill of Edward F. Swinney, Kansas City Suburban Belt Railroad Company and the Kansas City Southern Railway Company in the above entitled case, coming on for hearing on the application for a temporary injunction, Edward F. Swinney, Kansas City Suburban Belt Railroad Company and the Kansas City Southern Railway Company appearing by their counsel and solicitors, S. W. Moore, Fred H. Wood and S. W. Sawyer, and the Guardian Trust Company appearing by its counsel and solicitors

H. S. Mecartney and J. C. Rosenberger, and after hearing the same on argument and briefs of the respective counsels, the cause was taken under advisement by the court, and the court now being fully advised in the premises; it is ordered that the prayer of the supplemental bill for temporary injunction be and the same is hereby granted, and that the said Guardian Trust Company, its agents, attorneys and counsel, until the further order of this court, be and they are hereby restrained and enjoined from the further prosecution in the Circuit Court of Jackson County, Missouri, of their three certain suits pending in said court against The Kansas City Southern Railway Company, two of which suits were filed in said court on or about the 15th day of March, 1905, and the third of which suits was filed in said court on or about the 2nd day of July, 1906.

This order to take effect on the filing herein of a sufficient injunction bond by the said Edward F. Swinney, Kansas City Suburban Belt Railroad Company and the Kansas City Southern Railway Company, with surety to be approved by the Clerk of this Court in the sum of Ten Thousand Dollars ($10,000.00) on or before the 24th day of February, 1908.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 24th day of February, 1908, an Injunction Bond was filed. Said Bond is in words and figures as follows:

646 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independent Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittendon, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Railroad Company; The Kansas City Suburban Belt Railroad Company; The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Supplemental Bill of Edward F. Swinney, Kansas City Suburban Belt Railroad Company, and The Kansas City Southern Railway Company against The Guardian Trust —.

Bond.

Whereas, the above named plaintiffs, Edward F. Swinney, as receiver of the Kansas City Suburban Belt Railroad Company, the Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company have filed their supplemental bill in the Circuit Court of the United States for the Western Division of the Western District of Missouri, against the above named defendant, Guardian Trust Company, and applied for an injunction against the said defendant enjoining and restraining it, its agents

and attorneys, and each of them, from the commission of certain acts as in the supplemental bill filed in said action in the manner particularly set forth and described; and,

Whereas, the Honorable Smith McPherson, Judge of the Court above named, has on the 22nd day of February, 1908, made
647 an order granting the temporary injunction prayed for in said supplemental bill, and restraining and enjoining said defendant from the further prosecution of its three certain suits against The Kansas City Southern Railway Company pending in the Circuit Court of Jackson County, Missouri, two of which suits were filed in said court on or about the 15th day of March, 1905, and the third of which suits was filed in said court on or about the second day of July, 1906.

Now Therefore, we, the undersigned Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, the Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company, as principals, and The United States Fidelity & Guaranty Company, as Surety, in consideration of the premises, and of the said order, do jointly and severally undertake in the sum of Ten Thousand ($10,000.00) Dollars and promise to the effect that in case it shall finally be determined that plaintiffs in said supplemental bill, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, the Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company, are not entitled to the relief granted by the said order, then the said plaintiffs will pay to the defendant, Guardian Trust Company any and all damages which may [*may*] be awarded to it by reason of the said order, and by reason of any action taken by the plaintiffs in the premises, not exceeding the said sum of Ten Thousand ($10,000.00) Dollars.

Dated this 24th day of February, 1908.

[SEAL.] EDWARD F. SWINNEY,
As Receiver of the Kansas City Suburban Belt Railroad Company,

[SEAL.] KANSAS CITY SUBURBAN BELT RAILROAD COMPANY,
By H. VISSCHER, *Its Treasurer,*
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By H. VISSCHER, *Its Treasurer, Principals.*

[SEAL.] THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By GEO. O. BACON,
J. L. CROSS,
Its Attorney-in-Fact, Surety.

648 Approved, Feb'y 24, 1908.
ADELAIDE UTTER, *Clerk.*

Afterwards, to-wit, on the 29th day of February, 1908, a Motion of Guardian Trust Co. to dissolve Restraining Order of September 6, 1900, was filed. Said Motion is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,
vs.
CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Railroad Company; The Kansas City Suburban Belt Railroad Company; The Kansas City Southern Railway Company, Complainants,
vs.
GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Motion of Guardian Trust Company to Dissolve Restraining Order of September 6th, 1900, *Issued on the Original Bill of the Cambria Steel Company.*

And now comes the defendant, Guardian Trust Company, by its counsel, and moves the court to dissolve the restraining order issued in this cause on September 6th, 1900, on the prayer of the original bill of complaint of the Cambria Steel Company, on the ground that

it appears by the complainant's own showing by the said bill
649 that it is not entitled to the relief prayed by the said bill
against this defendant, and because the said bill of complaint
is wholly without equity.

J. C. ROSENBERGER,
H. S. MECARTNEY,
Solicitors for Guardian Trust Co.

Notice.

To the above-named Cambria Steel Company, Kansas City Suburban Belt Railroad Company, Edward F. Swinney, Receiver for the Kansas City Suburban Belt Railroad Company, and Kansas City Southern Railway Company, or their Solicitors of Record:

You are hereby notified that on Saturday the 29th day of February, 1908, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard at his Chambers in the City of Kansas City, Mo., the undersigned will present the foregoing motion to the Honorable John F. Philips, Judge of the aforesaid Circuit Court of the United States.

J. C. ROSENBERGER,
H. S. MECARTNEY,
Solicitors for Guardian Trust Co.

Received copy of the foregoing notice and motion this 27 day of Feb., 1908.

FRANK HAGERMAN,
Solicitor for Cambria Steel Co.
S. W. MOORE,
Solicitor for K. C. Suburban Belt Railroad Company and Edward F. Swinney, Its Receiver, and for Kansas City Southern Railway Co.

Afterwards, towit, on the 29th day of February, 1908, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

650 Bill.

EDWARD F. SWINNEY, as Receiver of The Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of The Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company; The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Now on this day the motion of the Guardian Trust Company to dissolve the restraining order issued herein on the 6th day of September, 1900, coming on for hearing the same is submitted to the court and is by the court denied.

(Signed) JNO. F. PHILIPS, *Judge.*

Afterward, to-wit, on the 10th day of March, 1908, a Petition for Appeal and Order allowing Appeal were filed:

Said Petition and Order are in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of The Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

651 EDWARD F. SWINNEY, as Receiver of The Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

The above named defendant, Guardian Trust Company, conceiving itself aggrieved by the order and decree made and entered in the above entitled cause on the 22nd day of February, 1908, granting the prayer of the supplemental bill of complaint of the Kansas City Southern Railway Company, the Kansas City Suburban Belt Railroad Company and Edward F. Swinney, Receiver of the Kansas City Suburban Belt Railroad Company for a temporary injunction, enjoining and restraining the said Guardian Trust Company from the further prosecution in the Circuit Court of Jackson County, Missouri, of the three actions at law in said order of temporary injunction and in said supplemental bill mentioned, does hereby appeal from the said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herein, and said Guardian Trust Company prays that this appeal may be allowed and that a transcript

of the record, proceedings and papers upon which said order or decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Eighth Circuit.

Dated this 10th day of March, 1908.

H. S. MACARTNEY,
J. C. ROSENBERBER,
Solicitors for Defendant, Guardian Trust Company.

The foregoing petition for an appeal is allowed, and it is ordered that the cost bond to be filed by said appellant is hereby fixed in the sum of one thousand dollars.

Dated this 10th day of March, 1908.

(Signed) JNO. F. PHILIPS, *Judge.*

Afterwards, to-wit, on the 10th day of March, 1908, the Bond for Appeal of the Guardian Trust Company was approved and filed. Said Bond is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

652 CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of The Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of The Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Supplemental Bill of the Kansas City Southern Railway Company, the Kansas City Suburban Belt Railroad Company, and Edward F. Swinney, Its Receiver, in the matter of the actions at law of the Guardian Trust Company vs. the Kansas City Southern Railway Company in the Circuit Court of Jackson County, Missouri.

Bond.

Know all men by These Presents: That we, the Guardian Trust Company as principal, and the United States Fidelity & Guaranty Company, of Baltimore, Md., as surety, are held and firmly bound unto the Kansas City Southern Railway Company, the Kansas City Suburban Belt Railroad Company and Edward F. Swinney, its Receiver, in the full and just sum of One Thousand ($1,000.00)

Dollars, to be paid to them, their successors or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents, sealed with our seals, dated at Kansas City, Mo., the 10th day of March, 1908.

Whereas, lately on the 22nd day of February, 1908, in the above entitled cause, an order was made granting the prayer of the supplemental bill of the said Kansas City Southern Railway Com-
653 pany, the Kansas City Suburban Belt Railroad Company and Edward F. Swinney, its Receiver, for a temporary injunction against the Guardian Trust Company, restraining and enjoining it from prosecuting certain actions at law against the Kansas City Southern Railway Company in the Circuit Court of Jackson County, Missouri, and the said Guardian Trust Company has obtained an order allowing an appeal from the said order granting said temporary injunction, and has obtained a citation, directed to the said complainants in the said supplemental bill, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Paul, Minnesota, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that of the said Guardian Trust Company shall prosecute said appeal to effect and answer all costs if it fail to make good its plea, then the above obligation to be void; otherwise, to remain in full force and virtue.

In Witness Whereof, the said Guardian Trust Company and the said The United States Fidelity and Guaranty Company have caused these presents to be signed by their proper officers, and their corporate seals to be hereunto affixed.

GUARDIAN TRUST COMPANY,
By J. C. ROSENBERGER, *Its Attorney.*
THE UNITTD STATES FIDELITY & GUARANTY COMPANY,
[SEAL.] By THOMAS S. RIDGE,
By J. L. CROSS, *Its Attorney in Fact.*

Approved:
JNO. F. PHILIPS, *Judge.*

Afterwards, to-wit, on the 14th day of March, 1908, a copy of a letter to Guardian Trust Co. was filed. Said copy of letter and the Affidavit of Thomas J. Bales attached thereto is in words and figures as follows:

March 5, 1908.

Guardian Trust Company, First National Bank Building, City.

GENTLEMEN: Referring to what is known as the Guardian Trust litigation, there are, as you know, three suits pending in
654 the State Court at Kansas City, in which the Guardian Trust Company is plaintiff and The Kansas City Southern Railway Company is defendant, and one equity case pending in the Federal Court here, which involves an accounting between the Suburban Belt Railroad Company and the Trust Company, and also

involves the disposition of certain collateral security held by the Trust Company.

It seems to me that it is a waste of substance and energy to have this litigation pending in both courts. Inasmuch as all of the testimony has been taken in the case in the Federal Court upon every issue that can possible arise between the parties, and inasmuch as no testimony has yet been taken in the cases in the State Court, it seems to me that it is to the interest of all parties concerned to have all matters of difference determined in the Federal Court case. All that will be necessary would be for you to file your cross-bill in the Federal Court setting up against the Kansas City Southern your claim that it is liable to you for the debts of the Suburban Belt and of the Kansas City, Pittsburg & Gulf. As before stated, all of the evidence upon this issue has been taken, and I do not apprehend that any further testimony will be required, altho- if you should look at the matter differently, I should be willing to cover that by stipulation.

This is to notify you, therefore, that if you desire to affiramatively set up your claims against the Kansas City Southern in the equity suit now pending in the Federal Court at Kansas City, I will agree that you may do so, and give you a stipulation to that effect, so that every matter of difference between your Company and those that I represent may be settled by one comprehensive decree.

One of your suits pending in the State Court is against the Kansas City Southern on account of [and] alleged indebtedness of the Kansas City, Pittsburg & Gulf. If this arrangement above outlined is satisfactory to you, I think we can stipulate as to the amount of the indebtedness from the Kansas City, Pittsburg & Gulf to you, so that it will not be necessary to take any testimony upon that point.

I have made suggestions along this line to your attorneys heretofore, but have thought it proper to make this formal offer to you, so that there may hereafter be no misunderstanding upon the subject.

Yours truly,

S. W. MOORE.

S.W.—M.

STATE OF MISSOURI,
County of Jackson, ss:

Thomas J. Bales, of lawful age, being first duly sworn upon his oath states that he enclosed the original of this letter in
655 an envelope addressed to John A. Prescott, First National Bank Building, Kansas City, Missouri, and deposited the same with the necessary postage in the United States mail on March 5th, 1908.

THOMAS J. BALES.

Subscribed and sworn to before me this 5th day of March, 1908. My commission expires October 10, 1908.

[SEAL.] CLARENCE R. HALL,
Notary Public in and for Jackson County, Missouri.

Afterwards, to-wit, on the 21st day of June, 1909, a Mandate from the United States Circuit Court of Appeals Eighth Circuit, was filed. Said Mandate is in words and figures as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the Western District of Missouri, Greeting:

[SEAL.]

Whereas, lately in the Circuit Court of the United States for the Western District of Missouri, before you, or some of you, in a cause between Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company; the Kansas City Southern Railroad Company, Complainants, and the Guardian Trust Company, Defendant, wherein the decree of the said Circuit Court in said cause, entered on the 22nd day of February, A. D. 1908, is in the following words, viz:

"The supplemental bill of Edward F. Swinney, Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company in the above entitled case, coming on for hearing on the application for a temporary injunction. Edward F. Swinney, Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company appearing by their counsel and solicitors, S. W. Moore, Fred H. Wood and S. W. Sawyer, and the Guardian Trust Company appearing by its counsel and solicitors H. S. Mecartney and J. C. Rosenberger and after hearing the same on argument and briefs of the respective counsels, the cause was taken under advisement by the court, and the court now being fully advised in the premises; it is ordered that the prayer of the supplemental bill for temporary injunction be and the same is hereby granted, and that the said Guardian Trust Company, its
656 agents, attorneys and counsel, until the further order of this court, be and they are hereby restrained and enjoined from the further prosecution in the Circuit Court of Jackson County, Missouri, of their three certain suits pending in said court against The Kansas City Southern Railway Company, two of which suits were filed in said court on or about the 15th day of March, 1905, and the third of which suits was filed in said court on or about the 2nd day of July, 1906.

This order to take effect on the filing herein of a sufficient injunction bond by the said Edward F. Swinney, Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company, with surety to be approved by the Clerk of this Court in the sum of Ten Thousand Dollars ($10,000.00) on or before the 24th day of February, 1908.

(Signed) SMITH McPHERSON, *Judge.*"

Filed Feb'y 22, '08.

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Eighth Circuit, by virtue of an appeal agreeably to the Act of Congress in such case made and provided, fully and at large appears:

And Whereas, at the December term, in the year of our Lord, one thousand nine hundred and eight, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of record from the said Circuit Court, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed with costs; and that the Guardian Trust Company, have and recover against the Kansas City Southern Railway Company, Kansas City Suburban Belt Railroad Company, and Edward F. Swinney, Receiver of Kansas City Suburban Belt Railroad Company, the sum of One Thousand and Forty Six and 45/100 Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court with directions to dismiss the supplemental bill of complaint for want of equity.

It is further ordered that a mandate be issued in this cause to the said Circuit Court in ten days from and after this date.

April 2, 1909.

657 You therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the Twelfth day of June, in the year of our Lord one thousand nine hundred and nine.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Costs of Appellant.

Clerk	$33.10
Printing Record	979.50
Do. Addl.	13.85
Attorney	20.00
	$1046.45

Afterwards, to-wit, on the 19th day of June, 1909, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468.

CAMBRIA STEEL COMPANY
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al.

Order.

This cause came on for hearing this 19th day of June, 1909. Complainants suggested the death of Thomas T. Crittenden, Receiver of the Central Improvement Company. The court being fully advised in the premises, orders and adjudges that Henry Huston Crittenden be, and he is hereby appointed receiver of the Central Improvement Company as the successor to and with all the powers heretofore vested in Thomas T. Crittenden. He shall cause to be transferred to his account as such receiver, in the First National Bank, the balance there deposited in the name of his predecessor, Thomas T. Crittenden, this order being the authority for said bank to make said transfer. Said receiver shall make and execute a bond in the sum of five thousand dollars, with surety to be approved by a judge or clerk of this court, conditioned for the faithful performance of his duties.

(Signed) JNO. F. PHILIPS, *Judge.*

658 Afterwards, to-wit, on the 21st day of May, 1910, the Report of Shannon C. Douglas, Special Master, was filed.

Said Report is in words and figures as follows, to-wit:—

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In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Com-
662 pany, and T. T. Crittenden, its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants; Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

Report of Shannon C. Douglass, Special Master, on the Second Amended and Supplemental Ancillary Bill of Complaint, and Intervening Petition of the Kansas City Southern Railway Company.

Comes now Shannon C. Douglass, heretofore appointed Special Master in the above entitled causes, and respectfully represents to the Court that, pursuant to the various orders of reference herein made at different times, during the pendency of this hearing before him, in respect to the original and ancillary bills of complaint, and the intervening petition of the Kansas City Southern Railway Company, he took, from time to time, as requested by counsel for the parties interested, all the testimony offered by them as to the large number of issues involved under the pleadings and stipulations in these causes, and which taking of testimony in shorthand continued through several years, and when transcribed into typewritten pages, resulted in the accumulation of the phenomenal record of approximately 36,000 pages

There have been numerous ocurrences, all more or less unavoidable, during the progress of this hearing, which have operated to materially delay the conclusion and filing of the Master's report. There was an entire change of counsel for complainants and respondents in January, 1905, when hardly one-fourth of the record had

been made, and thereby properly necessitating additional time for the new counsel to familiarize themselves with the pleadings and complicated state of facts presented by the evidence in the cause, and, then again, in 1909, there was another change of counsel for respondent, the Guardian Trust Company, which occasioned additional briefs and suggestions. For the past three years, the Master has given a large part of his time to the examination and consideration of this lengthy record in connection with the arguments and brief of the learned counsel for complainants and defendants, and the intervenor.

It is estimated that the items involved, first and last, in this accounting, will aggregate, 10,000 to 12,000, and hence, it will be readily seen that it has been impossible, within the compass of this report, to do more than group together the different classes of items which characterize the issues in this cause.

663 In the Matter of the Complaints or Charges in the Second Amended and Supplemental Ancillary Bill of Complaint.

I.

General Statement.

1. The original bill of complaint in this cause was filed in this court by the complainant, Cambria Steel Company, on September 6, 1900, against the Kansas City Suburban Belt Railroad Company, Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, defendants, and, in and by which bill of complaint, the Cambria Steel Company set up the recovery of a judgment by it against the Kansas City Suburban Belt Railroad Company for the sum of $100,962.91, and the issuance, and delivery, and return unsatisfied, of an execution thereon, and it was sought to subject to the payment and satisfaction of said judgment, certain assets, rights and properties belonging to said Belt Company, and the other above named defendants (Rec. 36-19253-'55).

The scope of the Cambria bill and the relief which it seeks to obtain for the complainant, Cambria Steel Company, will be hereafter considered, in so far as the same may be involved in and by the orders of reference to the Master, and stipulations in this cause.

For more convenient reference, the corporate companies involved or concerned in the matters, growing out of the filing of the original and ancillary bills of complaint in this cause, are as follows:

1. Cambria Steel Company, hereinafter referred to as Cambria Company.

2. The Kansas City Suburban Belt Railroad Company, hereinafter referred to as the Suburban Company.

3. Kansas City Suburban Belt Railroad Company, hereinafter referred to as the Belt Company.

4. Missouri, Kansas & Texas Trust Company, later by change of name the Guardian Trust Company, hereinafter referred to as the Trust Company.

5. The Missouri, Kansas & Texas Real Estate Trust Company hereinafter referred to as the Real Estate Trust Company.

6. Missouri Elevator & Terminal Company, hereinafter referred to as the Elevator Company.

664 7. Central Improvement Company, hereinafter referred to as the Central Company.

8. Fairmount Amusement Company, hereinafter referred to as the Amusement Company.

9. Consolidated Terminal Railway Company of Kansas City, hereinafter referred to as the Consolidated Company.

10. The Union Terminal Railroad Company, hereinafter referred to as the Union Company.

11. Kansas City & Independence Air Line, hereinafter referred to as the Air Line.

12. Kansas City & Northern Connecting Railroad Company, hereinafter referred to as the Connecting Company.

13. Northern Townsite Company, hereinafter referred to as the Townsite Company.

14. Kansas City, Pittsburg & Gulf Railroad Company, hereinafter referred to as the Gulf Company.

15. State Realty Company, hereinafter referred to as the Realty Company.

16. Second Street Improvement Company, hereinafter referred to as the Improvement Company.

17. The Kansas City Southern Railway Company, hereinafter referred to as the Southern Company.

18. Kansas City Fruit Auction & Coal Storage Company, hereinafter referred to as the Fruit Auction Company.

19. Kansas City Terminal Construction Company, hereinafter referred to as the Construction Company.

20. The Provident Life & Trust Company, hereinafter referred to as the Provident Company.

The original ancillary bill of the Belt Company and its receivers, Stuart R. Knott and Edward F. Swinney, was filed in this cause on November 20, 1901. On March 5, 1905, an amended and supplemental ancillary bill by the same complainants was filed and the Trust Company's answer thereto was filed on June 1, 1905.

On July 2, 1906, their second amended and supplemental ancillary bill of complaint was filed by the Belt Company and Edward F. Swinney, as sole receiver, and, on the same day, the Trust Company filed its answer thereto, which adopted, as part thereof, its answer theretofore filed on June 1, 1905, to the first amended ancillary bill. The second amended and supplemental ancillary bill of complaint, hereinafter referred to as the second ancillary bill, was brought by the complainants therein, against the Cambria Company, Trust Company, Elevator Company, Central Company, and Thomas T. Crittenden, its receiver, Townsite Company, and Amusement —, the Southern Company subsequently becoming an

intervenor in the cause. Each and all of the defendant cor-
665 porations, except the Cambria Company, are organized and existing under the laws of the State of Missouri, having their offices and places of business at Kansas City, Missouri, and are citizens and residents of this state. The Cambria Company is a Pennsylvania corporation, existing under the laws of the State of Pennsylvania, and is a non-resident of Missouri (Rec. 36-19254).

On October 19th, 1906, the answers of the Elevator Company, Townsite Company, Amusement Company, Central Company and its receiver, were filed to said second ancillary bill of complaint and, replications in the usual form were afterwards filed by complainants.

In the cause entitled W. W. Bierce, et al., against the Trust Company, brought and still pending in this division of this Circuit Court, one Francis M. Black was, on November 30, 1900, appointed receiver of the defendant Trust Company, and, at the time of the filing of the ancillary bill herein, was the duly qualified and acting receiver of such company, until his death in May, 1902; that he was succeeded as receiver by Walsh Adams, who continued to act as such receiver until he was discharged by order of this Court, made on or about November 1, 1902, and, that thereafter, the Trust Company has been continuously, and is now, in the possession of all its corporate property, and is continuing to wind up its own business affairs in connection therewith (Rec. 21-11313-'14).

In said Bierce action, the said Wash Adams was, on November 8, 1900, appointed receiver of the Elevator Company, but thereafter, the assets and property of that company have, since the filing of the original ancillary bill of complaint, been turned over to the trustee, the mortgagee in certain mortgages covering the property of the Elevator Company (Rec. 21-11311-'14, 11315-'20, and Vol. 36-19254).

At the time the original ancillary bill was filed, Wash Adams was the duly qualified and acting receiver of the Central Company, having been, in this Cambria case, appointed such receiver on November 8, 1900 (see admissions Vol. 21-11311). Adams afterwards resigned, and T. T. Crittenden, a resident and citizen of Missouri, was appointed his successor on or about June 27, 1902 (Vol. 21-11321).

Prior to the filing of the original bill of complaint by the Cambria Company, four certain other bills of complaint were filed in this Court by the Provident Company of Philadelphia, Pennsylvania, two of these bills being against the Belt Company, a Missouri corporation, as sole defendant, the third being against the Union
666 Company, a Kansas corporation, and the Belt Company, as defendants, and the fourth being against the Air Line and Belt Company, Missouri corporations. Each of said bills sought the foreclosure of the first mortgage upon the railroad and other properties, real and personal, described in the respective mortgages and bills of complaint, and all of which several described properties had been operated by the Belt Company as a continuous and allied system, the Belt Company being also the beneficial owner thereof, by reason of owning the capital stock of the several companies. Upon

the same day that said bills of complaint were filed, an application was made for the appointment of a receiver for the property of the Belt, Union and Air Line, and, on September 6, 1900, an order was duly entered of record in this Court, in all of said causes, as well as in the above entitled Cambria cause, appointing Edward F. Swinney and Stuart R. Knott as receivers of the Belt, Union and Air Line Companies, and vesting in them, as such receivers, all the right, title, interest, estate and property of said companies, and authorizing and directing them, as such receivers, to take such steps and institute such proceedings as might be necessary, to make restoration to the Belt Company, and its said receivers, of any property rights belonging to it, and to compel an accounting from any and all persons, firms or corporations, from whom the Belt Company might be entitled to such accounting, and Knott and Swinney were authorized to appear in any and all suits theretofore or thereafter instituted against the Belt — in its name, or in the names of the receivers, and to defend any and all suits (pages 3 and 4, paragraph 4, Trust Company's answer to the amended and supplemental ancillary bill; and the orders of appointment of receivers in the four foreclosure causes, Rec. 56-34416 to 34440).

Knott and Swinney, as such receivers, appeared and filed an answer to the Cambria bill, and, since the filing of the original ancillary bill herein, Stuart R. Knott resigned as receiver, his resignation being accepted on July 5, 1905, and Edward F. Swinney was continued as sole receiver.

Immediately after their appointment as receivers, and pursuant to the orders appointing them, they took possession of each and all of the properties of the Belt, Air Line, and Union Companies, and thereafter continuously operated all these railroad properties, until the foreclosure sales, which vested in the Southern Company the title to all the railroad properties comprising the Belt System.

667 On November 6, 1901, in said four foreclosure causes, decrees of foreclosure and sale were rendered, directing the sale of the railroad properties of the Belt, Air Line, Consolidated, and Union Companies, covered by mortgages upon said railroads and properties, respectively, and, on December 31, 1901, the properties so covered by said mortgages, were, in pursuance of said decree of foreclosure and sale, duly sold and conveyed to the purchaser, the Kansas City Southern Railway Company (see paragraph 4, page 4, Trust Company's answer to amended supplemental ancillary bill of complaint; also, certified copies of decrees of sale, Vol. 44-28775 to 28808, and, orders and decrees confirming said foreclosure, pp. 28810-'14 and commissioners' deeds pp. 28867 and 28877).

The Missouri, Kansas & Texas Trust Company was incorporated under the laws of Missouri, February 14, 1889 (Rec. 11-5680) and so continued until July 17, 1899, when, by the proper statutory proceedings, its name was changed to Guardian Trust Company (Rec. 11-5680).

2. Before taking up, for consideration, the various "items", or complaints, contained in the second ancillary bill, the Master has thought best to make a somewhat extended reference to the con-

trolling question in this cause, that is, the alleged Domination and Control by the Trust Company of, and over, the Belt Company, and its constituent companies, which complainants contend to have existed throughout the whole period, covered by the transactions, complained of in said bill.

It will be manifest to the Court, from a careful reading of this second ancillary bill, that it is grounded upon the proposition that the Trust Company so dominated and controlled these other companies, that their directors and officers were merely agents of the Trust Company to execute the wishes of A. E. Stilwell and others dominant in the control of Trust Company affairs. If, however, under the proofs in the record and the law applicable thereto, it shall be determined that these corporations, as legal entities, were not so dominated or controlled by the Trust Company or its officers, as to destroy or impair their reasonable freedom of corporate action along lines beneficial to themselves, then it follows that the very basis of the bill will be gone, and, that all other questions, affecting the legality or validity of the various complaints in the bill, may be disposed of according to their individual or respective merits, without regard to any alleged domination. The substance of the particular paragraphs of the second ancillary bill, necessary to show, in a general way, the contentions of complainants, in respect to such
668 alleged domination and control, are next hereinafter stated, though continuously throughout the bill, similar allegations are made as to such dominations of the Trust Company, respecting the thousands of items involved in the various accountings, sought by complainants in this cause.

The general nature of the Bill and particularly of the charge in respect to the Trust Company's Domination and Control over the Belt and other companies, will be shown in the following averments in the Second Ancillary Bill:

(*a*) That the Cambria Company filed its bill of complaint against the Belt Company and the other defendants, setting up the recovery of a judgment by it against the Belt Company for the sum of $100,962.91, and the issuance and delivery, and return unsatisfied, of an execution thereon, and, thereupon, the Cambria Company sought to subject to the payment of said judgment certain rights, properties and assets belonging to said Belt Company, and the other defendants.

(*b*) That, prior to the filing of the Cambria bill of Complaint, four certain other bills of complaint had been theretofore filed in this Court by the Provident Life & Trust Company of Philadelphia, two of which being against the Belt Company, as the sole defendant, the third bill being against the Union Company, a Kansas corporation, and the Belt Company, as defendants, and the fourth bill being against the Air Line, and the Belt Company. Each of said bills sought the foreclosure of a first mortgage upon the certain railroad properties, described in the respective bills of complaint, and, all of which railroad properties had been for some time prior theretofore operated by the Belt Company as a continuous and allied system, the Belt Company being also alleged to be the beneficial owner of said

properties, by reason of its owning the capital stock of said companies; that, upon the same day said bills of complaint were filed, an application was made for the appointment of a receiver of all the properties of the Belt Company, and thereupon, on September 6, 1900, an order was duly entered of record, in each of said causes, appointing Edward F. Swinney and Stuart R. Knott as such receivers, and vesting them with all the rights, property and interest of said Belt Company, and authorizing and directing them to take such steps and institute such proceedings, legal or otherwise, as might be necessary to compel a restoration to said Belt Company, and to said receivers, of any property rights belonging to it, and, also, to compel an accounting from [*from*] all persons, firms or corporations; and, they were further authorized to appear in and defend any and all suits theretofore or thereafter instituted against said Belt Company.

669 (*c*) That, under the authority so vested in them, the receivers, for and on behalf of said Belt Company, appeared and filed their answers to all said bills of complaint, and, thereupon they brought their ancillary bill of complaint herein against the defendants, and, the said Stuart R. Knott having resigned as receiver, the said Edward F. Swinney as its sole receiver, has brought a second ancillary bill against the defendants; that, immediately upon their appointment, the receivers took possession of all the Belt properties and operated the same until the foreclosure sales hereinafter mentioned; and that, on November 6, 1901, in the four foreclosure causes, decrees of foreclosure and sale were duly rendered, driecting the sale of the railroads, and properties, of the Belt, Air Line, Consolidated and Union Companies, which were covered by the mortgages executed by said respective companies, and, on December 31, 1901, the said railroads and properties so mortgaged were, pursuant to said decrees of foreclosure, sold and duly conveyed to the purchaser thereof, the Southern Company.

(*d*) That the matters and things set forth in this second ancillary bill of complaint are ancillary to said foreclosure suits pending in this Cour , and are properly cognizable in this Court, which has possession of all the property of the Belt Company, excepting such as was covered by its mortgage and has been conveyed, as stated, to the Southern Company.

(*e*) That the Trust Company was incorporated, according to law, in 1883, and, until the month of June, 1899, its name was the Missouri, Kansas & Texas Trust Company, but at a later date was changed to the Guardian Trust Company.

(*f*) That, on or about the 1st day of January, 1887, the Suburban Company was organized for the purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas, and was either organized by the Trust Company, or the control thereof passed to the Trust Company shortly after its incorporation, so that the servants and employes of the Trust Company were elected as officers and directors of the Suburban Company, which was at all times mentioned in the bill, dominated and controlled by the Trust Company; that, by reason of the Trust Com-

pany's dominating and controlling the Suburban Company, by virtue of holding possession of the officers of its board of directors and officers, it caused the Suburban Company to issue and deliver all its capital stock to the Trust Company, and, also, caused the Suburban Company to execute its bonds, aggregating $1,000,000.00,
670 and secured by a first mortgage upon all of its corporate properties then held, and to be thereafter acquired; and that said bonds, in like manner, by virtue of such domination and control of the Trust Company, were delivered to it, and the Trust Company thereupon proceeded to sell and otherwise dispose of said bonds and stock and to apply the proceeds thereof, as claimed by it, for the corporate purposes of the Suburban Company, in the construction and operation of its railroad, but the Trust Company, although often requested so to do, has not, at any time, truly accounted to the Suburban Company for the proceeds, realized by it from the sales of said bonds and stock, and has never accounted for the proceeds, or the manner in which it expended the same, except as stated in the bill.

(*g*) That the Trust Company caused to be incorporated, under the laws of Missouri, a corporation known as the Consolidated Company, for the purpose of building a line of road to connect with that constructed, or proposed to be constructed, by the Suburban Company, although it is alleged that the latter had full power, under its charter, to have itself constructed said road; and that the Trust Company caused the Consolidated Company to issue and deliver to it its entire capital stock, and, also, caused it to issue a first mortgage upon all its corporate property, to secure bonds aggregating the sum of $750.000.00, which it is alleged were, by reason of said domination of the Trust Company, delivered to it, and it thereupon sold and disposed of said stock and bonds, but has never truly accounted to the Consolidated Company for the disposition thereof, nor for the proceeds of the sales.

(*h*) That, thereafter, on or about July 25, 1892, the Consolidated Company and the Suburban Company, as authorized by the statutes of the State of Missouri, entered into articles of consolidation, whereby the two companies became one consolidated corporation, known as the Belt Company, and of which the said Swinney and Knott were appointed receivers, as above stated, and, by reason of which consolidation, the Belt Company and the receivers have succeeded to all the rights of the Consolidated and Suburban Companies; and that, at the time of the consolidation of these two companies, as aforesaid, the Trust Company caused its officers and employes to be elected to the positions of officers and directors of the Belt Company, so formed by said consolidation, and continued such persons in such respective positions, continuously, until about April, 1900, and whereby the Trust Company completely domiated and controlled the actions of the Belt Company.

671 (*i*) That, on or about December 30, 1891, and prior to said consolidation, it was found advisable, in the course of the construction of the line of road of the Suburban Company, to have a corporation formed under the laws of Kansas, for the purpose of building and holding the title to that portion of the line of

road of the Suburban Company, lying within the State of Kansas, and, for that purpose, the Trust Company caused the Union Company to be incorporated and its own officers and employees to be elected as the officers and directors of the Union Company; that the Trust Company caused all the stock of the Union Company to be issued to the Suburban or Belt Company, and, also caused the Union Company to execute its first mortgage bonds in the sum of $2,000,000.00, secured upon all corporate properties then owned and thereafter to be acquired, and that all of said bonds were issued and delivered to the Trust Company, for the use and benefit of the Suburban or Belt Company, and were disposed of by the Trust Company, but that the latter, though liable to account to the Belt Company for the proceeds and disposition of said stocks and bonds, has failed and refused to truly do so.

(*j*) That, on January 23, 1891, the Trust Company caused to be incorporated a Missouri corporation, known as the Air Line, for the purpose of building a line of railroad connecting the line of the Suburban Company and the City of Independence, Missouri, the capital stock of such company being $500,000.00; that the Trust Company caused its officers and employes to be elected directors and officers of the Air Line Company, which was caused by the Trust Company to issue its first mortgage bonds in the amount of $300,000.00, and to secure the same by a mortgage on all its corporate property, then owned, and thereafter to be acquired; that through the officers and directors of the Air Line, elected as above stated, the Trust Company at all times dominated and controlled the Air Line until the month of April, 1900; that thereafter, the Trust Company acquired all the stocks and bonds of the Air Line, in consideration for building its railroad, and disposed of the same for corporate purposes, but, though often requested to do so, it has never truly accounted to the Belt Company for the disposition of said stocks and bonds, or their proceeds, except as hereinafter stated.

(*k*) "That the Trust Company, at all times, up to, and about the month of April, 1900, absolutely and completely dominated and controlled the affairs of the Belt Company, by reason of the fact that the officers and employes of the Trust Company were elected officers and directors of the Belt, at the behest of the
672 Trust Company, and were simply dummies, acting as the agents of the Trust Company;" that the Trust Company disbursed all the moneys realized from the sale of bonds and stocks of the several companies hereinbefore named and attended to the disbursement of all moneys used in the building of the lines of railroads of said companies, and that the total cost of said railroads did not exceed the sum of $2,000,000.00, but that there was actually delivered to and disposed — by the Trust Company, the aforesaid stocks and bonds, aggregating more than $5,000,000.00, and for which the Trust Company has never accounted to the Belt Company, except as hereinbefore stated.

(*l*) That, on or about June 30, 1896, the Trust Company either in its own name, or in the name of some of its officers, or some

corporation controlled by it, had entered into a contract, whereby it was obliged to construct a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, for the purpose of connecting at that point with the Omaha & St. Louis Railroad Company, and the Omaha, Kansas City & Eastern Railroad Company; that the Trust Company thereupon caused the incorporation of the Connecting Company, and certain of its officers and employes to be elected officers and employees of the Connecting Company, and, by virtue thereof, at all times dominated and controlled the affairs of the Connecting Company; that the Trust Company, being under obligations to construct said road, and, in order to avoid all liability, or the possibility of loss in such construction, conceived the idea of having the Belt Company undertake the construction, in consideration of the issuance and delivery to it of the stocks and bonds of the Connecting Company, and by virtue of its domination and control over the affairs of both the Belt and Connecting Companies, the Trust Company caused a contract to be entered into between the Belt Connecting Companies, whereby the Belt Company agreed to construct, and did construct, said line of railroad for the Connecting Company, in consideration of the issuance to the Belt Company of certain first and second mortgage bonds and stock of the Connecting Company, fully specified in said contract, and set up in Exhibit "A" to the answer of the Trust Company filed in this case; that said line of railroad, so built as aforesaid, was constructed for the sole use and benefit of the Trust Company, and for the purpose of enabling it to comply with its obligations to furnish said railroad, which was not and never has been of any value whatever to the Belt Company; that the construction of said road by the Belt Company was the result of the Trust Company's domination and control of the Belt Com-
673 pany, and, all of the moneys paid out by the Belt Company, in the construction of the railroad of said Connecting Company, passed through the hands of the Trust Company, and all the stocks and bonds, which were to have been delivered to the Belt Company under terms of said contract, likewise passed through the hands of the Trust Company, which sold or otherwise disposed of the same, and has never accounted to the Belt therefor, except as hereinafter stated; and it is alleged by complainants that, in so using the Belt Company in the construction of said road, the Trust Company is chargeable, in law and in equity, with the amount of the loss claimed by the Trust Company to have resulted to the Belt, and should be held accountable therefor.

(*m*) That, during the time it [*sic*] dominated and controlled the affairs of the Belt, Consolidated, Union and Air Line Companies, the Trust Company, at various times, had said last named companies advanced to it, or take out of their earnings, and assets, large sums of money, which it pretended to expend on account of and for said companies, respectively; that, on account of the fact that the Trust Company at all times so dominated and controlled the affairs of said other named companies, the complainants are unable to state the amount of money so appropriated by it, but charge

that the same aggregates upward of $500,000.00, and for which the Trust Company has never truly accounted for, in any manner whatever, except as hereinafter stated.

(*n*) That, during the times hereinafter mentioned, the Trust Company took upon itself the business of paying out practically all the moneys, which were paid out for the benefit of the Belt Company, and of buying for the Belt Company practically all the properties, which the latter needed to acquire in its business of operating its said railroad, and used the moneys of the Belt Company for that purpose, but, instead of taking title of the properties so purchased in the name of the Belt Company, the Trust Company caused other corporations to be formed for the purpose of holding the naked legal title to said respective properties, and caused the capital stock of said corporations, so organized, to be issued to the Belt Company, and then turned over to the Trust Company, or to be issued to the Trust Company direct, in trust for the use and benefit of the Belt Company; and the Trust Company caused its own servants and agents and employees to be elected and continued as the officers and directors of said companies, respectively, so that the Trust Company, in the same manner that it controlled the affairs of the Belt Company, also dominated and controlled the affairs of the said subsidiary companies; that, among the companies so
674 organized by the Trust Company, in the manner aforesaid, was the Elevator Company, with a capital stock of $100,000.00, of which $42,500.00 has been issued; that said Elevator Company owns two certain elevators in Kansas City, Missouri, along the line of the Belt Company, the construction of which was caused by the Trust Company, and, also, another elevator built with the money of the Belt Company upon the request of the Trust Company, and which elevator was destroyed; that no true accounting has been had between the Trust Company and the Belt Company, as to the amount of money which it actually expended for the construction of said elevators, or the manner in which it disposed of the funds received by it from the Belt Company, although requests for such accountings *has* frequently been made upon the officers of the Trust Company; that the Trust Company caused the Belt Company to assume all the outstanding debts and liabilities of the Elevator Company, and upon the same the Belt Company paid large sums of money, for which it has never been reimbursed; that, since November 8, 1900, the Court made an order in this cause, turning over to the Trust Company the said properties of the Elevator Company for the collection of rents therefrom, and the application of said rents upon the mortgages or encumbrances held by the Trust Company.

(*o*) That the Trust Company caused to be organized the Central Company, a Missouri corporation, with a capital stock of $200,000.00 of which $141,500.00, par value, has been issued, and which company was organized for the purpose of holding the title to various pieces of real estate in Kansas City, Missouri, and elsewhere, purchased for the use and benefit of the Belt Company, the Gulf Company, and others of the above named companies, so organized,

dominated and controlled by the Trust Company; that the officers and employees of the Central Company were officers and employees of the Trust Company, and continued in control and management until April, 1900; that certain pieces of real estate, of vital importance to the Belt Company, are held in the name of the Central Company, and which real estate the Trust Company caused to be purchased with the Belt funds; that the Trust Company has never truly accounted to the Belt Company, although often requested to do so, for the many sums of money paid out by the Belt to the Trust Company, in purchasing such real estate; that certain shares of stock of the Central Company, though belonging to the Belt Company, were issued to the Trust Company, which disposed of the same, and never truly accounted therefor to the Belt Company; that a large amount of property was purchased with money advanced by the Belt Company, and was really Belt property, though
675 the title thereto was taken in the name of the Central Company, and for the moneys so advanced by the Belt Company, it has never been reimbursed, unless the title to such properties has passed from the Central Company by virtue of the foreclosure sale of the properties covered by its mortgage.

(*p*) That another subsidiary company organized by the Trust Company was the Amusement Company, with a capital stock of $2,500.00, all of which belonged to the Belt Company; that said Amusement Company was dominated and controlled by the Trust Company in the same manner as the other corporations herein set forth, and all the moneys expended by it were supplied either by the Belt Company, or by the Trust Company, and charged to the Belt Company; that the Trust Company took itself upon the duty of disbursing all of said funds, and large sums of money were paid by the Belt Company to the Trust Company for that purpose, but the latter has never at any time truly accounted to the Belt Company for said moneys so received, or for the manner in which they were expended; that said Amusement Company was organized for the purpose of operating Fairmount Park, along the line of the Air Line road, and, during the time it so dominated and controlled the Belt Company, the Trust Company caused it to advance large sums of money for the purpose of fitting up Fairmount Park, and aggregating nearly $350,000.00, and for which the Trust Company, though often requested so to do, has never, at any time, truly accounted to the Belt — for the manner in which it expended such money, except as hereinafter stated.

(*q*) That the Trust Company also caused the incorporation of the Townsite Company, a Missouri corporation, with an authorized capitalization of $100,000.00, of which $92,800.00 has been issued, said company having been organized in connection with the construction of the railroad of the Connecting Company, for the purpose of acquiring property at or near townsites along the line of said road; that the Trust Company, in the same manner that it dominated the other corporations above named, caused its own servants and employees to be elected and maintained as officers and directors of the Townsite Company and did cause the Belt Company

to advance to the Townsite Company upwards of $47,000.00, which it used in the purchase of property, and was taken in the name of the Townsite Company; that substantially all the money with which the property of the Townsite Company was acquired, was advanced by the Belt Company, and that the Trust Company, instead of issuing to the Belt Company all the capital stock of the Townsite Company, issued large portions of it to itself or to other persons, for its use and benefit, or otherwise disposed of the same,
676 and that the Trust Company, though requested so to do, has never truly accounted to the Belt Company for the moneys so received by it for the Townsite Company, or the manner in which it was expended except as hereinatfer stated.

(r) That the Trust Company also caused the incorporation of the Gulf Company, for the purpose of constructing a line of railroad from Kansas City, Missouri, to the Gulf of Mexico, and in order to acquire the funds, with which to construct such railroad, it caused the railroad company to issue its first mortgage to secure an issue of bonds, the amount of which outstanding on April 1, 1899, was $23,000,000.00, at which time a default was made in the payment of interest on the bonds, and a bill was forthwith filed for the foreclosure of said mortgage, and receivers were appointed, and proceedings had, resulting in the sale of said railroad under the foreclosure and decree.

(s) That the Belt Company, the Union Company and the Air Line, were largely dependent upon the Gulf Company for their earnings so that it was well known to the Trust Company that, if the Gulf Company went into the hands of receivers, it would necessarily result in the insolvency of the Belt and the other companies named, and would, ultimately, necessitate their being also placed in the hands of receivers, and the foreclosure of the mortgages upon the property; that the Trust Company, by reason of its domination and control over the affairs of the Gulf Company, well knew, prior to the 1st day of March, 1899, that the Gulf — would make default in the payment of the installment of interest due on that date, and that such default would result in the filing of a bill to foreclose the mortgage, and for the appointment of receivers for the road, and that thereupon, the Trust Company set about to contrive a scheme whereby it might appropriate to itself, before the Belt Company passed beyond its control, all of the remaining property and assets of the Belt Company, which were in such shape that they could be transferred to the Trust Company; that the Trust Company caused to be exhibited to its own officers and employees who were holding positions as officers and directors of the Belt Company, various claims and demands which it alleged were due and owing by the Belt Company to it, and caused such officers to pass upon and approve said claims and demands, and thereupon caused such officers and directors of the Belt Company, between March 31, 1899, and February 9, 1900, to execute to the Trust Company various pretended promissory notes and other negotiable instruments, for the alleged purpose of securing to the Trust Company

the payment of the same pretended claims, which it held
677 against the Belt Company, and, also, caused its own officers and employees to cause to be delivered or transferred to it various stocks, bonds, and accounts and other personal property belonging to the Belt Company, as collateral security for the pretended indebtedness of the Belt Company to the Trust Company; that the notes so fraudulently caused to be made by the Belt Company to the Trust Company, and the stocks and bonds held as collateral security therefor, are fully stated on pages 19, 20 and 21 of the second amended and supplemental ancillary bill.

(*t*) That said notes were executed, and said properties turned over as collateral security, solely by virtue of the domination and control of the Trust Company over the Belt Company, in the manner hereinbefore stated; that the Trust Company continued to keep its own officers, servants and employees filling the positions of officers and directors of the Belt Company, until about the month of April, 1900, and that at no time was there any true accounting had between the Trust and the Belt Companies, for or by reason of the matters hereinabove set forth, except such an accounting as the officers and employees of the Trust Company, so holding like positions of the Belt Company, pretended to make in looking over and going through the form of approving the accounts and statements rendered to the Trust Company by the Belt Company; that, since the filing of the original ancillary bill herein, the Trust Company has prepared and submitted a statement of account which it pretends and claims to be a full and complete statement as to all matters and transactions had between it and the Belt Company, and the other companies aforesaid, covering the matters hereinbefore set forth, but the complainant charges that the said account is insufficient, untrue, and does not properly or truly account for the stocks and bonds and other properties received by the Trust Company from or on account of the Belt Company and the other companies named; that many of the charges against the Belt and other companies are untrue, illegal, unauthorized, and ought not in law or equity be permitted to stand as charges against the Belt and other companies; that the Trust Company, in making said account, had omitted therefrom a large number of credits to which the Belt and other companies are entitled.

3. The answer of the Trust Company in effect admits the incorporation of the various companies hereinbefore mentioned, but denies that it dominated or controlled such corporations in the manner stated in the Bill, or in any other way, or that it caused
678 said companies, or any of them, to do any of the things alleged by the complainants to have been done by them, at the direction or instigation of the Trust Company, and it further denies that complainants are entitled to have any accounting in this cause.

Statement of Witnesses Cone, Woods, Telfer, Wilcox, McCarty, Howe, Nolthenius, Pickering, and Martin.

4. In support of their claim that the Belt and other companies were dominated and controlled by the Trust Company, the complainants rely, principally, upon the statements in the record made by witnesses Cone, Woods, Telfer, Wilcox, McCarty, Howe, Nolthenius, Pickering and Martin, all of whom were intimately connected with one or more of the companies involved in this cause.

(*a*) Robert B. Cone testified, in substance, that he was connected with the Missouri, Kansas & Texas Trust Company when organized, February 14, 1889, and, prior to that, with the Missouri, Kansas & Texas Real Estate Trust Company, a Kansas corporation, and occupied every position with the Trust Company from office boy to secretary; that, in November, 1889, he was elected cashier, in May, 1890, assistant secretary and cashier, in January, 1892, assistant treasurer, in March, 1892, secretary, and in May 1896, severed his connection with the Trust Company and moved to Boston (Rec. 57-34777 to 34781); that, during the time he was with the Trust Company, it engaged in the business of organizing companies, and acting as their financial agent in the sale of stocks and bonds; that the Belt Company was the Trust Company's first proposition of that kind, and, continuously thereafter, its principal business was in the promotion line; that the Trust Company also, organized and promoted the Air Line, Consolidated and Union Companies, and some other companies, and its profits consisted largely in selling, marketing and trading in the stocks and bonds of these companies, and it did little outside business; that A. E. Stilwell was connected with the Old Kansas corporation, and was the organizer and leading figure in it, and continued to be the leading figure in the Trust Company (Rec. 57-34788 to 34790); that he (witness) attended principally to the minute books of the Trust Company, and the Gulf Company; that, as to Stilwell being the dominating and controlling figure in these companies, he was the president of the Trust Company, and the leading officer of the other companies, which were referred to as the Stilwell companies (Rec. 57-34794 to 34795); that the Trust Company issued prospectuses of the new companies and sent them around and invited investments (Rec. 57-34802).

679 (*b*) W. S. Woods testified, in substance, that he was a stockholder and director in the Trust Company, had general and special knowledge of its railroad affairs, and that it had been engaged in promoting the Union, Belt, Air Line, Connecting, and Consolidated Companies, as well as other enterprises, and as the promoter of such enterprises, it was necessary for the Trust Company to market their securities; that in the building of the Belt Railroad, the Trust Company organized the Construction Company; that he regarded all these railroads as Trust Company enterprises, and the Trust Company as their promoter, and this would include the Air Line, Consolidated, Belt, Union and Northern Connecting roads,

and it was the general understanding among the directors of the Trust Company that it was the promoter of these railroads (Rec. 53-31742-'44).

(c) John C. Telfer testified, in substance, that in 1890, he became auditor of the Belt, also of the Air Line, when constructed kept the books of the Construction Company, had supervision of the accounts of the Union Terminal and Consolidated Terminal, was also auditor of the Kansas City, Nevada & Fort Smith, and continued as such from May, 1890, until June, 1893, when he became assistant general auditor of the Missouri, Kansas & Texas Railroad Company in St. Louis, but prior to that, for three weeks, he was general auditor of the Trust Company. At the time he was acting as auditor of the Trust Company, Stilwell gave him a list of 28 subsidiary companies, for which he was to arrange the form and system to be used by these different companies in keeping their accounts, and, Stilwell gave him to understand that he was to have oversight of the accounting of these companies, stating that he wanted the Trust Company officials to handle, take charge of, and care for, the accounts of these various companies, which were to account to witness. At that time he had severed his connection with the subsidiary companies, though he was an official of the Trust Company. Up to that time, there had been no general auditor of the Trust Company (Rec. 17-8685-'91). The officers of the Belt, Kansas City Nevada & Fort Smith, and other companies, were in the same building, and on the same floor as the Trust Company offices, and the officials of the Belt and Trust Companies were "like one family of officers and clerks." Howe, who was cashier of the Belt, also acted as cashier of the other subsidiary companies. Dobson & Trimble, later Trimble & Braley, represented the Trust Company, as well as the Belt, Consolidated, Air Line and Union Companies, and all of the 28 companies a list of which had been handed to witness by Stilwell (Rec. 17-8692 to 8700.)

680 Stilwell, president of the Trust Company, received as vice president of the Construction Company, from July, 1889, to November, 1889, $50 a month, and subsequently, from December 1889, to July, 1900, $100 per month and he also received from the Belt Company from May 1, 1890, a salary of $100 per month. W. S. Taylor (one of Belt Company's officers), received a salary from the Construction Company of $50 per month from August 1, 1889, to November 30, 1889, and from December 1, 1889, to April 1, 1890, $100 per month, and he also received compensation from the Belt from May, 1890, or $100 per month (Rec. 17-8706). From the time of witness' connection with the Belt Company, until he left the Trust Company, the bulk of the latter's business was that of promoter of railroads and other subsidiary companies, the Trust Company having organized and incorporated various companies in its office, and used its clerks and others as incorporators, and for the first board of directors. At the time he became connected with the Belt Company, A. L. Howe was its cashier, and also the cashier of the Missouri Coal & Construction Company, which was then constructing the Kansas City, Nevada & Fort Smith Railroad (afterwards

called the Pittsburg & Gulf) and both of which companies were being promoted by the Trust Company and Taylor, as manager of the Trust Comapny, indicated to Howe what payments should be made, and what moneys should be paid out to these companies (Rec. 17-8945-'46). The Trust Company had in its charge, and kept in its vaults, all the securities owned by the Belt and these various subsidiary companies, in which it was interested. The minute book, stock books, ledgers and bond ledgers, were kept in the trust Company's vaults for safe keeping. The Belt Company had a vault of its own in the Trust Company building, but nothing was kept there except books of accounts, cash books, ledgers and journals. Cone and Wilcox were the custodians of the securities of the Belt, Union, Consolidated and Air Line, and kept them with the minute books, in the vaults of the Trust Company (Rec. 17-8947-'49).

As to the relations between the Belt Company and the Trust Company, and the control exercised by the Trust Company over the financial affairs of the Belt, witness stated that he had a great many conversations with Stilwell at various times, and was given to understand that the relations between the Belt and Trust Companies were very close, and that he should take his instructions from Stilwell, or his confidential clerk, Cone, in regard to entries of financial transactions. Witness stated "I cannot definitely point out any particular conversation, but it was a matter of daily occurrence in my intercourse with Mr. Stilwell, that I came to understand that
681 I must do so and so in regard to such transactions, and, if I did not do as I was told, I would simply be discharged."

These conversations were held in the Trust Company office, and witness would consult with him as president of the Trust Company, "because in those dealings he was all powerful." In other matters, witness would go to Martin, as president of the Belt. The conversations between Stilwell and the witness apply to matters between the Trust Company, Union Company, Consolidated Company, and Air Line, and witness was never permitted to question any of the Trust Company's charges made for fees and commissions as against any of the railroads. Stilwell instructed him to take instructions from Cone, his confidential clerk and secretary, and, throughout the books of the Belt Company and other companies will be found such notations "as per advice of R. B. Cone" or "as per advice of F. B. Wilcox", and these entries mean that advice was received from Cone or Wilcox. As auditor of the Belt, Union, Consolidated and Air Line, witness had power to originate charges, and make entries between these companies and other companies, but not as between these companies and the Trust Company. As to all charges growing out of the transactions between the Trust Company building department and these railroad companies, such charges were originated upon bills of H. C. Lindsay, and witness was not allowed to enter into the merits or demerits of the bills sent to him by Lindsay, and he was required to make entries of those charges and place them upon the books without investigation. At times, the Trust Company would direct him, as auditor of the Belt, to open on the Belt books, certain accounts (Rec. 17-8963-'70). In

the organization of the Union Air Line and Consolidated, Stilwell, among the officers of the Trust Company, was the moving spirit, and most active in that respect (Rec. 17-8977). The conditions existing between the Trust Company and the Kansas City, Nevada & Fort Smith Railroad Company, afterwards the Pittsburg & Gulf, were much the same as those existing between the Trust Company and the Belt, and the other subsidiary companies (Rec. 17-8981). Later on, the Construction Company undertook the construction of the Air Line, and issued its stock for the purpose of raising money to build the road, and a clerk of the Trust Company made the entries in the general journal of the Construction Company, the entries appearing on pages 51, 52 and 53 of the journal, being in the handwriting of E. J. Davison, clerk of the Construction Company, and were on that journal when the books were turned over to the witness by the Trust Company (Rec. 17-9010 to 9016.) On page 18, of the Consolidated Company minute book, the recital that the
682 witness was elected auditor of the Consolidated Terminal is in the handwriting of J. T. Nolthenius, who at that time was connected with the Trust Company (Rec. 17-9057). At the time that Stilwell appointed witness general auditor of the Trust Company, he stated what the salary would be. That it is usual and customary, when a railroad executes its notes, to have them pass through the hands of the auditor for original entry, but that none of the notes of the Belt Company payable to the Trust Company passed through his hands in that manner (Rec. 17-9058 to 9061.) In building the first division of the Belt Company by the Construction Company, he compiled the Construction Company's books from data furnished him and when completed, he would turn them back to the Trust Company (Rec. 17-9064-65). Stilwell as well as others connected with the Trust Company, referred to these companies as subsidiary, and he indicated to witness that he wanted a man connected with the Trust Company to prescribe the method of the accounting of these various companies (Rec. 16-9068-69). The officers of the Trust Company and the other companies were in the same building "and the Trust Company was the overshadowing organization in all these matters and things that came up and the officers of the Trust Company were in constant communication with him, and he thought very little of them but as officers of the Trust Company."

When Stilwell handed to witness, as auditor of the Trust Company, the list of 28 companies, it was his recollection that Stilwell said in substance, to him, that these subsidiary companies were creatures of the Trust Company, and managed by it (Rec. 17-9125-26).

(*d*) Frank B. Wilcox testified, in substance, that he was assistant treasurer of the Missouri, Kansas & Texas Trust Company, in April 1892, and remained with the Trust Company until 1900, and, during that time, had general supervision of the Trust Company books, it being his duty to see that the accounts were correctly kept. W. S Taylor was nominally treasurer of the company, but his office was in Philadelphia, though the Trust Company books and bulk

of the securities were kept in Kansas City. The active management, supervision and control of these books was in the witness. Later on, Mr. Willey became auditor, and after that, he, witness, did not give much attention to the books, except in a supervisory way. In the fall of 1899, he became manager of the Trust Company at Kansas City, after the main office had been moved to Chicago, and he had a great deal to do making or having made entries upon the Trust Company books (Rec. 34-17991-94). The
683 offices of the Trust Company were at 7th and Wyandotte streets, Kansas City, Missouri, in the Missouri, Kansas & Texas Building, and in which were located the offices of the surety department, and building department, of the Trust Company, and the entire building was, in fact, occupied by the Trust Company, and the companies in which it was interested. The surety department provided bonds for these different railroads, and the building department did construction work for them (Rec. 34-17995-'98). The men actively engaged in the Trust Company, and also some of the investors who were directors therein, developed the policy of extending the Belt system of Kansas City, and, in carrying out such purposes, many other companies were incorporated for the purpose of developing the natural resources, locating town sites, and creating business enterprises along the roads; and, in the organization of these companies, the same men, who were acting as officers of the Trust Company, were selected as the officers of the various companies prompted by it and these men directed the development and operation of the subsidiary companies. There were 40 of these corporations so organized by the Trust Company, and among the number were the Belt Consolidated, Air Line, Connecting and Gulf Companies, and the Elevator, Central, Amusement, and Townsite Companies; also, the Arkansas Construction Company, Philadelphia Construction Company, Shreveport & Gulf Terminal Company, Port Arthur Land Company, Port Arthur Townsite Company, Port Arthus Rice & Irrigation Company, Missouri Irrigation & Pine Land Company, Pine Land Manufacturing Company, Plymouth Pine Land Company, Central Coal & Coke Company, Randolph Land & Improvement Company, State Realty Company, Second Street Improvement Company, Oronoke Mining Company, Victoria Zinc Mining Company, Chicago Zinc Mining Company, United States & British Columbia Mining Company, Liberty Bell Gold Mining Company, Janssen Place Land Company, Exchange Building Company, Port Arthur Channel & Dock Company, Pittsburg Land Company, Missouri Water & Light Company, Southwest Missouri Light Company, Nevada Light Company, American Incandescent *Land* Company, Stilwell Curtain Fixture Company, Stilwell Automatic Shade Company, National Surety Company, Missouri, Kansas & Texas Building Company, Horse Show Monthly Publishing Company, Ozark Orchard Company, and Ozark Stone & Lime Company.

When witness resigned and left the Trust Company, he resigned either as president, vice-president, secretary, assistant secretary, treasurer, assistant treasurer, or director from 43 of this class
684 of companies, organized in carrying out the original policy of the Trust Company in the promotion business. The di-

versity of the business, represented in the different companies promoted, contemplated railroad construction, railroad operating, land and townsite handling, building of elevators, erection and operation of light and water companies, building of warehouses, docks, hotels, ship canals, development of fruit orchards, buying and selling of timber land, and development of mines, stone quarries, building of houses, etc. Whenever a project was contemplated by any officer of the Trust Company, usually Stilwell, Martin, Mosher, Trimble, Braley and Taylor, would suggest the organization of the company for that purpose, and the incorporation papers would then be prepared and the expenses of incorporation were usually paid by the Trust Company, and included fees of the Secretary of State, attorneys' fees, the cost of stock books, ledgers and seals, though the Trust Company would be reimbursed therefor later on by the companies so organized by it. The men named would usually decide at a conference held in the Trust Company office, who would be selected as officers of the newly incorporated company, but Stilwell's views as to this were more often accepted, "he being a very influential man among this group of men, and as the years rolled by became more so, and his desires became more and more deferred to by the others, he being the man who obtained most of the capital for the purpose of nearly all the companies. Stilwell's influence grew in power, and his desires, during the later years, were generally complied with, as he became the ruling spirit of the entire crowd; and by 'ruling spirit' I mean the ruling spirit of the Trust Company. If Stilwell wanted some certain men elected as a director of any of these companies, he would express it, and have him elected." (Rec. 34-17998 to 18006).

After these companies were organized, the officers of the Trust Company would go ahead and acquire property for the companies, and arrange, when necessary, for the Trust Company to furnish the money for such purposes. The conclusions as to what properties should be acquired, and as to shaping the business policies of these companies, were generally reached in the Trust Company offices, and most of the participants were the officers of the Trust Company, and its attorneys and directors, and these persons would generally select the affairs of each particular company from the employees, officers or directors of the Trust Company, and also determined how the capital stock should be issued. After these new companies had been incorporated, these same men would direct the issuance of its securities, and the Trust Company would take an active part
685 in marketing them. In the early stage of these new companies, the Trust Company would dispose of the new securities, and before their sale would, when necessary, advance the money to those companies for these expenses, sometimes taking the securities and paying for them, and at other times arranging with such companies in respect to the price to be paid for such securities, when sold by the Trust Company, and also as to the commissions, trustees' fees, or bonuses to be allowed by those companies for the services rendered by the Trust Company; in other words, the Trust Company undertook the general financing and managing of those

companies, and, in view of their relations with the Trust Company, they were usually operated in a manner following the policy desired by the Trust Company, the books of the majority of the companies being kept in the office of the Trust Company, and by its clerks.

This specially applies to the books of the Elevator Company, Fruit Auction Company, Central Company, and the State Realty Company, and, also, in respect to the Union, Air Line, Consolidated, Belt and Connecting Companies, as to their bond and stock ledgers, stock certificate books and minute books, which were kept in the Trust Company vaults. The Trust Company offices were also the general offices of those companies organized to do business outside of Kansas City, and the clerical work was done here. The securities of the Belt, Union, Consolidated, Air Line and Connecting Companies, were kept in the Trust Company vaults until they were disposed of. The Trust Company, through its officers, was the custodian of the stock and bond ledgers and minute books of these various companies and Cone was the Trust Company officer, so delegated to look after the stock certificates and other books and to keep custody of these securities. When any of the securities weres old, a report would be made to the witness, who would get them out of the boxes and have them delivered to the purchaser and collect the proceeds. The Trust Company had foreign offices and agencies in London, Amsterdam, Berlin and Paris. The Philadelphia office was more of a retail department for these securities, and the Kansas City office was in the nature of a wholesale department, the Philadelphia office being a branch of the Kansas City office. Stilwell sold the bulk of the bonds and securities of these various companies, when he was away from Kansas City, and reports would be made, indicating the prices for which they were sold, and, also, the price to be allowed to these companies for their securities so sold, which would be indicated or fixed by Stilwell; sometimes there was a regular price allowed the
686 companies for their securities, and, if there was any doubt as to the amount, he would go to Stilwell for information, and Stilwell would indicate the price that should be allowed for the securities sold, the railroad companies usually being credited at a price lower than the price obtained by the Trust Company; the range of difference would vary from one per cent to ten per cent. Sometimes the Trust Company would buy the securities direct from those companies, on which a commission would be charged, in addition to a stock bonus, and, in re-selling, the Trust Company might give the subsequent purchaser the same proportion of stock as a bonus with the bonds, or re-sell the bonds and keep the balance of the stock in its own treasury as a part of the profits of the transaction. In some cases, where Stilwell would sell the securities at certain prices, he would instruct the witness to credit the Belt at a lesser price. There were many instances of that kind. As to the amount of the bonus or commission, or trustee's fees, to be charged by the Trust Company for the promotion of those companies, or for services rendered by it in the sale of the securities, it would rest largely with Stilwell to regulate the same (Rec. 34-18007 to 18021).

The officers and directors of those companies, being usually the

same men holding the position of officers and directors in the Trust Company, the decision as to what the Trust Company would take for its services, would be determined by the same men who had planned and arranged for the organization and policy of the different companies. For a long time, the securities belonging to the railroad companies, and in the custody of the Trust Company, were kept in the same boxes that the securities of the Trust Company were, then afterwards receipts were given to the railroad companies for such securities (Rec. 34-18025-'27).

Originally, the business of the Trust Company was that of building houses and making loans upon real estate, but, subsequently it developed broadly into the general promotion business; the profits of the Trust Company being through the acquirement of securities for its services, and on account of the securities bought by it, and resold, and, also, through the commissions, bonuses, earnings or profits on securities it might sell for the subsidiary companies. The bulk of the Trust Company's business arose out of its original promotion projects, and the handling of the securities of the companies promoted; but the volume of its business decreased when it became difficult to promote new enterprises, which seriously affected its net income (Rec. 34-1827-'033). As a general thing, the salaries
687 of the officers of the newly incorporated companies would be determined by Stilwell, but in most cases, they were merely nominal, except occasionally to an officer of the subsidiary company, who was active in its management. In many of the companies the officers received no salary, except what they received from the Trust Company, and were expected to discharge the additional duties without additional salary from the other companies. The directors, officers or clerks of the Trust Company who were made directors of the subsidiary companies, would resign when indicated to them, so that an investor could be elected to take their place, and such requests for resignations usually came from Stilwell. The journals, cash books and ledgers of the Belt, Consolidated and Union Companies were kept in the vaults of those companies, under the control of the auditor or treasurer, or assistant treasurer of those companies. The term "subsidiary" was generally used when witness was with the Trust Company, to indicate those companies, which had been organized by the Trust Company, and whatever control the Trust Company had in them, with the exception of the Central Coal & Coke Company, continued in spite of the fact that the Trust Company did not own any controlling amount of stock in those companies (Rec. 34-18033-'37). The Central Company is one of the subsidiary companies, and was organized for the purpose of acquiring properties for the railroad corporations, in which the Trust Company was interested (Rec. 34-18038-39). The State Realty Company was organized as a direct subsidiary company to the Trust Company, for the purpose of acquiring, at foreclosure, the properties, upon which the company had made loans, the Trust Company holding all of the stock of the State Realty Company (Rec. 34-18040-'42). Stilwell was a heavy stockholder in the Trust Company, and so were Martin and Taylor, and they retained their hold-

ings largely as permanent investments. They also owned stock, from time to time, in the Belt Company, and other railroad companies promoted by the Trust Company, but these securities would be sold from time to time. Martin was the president of the Belt Company, active in its management, and received a good salary from it. The others were actively engaged in the Trust Company. Stilwell's salary from the Trust Company was $10,000.00 annually, and one year perhaps $20,000.00, but it was not over $100 or $150 a month from the Belt, or any of the companies subsidiary to the Belt, and from some of them no salary at all. The ideas of Stilwell were usually considered important by all of those in charge of the Belt, Union Terminal, or Consolidated Terminal, and as a rule his ideas would predominate and be adopted (Rec. 34-18044-'48).

688 It was a frequent occurrence for Stilwell to inform witness that he had sold certain securities at a certain price, and then direct that a credit be given to the Belt, or these auxiliary companies, at a less price, and, oftentimes, securities would be sold in that way, and then purchased by the Trust Company from the other companies, so as to fill the orders. As to Stilwell having a wide discretion in the sale of securities, witness did not remember of any question ever being raised by any party as to the prices at which he marketed them, nor did he recall that any objection was ever raised by any one in respect to the sale of the securities by him or the Trust Company. In nearly every case where the stock would be sold by Stilwell at one price, and purchased of the Belt at a lower price, the lower figure would be credited to the Belt Company on the Trust Company books. The parties, who had active management of the sale of those securities, and who did the work for the Trust Company in marketing them, were also officers or employees of the Belt Company and drawing a salary from both companies (Rec. 34-18052-'57).

The Fairmount Park proposition was one of Stilwell's ideas. Although witness was president of the company, Stilwell and others, who were not officers of it, negotiated the contract for the electric cars in connection with the Metropolitan system, whereby they were to be running to the Park instead of the Air Line steam cars, and he, witness, had nothing to do except to sign the contract which was prepared for his signature (Rec. 34-18066-'68). There was a contract between the Belt and Connecting Companies for the building of the Connecting Railroad by the Belt, and witness supervised a great many entries on the books of the Trust Company with reference to that contract, the Connecting securities going to the Belt Line from time to time as the work progressed, and the Trust Company having the custody of such securities after they were issued, and when they belonged to the Belt (Rec. 34-18068-69). The attention of witness was called to his letter to Stilwell, attached to the Trust Company journal voucher, appearing in Rec. 10-5394-5, showing a charge against the Belt for $30,850.00 in Connecting Company interest coupons paid by the Trust Company, and, he stated that it was the usual and customary way of securing advices from Stilwell in reference to entries to be made upon the books,

that if Stilwell was in the city, witness would consult him, and if he was away, he would write to him in respect to the entries to be made, and which would be made as directed by him on the books of the Trust Company, and then a slip would be sent to the Belt Company, the same entry, in a reverse order, to be made upon its
689 books (Rec. 34-18074-'77). There was nothing unusual about this letter to Stilwell in January, 1899, asking which company he preferred should owe the Trust Company, for Stilwell was in the habit of either directing verbally, or by letter, which company should be charged with each account, and his instructions were carried out, and entries made accordingly, on the books of the Trust Company, and on the Belt Books. The Belt Company never actively opposed any policy that was inaugurated or established by the Trust Company (Rec. 34-18087 to 18094). The Trust Company advanced to the Fruit Auction Company all the money represented by its capital stock, excepting a small amount received as income during its brief existence (Rec. 34-18247-48).

It was the custom of the Trust Company to have the custody of the stocks and bonds of the various allied companies, and to keep them in its possession, and whatever was represented by the books as being the amount of the stocks and bonds in the treasury, was understood to be in the Trust Company's possession (Rec. 34-18415). The stock ledgers, bond ledgers, stock transfer book, and minute books of these various companies, were kept for the convenience of the Trust Company, because the work was being done at the Trust Company's office. The minutes of the meetings were written up in the office of the Trust Company, and it was convenient to have those minutes books close at hand. The Trust Company had specially provided a room for directors' meetings (Rec. 34-18323-24). The Belt offices were in the same building, adjoining the Trust Company's office, from 1894 to 1900, but, prior to that time, they had been at 2nd and Wyandotte Streets, from where they were removed because there was not sufficient office room available at the depot, and it was more convenient to have the auditing offices of the Belt and its allied companies located closer to the Trust Company. The Bond and stock ledgers and transfer books of the Belt, and minute books, were kept in the custody of the Trust Company (Rec. 34-18348-49). The Construction Company, after completing its operations in connection with the Belt road, was dormant five or six years, then was revived, its capital enlarged, and used in the construction of the Gulf Railroad (Rec. 34-18351). The purchase of securities by the Trust Company from these railroads was not always in the shape of a written contract, the arrangement being usually made between the president of the Trust Company and the officers of the Belt. In many cases Stilwell and Martin would agree upon the transaction and, in others, Stilwell would act for both companies; unless the matter was one of great importance, these purchases would not be a matter of general discussion between the officers of the two companies. "It was simply a matter of the Trust
690 Company using its best efforts to dispose of securities; and either Mr. Martin, or Stilwell, or Taylor, would effect the

sales, and they would be accepted by the Belt, and the usual entries covering them made upon the books. And these men had discretion in the matter or used discretion in the matter." (Rec. 34-18353-54). The Trust Company had the custody of the securities of the Connecting Company, after they were issued to the Belt (Rec. 34-18369). As the Belt constructed the Northern Connecting railroad, for the Connecting Company, the latter issued its securities to the Belt, which turned over to the Trust Company for disposition and sale for its account, and the transaction was treated and regarded by the Trust Company as for the benefit of the Belt. (Rec. 34-18369-70). The Fruit Auction Company was an enterprise started by the Trust Company, whereby daily, or almost daily, auction sales of fruit and produce was inaugurated, and held in the warehouse building at 2nd and Main Streets. It was operated for several months, quite a business being done, but afterwards abandoned (Rec. 34-18396).

In respect to the statement made by the witness to the effect that these various corporations were operated according to the policy of the Trust Company, he stated that he meant that the officers of the Trust Company had such policies and that the operations of the Trust Company followed these policies (Rec. 34-18416).

The Belt stock, after it was exchanged for the stock of the Air Line and Union Companies, and after the consolidation of the Belt with the Consolidated, was largely held in Europe, and that which was held in this country was held principally in the east; the stockholders were numerous and scattered (Rec. 34-18416).

As to the building of the Northern Connecting Railroad, witness stated that it was his recollection that at the outset the Trust Company intended to construct the road, but afterwards it was decided to have the Belt Company build it. At the time the Connecting Company was incorporated, the securities issued by the Belt and its allied companies had nearly all been sold, and it was thought advisable by the officers of the Trust Company to have the Belt Company construct it, and that the Connecting Company would issue its securities, which would pass from the Belt to the Trust Company, and be marketed by it, and money realized therefrom. It was also his recollection that it was considered that the business of the Trust Company would be augmented in a profitable way, by organizing the Connecting Company, and getting its securities and marketing them, and that such was understood to be a con-
691 tinuation of the general policy, by which the Trust Company and its allied companies had been operated (Rec. 34-18432-'35).

The meetings of the Belt stockholders were usually arranged to be held about the same time as those of the Trust Company, and there were generally a small number present. The Trust Company would secure proxies from the non-resident shareholders, so as to have a majority present at the meetings, and these proxies would usually run to Stilwell, and he, as such proxy, would vote the stock at these meetings. Cone looked after the matter of obtaining a majority of the proxies, and he was instructed by Stilwell to keep

writing to stockholders until he had a majority. The statements usually presented at these stockholders' meetings were balance sheets, showing the assets, liabilities, earnings and expenses and the net result in surplus, but in those statements there would be no specification, showing the amount in detail, the amount of commissions or of interest, or of other charges by the Trust Company, and in the statements sent out to financial publications, or to stockholders, these matters would not appear in detail in any of those statements (Rec. 34-18437-'40).

(*e*) R. J. McCarty, in substance, testified that for five or six years he was auditor of the Gulf Railroad Company, and its receivers, becoming associated with the company in 1897, and continued while the receivership lasted. He was also auditor of the Connecting railroad, and of the Omaha, Kansas City & St. Louis, and Quincy, Omaha & Kansas City, all of said roads being under the same general management and control (Rec. 25-13147-48). The offices of the Gulf and of the Trust Company were on the same floor of the general main office building of the Trust Company, but in adjoining rooms. He had frequent dealings with the Trust Company officers, who were joint officers of the Trust Company and Gulf Company, but, in their dealings, they did not distinguish themselves as officers of one company from that of the other, so that very often communications from either company would be on the letter-head of the other; and, it was frequently difficult for him to decide whether he was dealing with an officer of the Trust Company or of the railroad company. He knew that Stilwell was the controlling spirit of all these different enterprises, the Trust Company, the Belt Company, the Gulf Company, the Connecting Company, and the other lines, was an organizer and promoter of various enterprises, and whatever he wanted done, or decided, was done.

There were services for switching rendered to the Connecting Company by the Belt and Gulf, from month to month, for
692 which bills were rendered, but unpaid, and notwithstanding that fact these roads continued to render services to the Connecting railroad until the receivers were appointed for the Belt, and witness resigned as auditor for the Connecting Company. After the bills were due and not paid, and prior to appointment of receivers for the Belt, these bills kept piling up right along (Rec. 25-13253-'60).

(*f*) A. L. Howe, in substance, testified that, early in 1890, he was appointed assistant secretary of the Belt Company, and continued as such until the year 1900, and, during all that time, he was informed and instructed that in all financial transactions any instructions that should be given by Cone or Wilcox, of the Trust Company, should be accepted and followed accordingly; that during the month of July, 1899, Wilcox gave instructions that certain minutes should be placed upon the minute books of the Belt Company, whereby a large number of shares of stock of various railroads and other companies, should be turned over to the Trust Company, and that, in pursuance of such directions, he, witness, signed said minutes, and the stocks were turned over to the Trust Company;

that it was a matter of frequent occurrence that the affairs of the Belt, particularly the financial affairs, would follow a course indicated and directed from communications received from Cone or Wilcox, and, in pursuance of such instructions, entries would be placed upon the Belt books, in accordance with instructions (Rec. 49-30245-46).

(*g*) J. T. Nolthenius, in substance, testified that he entered the employ of the Trust Company in 1891, became assistant treasurer in 1896, and fourth vice-president, and so continued until the year 1899, when he was elected third vice-president of the Trust Company; that, in July, 1899, Wilcox, assistant treasurer of the Trust Company, called upon him as treasurer of the Belt Company, to turn over to the Trust Company a large amount of stocks and bonds of the Union, Consolidated, Air Line, and Connecting, and other companies, belonging to the Belt Company; that, he, witness, objected, but owing to the position then held by the Trust Company in relation to the affairs of the Belt Company, his objection was overruled, and said stocks and bonds were turned over to the Trust Company, in connection with a certain indebtedness then held by it against the Belt; that during all the time he was with the Trust Company, and in the year 1900, the minute books, seals, stock books, stock ledgers and bond ledgers of the Belt Company, Consolidated Company, and the various other companies, were made up by employees of the Trust Company, kept in the vaults of the Trust Company, and in its care and custody, and under its direc-
693 tions and supervision (Rec. 49-30248-49).

(*h*) James H. Pickering, in substance, testified that he became superintendent of the Belt Company in February, 1892, continuing as such until March, 1899, and his duties also extended over the Consolidated Union and Air Line. Shortly after becoming acquainted with Stilwell in 1890 or 1891, the latter advised him in respect to the terminal facilities of the Belt road, and with reference to extending the Belt into the West Bottoms, and around into Kaw Valley. At that time, neither the Consolidated nor Union had been constructed, nor their franchise obtained. Witness was then interested in a railroad, known as the Kansas Circular Railway, and the franchise for which was granted in Kansas City, Kansas, and he went to Stilwell and Mosher, in the Trust Company's office, and made them a proposition for the purchase of these franchises, and in going to see Stilwell and the others at the office of the Trust Company, he supposed he was dealing with them as officers of that company. The proposition made by Stilwell and others to acquire the franchise of the Kansas Circular Company was rejected, and thereafter, upon the suggestion of witness, a franchise was obtained for the Union Terminal railroad over practically the same ground as that of the Kansas Circular Railway (Rec. 35-18590-'93).

That he was a stockholder and director in the Union Company and attended its annual meetings, but never attended any directors' meetings, other than annual meetings, nor was he ever notified of any such meetings, and he did not know of any such meetings ever having been held (Rec. 35-18601). That the first time he ever

heard or saw the contract for the building of the Union Terminal by the Belt (appearing at pp. 7308-'10 of the record), was a few days before he testified, when his attention was called to it by counsel, and, as a director of the Union Company, he never ratified or approved the contract, nor was it ever submitted to him for his inspection or approval (Rec. 35-18603).

He was elected director of the Union Company in 1896, and was in Kansas City all the time, except about two months' absence in England in 1898 (Rec. 35-18606-'06), and, as a director of the Union Company, he never ratified or approved the contract for the extension of the Union Terminal to a connection with the Santa Fe railroad, neither was such contract presented to him for inspection or approval (Rec. 35-18606-'08). As a director of the Union Company the contract appearing in Johnson's exhibit 155, page 7879, for building certain spurs into the packing houses, was never submitted to him for his approval or ratification (Rec. 35-18612). As to the entry appearing at page 3941 of the record, being for 250 Union bonds for extension to the Stock Yards, he was
694 familiar with that extension, but as a director never knew anything about it, and never ratified or approved it (Rec. 35-18625-'26).

The contract, appearing at page 7890 of the record, dated July 6, 1898, providing for certain facilities for the St. Louis & San Francisco Railroad Company, and the St. Joseph & Grand Island Company, was never submitted to him as a director of the Union Company, for his approval or ratification (Rec. 35-18627); nor, as a director of the Union Company, did he ever ratify or approve giving to the Belt 350 bonds for any purpose, this being the transaction whereby the Belt received from the Union 350 bonds for the purpose of clearing up the floating indebtedness of the Belt (Rec. 35-18641-42).

He was frequently in conversation with officers of the Trust Company, and knew that it financed various other companies, in addition to the railroad companies, and Stilwell would frequently send for him to take prospective purchases of the Company he was promoting, over the Belt Line, so as to explain to them the good features of that system; and he often heard Stilwell call Cone or Wilcox and give them instructions for making charges against the Belt, or this or that road, and tell them to use the money of one company for another company to help it out; that it was a frequent occurrence to hear instructions as to charging one company and crediting another (Rec. 35-18671-73). Later on, it became a custom for the heads of the various departments of the railroad company, and the officers of the Trust Company, to lunch together at the office of the Trust Company, and at that time, the business of the various companies, that is, the Air Line, Union, Gulf, and all the collateral companies, 30 or 40 of them, would be discussed, and at such conferences, Stilwell was the only man who gave any instructions as to the affairs of the Trust Company and the various railroad companies, which he had organized. "Stilwell was always the supreme dictator and issued the instructions, and we obeyed

them. We would advise him, and he would take our advice, just as he pleased."

He, Stilwell, always looked after the interest of the Trust Company first, before that of the railroad companies or any of the other companies; that he, witness, had heard Stilwell, while discussing some contemplated railroad enterprise, in connection with these railroads, state that the Trust Company should make so much out of the deal, and he would then outline the plan (Rec. 35-18673-'79).

While witness was a Union director, Mosher was vice-president of the Trust Company, and, on one occasion, witness had a
695 conversation with Mosher about the cost of the Union Terminal, and Mosher informed him that it was a matter that did not concern the witness; that at that time he was a director of the Union Company, and making inquiry as to the cost of the road (Rec. 35-18679-'83).

As a director of the Belt Company, he was never consulted in matters that concerned him as a director, and, when present at one of the Belt meetings, he was not asked to pass upon any matters, as the resolutions had already been propared, and upon being submitted were passed in a very few minutes; nor was he consulted in advance of the meeting as to any such matters (Rec. 35-18683-'88).

Prior to the construction of the railroad of the Connecting Company by the Belt, Stilwell told him that the Belt was to undertake the construction of the road (Rec. 35-18688).

The Fruit Auction Company was organized by the Trust Company, and operated by it, and was used to handle fruit and carload lots of oranges from California, and they maintained a daily auction of fruit for several months (Rec. 35-18767).

The Air Line paid the expenses of running Fairmount Park, the expenditures reaching large proportions. While the Park was being operated, Stilwell frequently sent for witness to take out to the Park prospective investors for the securities of the company. In talking to Mosher, regarding the enormous expenditures at the Park, he told witness [*he*] was the policy of the Trust Company to make as good showing as possible, in order to show that their enterprises were in a flourishing condition, and that there was a large amount of travel over the Air Line, the intention being to create as good an impression as possible on proposed investors in the securities which the Trust Company was promoting (Rec. 35-18857-'61).

(*i*) E. L. Martin, testified, in substance, that the Trust Company acted simply in the capacity of a financial agent for the various companies allied with it, and marketed most of their securities. His attention being called to a former statement in his testimony to the effect that the Trust Company was the financial sponsor and backer of the Belt and other railroad companies, and that there was a mutual interest between it and these other companies, he stated that what he meant was that the Trust Company was the source, from which the finances were raised to build all the railroads, constructed by those companies. Generally speaking, the Trust Company sold practically all the securities of such companies, and A. E.
696 Stilwell was the active man, who gave general direction to the sales in this country and in Europe (Rec. 55-33665-'69).

He, Stilwell, did not always fix the prices for the securities. This was frequently done by the companies, respectively interested, or their officers, after consultation on the subject of prices. When Stilwell went east with general authority to do the best he could, he would be authorized to fix the selling price. The securities were sold sometimes at a profit, other times at a loss. There were mutual interests between the Trust Company and the Belt and other Companies, and the Belt was liberal in its dealings with the Trust Company, "did not cut cents in two"; and Stilwell, Taylor and Mosher did everything that was legitimate in being liberal to the Trust Company (Rec. 55-33666 and 33727).

Martin further stated that the Trust Company financed the Gulf road in the same general manner that it financed the other railroads, that investors were brought to Kansas City for the purpose of going over these roads, and make an examination of them; that he was president of the Construction Company which built the Gulf road, that the stock of the Construction Company, after being used to build the roads of the Suburban Company and Air Line, was cancelled and re-issued to take up the construction of the Gulf Company on the south end; that the first construction company organized to build the Gulf was the Missouri Construction Company, then the Philadelphia Construction Company, succeeded the Missouri Coal & Construction Company, and the Arkansas Construction Company succeeded the Philadelphia Construction Company. The Gulf exploitation started about 1890, and continued until 1899, and during that time, the Trust Company was handling the securities of all these various railroads and construction companies, and placed them upon the market, and also handled the securities of the Belt, Union, Consolidated and Air Line, as well as various other companies, in which the Trust Company was interested.

Officers and Directors of the Companies Associated with the Trust Company.

5. Respecting the identity of the different persons, who were incorporators, officers and directors of the various allied companies, associated with the Trust Company up to the year 1900, reference is made to the following records:

Wilcox's testimony, Rec. 34-18263 to 18278, 18408 to 18411, 18424 to 18427, 18448 to 18449.
Telfer's testimony, Rec. 17-8981 to 8988, 8692 to 8697.
Martin's testimony, Rec. 55-33833 to 33850.
Pickering's testimony, Rec. 35-18590 to 18600.

697 For a list of the Trust Company officers and directors for the years 1899 to 1900, see Rec. 11-5694 to 5705; and, for the Trust Company stockholders, at various dates see Rec. 48-28944 to 29069. For a list of the officers and directors of the various other companies, see Rec. 12-6647 to 6677.

Construction Company.—The articles of association of the Construction Company will be found in Rec. 13-6967 to 6971. All the

officers and directors of the Construction Company, shown by their minutes (Rec. 13-6966 to 6977), covering the period from its incorporation, and during the time it was building the railroads of the Suburban Belt and the Air Line, were either officers, directors or stockholders of the Trust Company (Rec. 41-22473 to 22581; Rec. 48-28944 to 28069).

It is shown that 2137 shares of the total 3000 shares of the Construction Company stock, issued for the building of the Suburban Company's road, were held by stockholders, or officers or directors of the Trust Company (Rec. 42-22492), and that out of the 2000 shares Construction Company stock to be issued to the Belt and Air Line, 1446 shares stood in the name of the record stockholders or officers of the Trust Company, and in the name of the Trust Company itself (Rec. 12-6652).

Suburban Company.—The articles of association of the Suburban Company are in Rec. 52-30301 to 30305. The names of the incorporators, officers and directors of the Suburban Company up to June 1, 1899, will appear in Rec. Vol. 18-9138-'39; and, by reason of changes made in the names of the officers and directors, between June 1889, and May 9, 1890, the old officers and directors of the Suburban Company, who were not officers and directors of the Construction Company, had been replaced by officers and directors of the Trust Company, and Construction Company, with three exceptions (Rec. 52-31246-'47, 31255-'59; Rec. 11-5694-'95). At page 6661 of Rec. 12, a list is given of the Suburban Company directors and officers up to the time of the consolidation with the Consolidated Company, and all of these Suburban officers and directors were officers and directors of the Trust Company, with the exception of A. L. Howe, who was a brother of a stockholder of the Trust Company.

Consolidation of Suburban Company and Consolidated Company.

The articles of consolidation will appear in Rec. 52-31309 to 31317. All the officers and directors of the Belt Company (being the company occasioned by the consolidation of the Suburban Company and the Consolidated Company), were officers, directors or employees of the Trust Company, except Bowen, Shipley and A. L. Howe. Bowen being a Trust Company shareholder, and Howe a brother of a large Trust Company shareholder and director. The directors and officers of the Belt Company, from the date of the consolidation up to the year 1899, were officers, directors or employees of the Trust Company, (Rec. 12-6662-'65). As shown by the Belt minutes (Rec. 52-31433-'35), the old Belt directors and officers resigned, and new officers and directors of the Belt Company were elected, that had no connection with the Trust Company. In this connection, counsel for complainant called the Master's attention to Belt minutes in Rec. 52-31373 to 31378, 31395 to 31399, 31399 to 31405, 31413 to 31418, and 31432, and showing these pages of the minutes O. K'd by the following initials: "C. W. H." or "E. E. *E.*" or ',A. C. R." or R. H. S."; the initials C. W. H.

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being those of Charles W. Hastings, and the initials R. H. S. being those of R. H. Stewart, and E. E. D. being the initials of E. E. Dearborn, and A. C. R. being the intials of A. C. Robinson, all being Trust Company employees. These memoranda have naturally suggested the inquiry by complainants' counsel, why should the Belt minutes be O. K'd by Trust Company employees.

Consolidated Company.—The articles of incorporation of the Consolidated Company are in Rec. 52-31305 to 31309. All of the incorporators of the Consolidated Company, except one Whipple, were Trust Company directors, officers or employees, and all of the officers and directors of the Consolidated Company, from its incorporation up to its consolidation with the Suburban Company, were officers, directors or employees of the Trust Company, with a few exceptions (Rec. 12-5669). The Trust Company paid for the incorporation and filing fees of the incorporation articles of this company, and, also for its seals, stock registers, stock certificates, and all of which payments, made by the Trust Company, were charged to the Consolidated Company (Rec. 26-13745-'52).

Air Line.—The articles of incorporation will be found in Rec. 15-8007, and all of the Air Line incorporators were either officers, directors or employees of the Trust Company, except A. L. Howe, who was a brother of a Trust Company shareholder and director, and C. R. Barnhart, who was the superintendent of the Belt Company (Rec. 12-6651-'54). As shown by the Trust Company's account with the Air Line (Rec. 49-29655), the Trust Company paid the legal fees, and other expenses of incorporation, and prospectus, amounting to $675.00, which were, in May, 1891, credited by the Trust Company to the Air Line, and charged by the Trust Company against the Construction Company.

699 Union Company.—The articles of incorporation of this company are in Rec. 21-10919; and all of the incorporators of the Union Company were officers and directors of the Trust Company, except J. H. Pickering, who was superintendent of the Belt Company, O. D. Hall and William Thompson, residents of Kansas City, Kansas, and suggested by Pickering, and J. J. Spencer, in the employ of the Belt, as right-of-way agent (Rec. 12-6655 to '68). It is shown that the Trust Company paid out for the Union Company divers sums on account of the incorporation expenses, promotion services, retainer fees, newspaper publications, etc., all of which items were charged by the Trust Company against the Consolidated Company (Rec. 3-628, 655, 667, 683, 718).

Elevator Company.—The articles of incorporation will be found in Rec. 14-7387, and all of the incorporators, officers and directors of the Elevator Company, as shown in Rec. 12-6666-'7, were either officers, employees, stockholders or directors of the Trust Company, except A. L. Howe, a brother of a Trust Company stockholder and director. The Trust Company's account with the Elevator Company (Rec. 45-30059) shows that it paid for the articles of incorporation, and the other expenses incident to the incorporation, all of which were charged by the Trust Company against the Elevator Company. In this connection, attention has been called to the minutes of the

Elevator Company in Rec. 43, at pages 22944-45, '48, '49, '50 and '51, which are O' K'd by the following initials. "A. C. R." and "C. W. H.", these being the initials of A. C. Robinson and Charles W. Hastings, who were Trust Company employees.

Central Company.—The articles of incorporation of the Central Company will be found in Rec. 18-9158. A list of the directors and officers of the Company, down to the year 1900, will be found in Vol. 12-6068-69, and they were officers, directors or employees of the Trust Company. The minutes of the Central Company (Rec. 43-22969-71, '76 and '77) were O. K'd by the following initials. "A. C. R." and "C. W. H." being the initials of A. C. Robinson and Charles W. Hastings, who were Trust Company employees. The Trust Company paid the incorporation expenses, and for stock book and seal of the Company, all of which were charged by the Trust Company to the Central Company (Rec. 30-16130).

Amusement Company.—The articles of incorporation will be found in Rec. 16-8343. A list of the incorporators, directors, and officers of the Amusement Company, from its incorporation down to the year 1900, are in Rec. 12-6670-71, and they were officers and employees of the Trust Company, except A. L. Howe, a
700 brother of a Trust Company stockholder, and Neil S. Doran, who was auditor of the Belt. The minutes of the Amusement Company were O. K'd by the initials "C. W. H.", being the initials of Charles W. Hastings, a Trust Company employee (Rec. 43-22989-'94).

Connecting Company.—The articles of incorporation of the Connecting Company are in Rec. 15-8165. A list of incorporators, directors, and officers of the Connecting Company from its incorporation to the year 1899, shows that all of them were either officers, directors or employees of the Trust Company, with a few exceptions (Rec. 12-6672-'75). All the incorporation expenses were paid by the Trust Company, and afterwards charged to the Connection Company.

Townsite Company.—A list of the incorporators and directors of the Townsite Company, from the date of its incorporation to 1900, is shown in Rec. 12-6676, and all of them were officers, directors or employees of the Trust Company, which paid for the incorporation expenses, amounting to $314.82, and charged the same to the Belt Construction. The Townsite Company minutes (Rec. 43-22920-'29) are O. K'd by the initials "C. W. H." and "R. H. S." being the initials of Charles W. Hastings and R. H. Stewart, who were Trust Company employees.

Gulf Company.—The articles of incorporation will be found in Rec. 21-10940. All the incorporators were either officers, directors or employees of the Trust Company, except two, and the directors and officers of the Gulf Company, from its incorporation to the year 1899, at the time of the appointment of the receivers for the Gulf Company, were officers, directors, employees or stockholders of the Trust Company, with a few exceptions, varying from one to five in these different years.

Realty Company.—All of the incorporators, directors and officers of the State Realty Company, from 1892 through 1899, were officers,

directors or employees of the Trust Company (Rec. 47-28466). Wilcox states that all the stock of the State Realty Company was owned by the Trust Company.

Improvement Company.—The articles of association will be found in Rec. 21-10935, and show a total capitalization of $300,000.00 divided into 3000 shares. All of the incorporators, officers and directors of the Improvement Company, from its incorporation to the year 1900, were officers, directors, employees or stockholders of the Trust Company (Rec. 12-6647-'50). Wilcox states that no salaries were paid to Improvement Company officers for 1892, and,
701 prior to that time, there was only $300.00 paid out for salaries, and that the books of the company were kept by the employees of the Trust Company (Rec. 47-28203, 28314-15).

Willey, in his testimony (Rec. 47-28221) shows that as early as September, 1892, the Trust Company was a subscriber and paid for 500 shares of the 3000 shares of the Second Street Improvement Company stock; that Martin, in May, 1890, had 200 shares of this same stock, and that Taylor held 60 shares of the same stock. The Trust Company paid $175.00 for filing fee and expenses of the articles of incorporation of the Second Street Improvement Company, which were charged against the Improvement Company (Rec. 12-6475).

Fruit Auction Company.—The articles of incorporation are in Rec. 34-18244, and all of the incorporators, officers and directors were officers and directors of the Trust Company, and the expenses of the incorporation were paid by the Trust Company, and by it charged to the Fruit Auction Company.

II.

The Incorporate Relations of the Trust Company and Belt Company Arising Out of Their Having One or More Common Directors, and, as Affecting the Question of the Alleged Domination and Control of the Trust Company Over the Belt Company.

In the foregoing references to the proofs in the record, respecting the relations between, and the course of business of, these two companies, the Master has endeavored to fairly and fully present, for the consideration of this Court, the more important facts, or combination of facts, which have been relied upon by complainants to support their domination and control theory. Their counsel have, with great industry, complied, and furnished to the Master, a printed brief of legal authorities, of approximately 500 pages, which exhaustively treats of "Intercorporate Relations", "Liability of Promoters" and "Laches", the three important propositions, specially involved in the determination of the issues raised in the second ancillary bill. The character or nature of the kind of domination and control, which complainants contend that the Trust Company and its domniating officials exercised over the Belt and constituent companies, and their alleged subservient directors, and officials, clearly appears in those portions of the bill hereinbefore mentioned.

Complainants' counsel asserts the following propositions of law, as decisive of the issues in this cause.

702 First. All contracts or transactions between two corporations, having one or more common directors, are voidable at the election of either corporation, without the necessity of inquiry as to their fairness, subject to the usual limitations that the right of avoidance must be exercised with reasonable promptness, and that the adverse party must, so far as practicable, be put in statu quo.

Metropolitan, etc., Railway Co. v. Manhattan Railway Co., et al., 11 Daly, 375.
Fitzgerald v. Fitzgerald & Mallory Const. Co., 41 Neb., 374.
Fitzgerald v. Fitzgerald & Mallory Const. Co., Rehearing, 44 Neb. 463.
Wardell v. Union Pacific Railroad Company 103 U. S., 651.
McGourkey v. Toledo, etc., Railway Co., 146 U. S. 536.
Dickerman v. Northern Trust Co., 176 U. S. 204.
Bridgens v. Savings Bank 66 Fed., 9.
Bill v. Western Union Telegraph Co., 16 Fed., 14.
Thomas v. Peoria & R. I. Ry. Co., 36 Fed. 808.
Jackson v. McLean, 36 Fed. 213.
Currier v. New York, etc., R. R. Co., 35 Hun., 355.
Barr v. New York, etc., R. R. Co., 125 N. Y., 263.
Munson v. Syracuse, etc., R. R. Co., 103 N. Y. 58.
Sage v. Culver, 149 N. Y., 241.
Jacobs v. Mexican, etc., Company, 93 N. Y. Supp., 776.
Pearson v. Concord Railroad, 62 N. H., 537.
Memphis etc., R. Co. v. Woods, 88 Ala., 630.
Finch Company v. Stirling Company, 187 Pa. St., 596.
Gilman v. Kelly, 77 Ill., 426.
Attalla Iron Ore Co. v. Virginia Iron Co., Ill. Tenn., 527.
O'Connor v. Coosa Co., 95 Ala., 614.
Goodin v. Verdugo, etc., Co., 138 Cal., 308.
German National Bank v. First National Bank, 55 Neb., 86.
McLeod v. Lincoln Medical College, 98 N. W., 672 (Neb.).
Coombs v. Barker, 79 Pac., 1 (Mont.).
Thompson, Corporations, Vol., 3, Secs. 4079, 4082.
Morawetz, Corporations, 2nd Ed., Vol. 1, Sec. 520.
Clark & Marshall, Corporations, Vol. 3, Sec. 760.
Hoffman Co. v. Cumberland Co., 16 Md., 394.

Second. A majority stockholder who actually controls the Board of Directors, though not himself a member of the Board of Directors, stands in the same fiduciary relation to the corporation as does its Board of Directors, and contracts or transactions made with him are likewise voidable at the election of the corporation.

Authorities hereinabove cited in first paragraph; and

703 Meeker v. Winthrop Iron Co., 17 Fed., 48.
Ervin v. Oregon, etc., Co., 27 Fed., 625.
O'Connor v. Virginia, etc., Company, 92 N. Y. Supp., 525.

Third. Similarly, where one corporation dominates and controls another, the corporation so dominated and controlled may avoid all contracts and transactions entered into between the two corporations.

Authorities cited above in first and second paragraphs; and

Earle v. Seattle, etc., Railway Co., 56 Fed., 909.
Pondir v. New York, etc., R. R. Co., 72 Hun., 384.
Glengary Mining Co. v. Boehmer, 28 Colo., 3.
Farmers Loan & Trust Co. v. New York, etc., Ry. Co., 150 N. Y., 410.
Pittsburg, etc., Ry. Co., v. Dodd, 115 Ky., 176.
Robotham v. Prudential Ins. Co., 64 N. J. Eq., 673
Miner v. Belle Isle Ice Co., 93 Mich., 97.
Ryan v. Leavenworth, 21 Kan., 270.

Fourth. The promoters of a corporation stand in a fiduciary relation towards it from the moment they begin its organization, and, if after beginning its organization, they purchase property at one price and turn it over to the corporation at a higher price, the corporation, at least where it has not been provided with an independent and impartial Board of Directors, free from the influence and control of the promoters, or full disclosure of all material facts has not been made to such Board of Directors, may compel them to account to it for the profit so made by them, or may, if it choose, rescind the whole transaction.

Bagnall v. Carlton, L. R., 6 Ch. Div., 371.
Emma Silver Mining Co., v. Grant, L. R., 11 Ch. Div., 918.
in re Olympia, L. R. (1898), 2 Ch. Div., 153.
Dickerman v. Northern Trust Company, 176 U. S., 181.
Hayward v. Lesson, 176 Mass., 310.
Exeter v. Sawyer, 146 Mo., 302.
South Joplin Land Co. v. Case, 104 Mo., 572.
Woodbury Heights Land Co. v. Loudenslager, 43 Atl., 671 (N. J.)
Plaquemines Tropical Fruit Company v. Buck, 52 N. J. Ep., 230.
Pittsburg Mining Company v. Spoiner, 74 Wis., 307.
Brewster v. Hatch, 122 N. Y., 349.
Simons v. Vulcan Oil & Mining Co., 61 Pa. St., 202.
Getty v. Devlin, 54 N. Y., 403.
Densmore Oil Company v. Densmore, et al., 64 Pa. St., 43.

704 Fifth. Promoters may also be compelled to account for any other secret profits, whether in the form of commissions, or otherwise made at the expense of the corporation which they promote.

Cases cited in fourth paragraph; and

Emma Silver Mining Co. v. Lewis & Son, L. R., 4 C. P. Div., 396.
Chandler v. Bacon, 30 Fed., 538.
Central Land Company v. Obenchain, 92 Va., 130.
Fountain Spring Park Company v. Roberts, 92 Wis., 345.
Groel v. United, etc., Co., 61 Atl., 1061 (N. J.).

Sixth. Corporations which undertake the promotion of other corporations stand in the same relation toward them as do individual promoters, and transactions between them are subject to the same rules.

In re Leeds and Hanley Theatres, etc., L. R. (1902), 2 Ch., 809.
Rubins v. Pressed Steel Co., Atl., 1050 (N. J.).

Seventh. Upon similar principles, a corporation which is dominated and controlled by another corporation may compel such other corporation to account for all profits made by reason of its domination and control of the first corporation, in all cases where rescission is impracticable or is not desired by the first corporation.

Fitzgerald v. Fitzgerald, etc., 41 Neb., 374.
Fitzgerald v. Fitzgerald, etc., Co., (Rehearing), 44 Neb., 463.
Ervin v. Oregon etc., Co., 27 Fed. 625.
Thomas v. Peoria, etc., Co., 36 Fed. 808.
Currier v. New York, etc., R. Co., 35 Hun., 355.
Pondir v. New York, etc., R. Co. 72 Hun., 384.
O'Connor v. Virginia, etc., Co., 92 N. Y. Supp., 525.
Jacobus v. Diamond, etc., Company, 88 N. Y. Supp., 302.
Loewenstein v. Diamond, etc., Co., 88 N. Y. Supp., 314.
Goodin, v. Cincinnati, etc., Co., 18 Oh. St., 169.
Montgomery Traction Co. v. Harmon, 140 Ala., 505.
Gilman v. Kelly, 77 Ill., 426.
Pittsburg, etc., Railway Co. v. Dodd, 155 Ky., 176.
Goodell v. Verdugo Canon Water Co., 138 Cal., 308.
German National Bank v. First National Bank, 55 Neb., 86.
Ryan v. Leavenworth, 21 Kan., 270.
Beeny v. Moeller, 59 Atl., 97 (N. J.).

Eighth. Laches is not a question of time alone, but depends upon the existence of circumstances, making it inequitable
705 to grant relief after the lapse of time, and it is not to be imputed to one whose failure to act promptly was cause- by lack of knowledge of the facts giving him a right to act; nor is laches readily imputed to a cestui que trust, who fails to proceed promptly against an unfaithful fiduciary through reliance on the fiduciary's faithfulness.

Morgan v. King, 27 Colo., 539.
Montgomery Light Co., v. Lahey, 121 Ala., 131.
Oliver v. Lansing, 49 Neb., 338.
Bryan v. Kales, 134 U. S., 126.
Galliher v. Cadwell, 145 U. S., 368.
Halstead v. Grinnan, 152 U. S., 412.
Townsend v. Venderwerker, 160 U. S., 171.
Penn. etc., Insurance Co. v. City of Austin, 168 U. S., 685.
Hoffman Co. v. Cumberland Co., 16 Md., 456.
Bent v. Priest, 86 Mo., 475.
Pomeroy Equity, 3rd Ed., Vol. 2, Sec. 917.
Kessler & Co. v. Ensley Co., 129 Fed., 397.

Krohn v. Williamson, 62 Fed., 869.
McInture v. Pryor, 173 U. S., 38.
Anthony v. Campbell, 112 Fed., 212.
Barron v. Rhinelander, 1 Johns. Ch. 550.
Rhinelander v. Barron, 17 Johns., 538.

Ninth. Laches will not be imputed to a corporation which is dominated and controlled by another corporation for failure to act immediately in avoidance of a transaction between the two corporations, provided it acts with reasonable promptness when freed from the domination and control of such other corporation.

Metropolitan etc., Ry. Co., v. Manhattan Ry. Co., 11 Daly, 375.
Fitzgerald v. Fitzgerald, etc., Co., 41 Neb., 374.
Fitzgerald v. Fitzegerald, etc., Co., (Rehearing), 44 Neb., 463.
Gilman v. Kelly, 77 Ill., 426.
Goodell v. Verdugo, etc., Co., 138 Cal., 308.
German National Bank v. First National Bank, 55 Neb., 86.
Pacific Railroad Co. v. Missouri Pacific Railway, *Ill.* U. S. 505.
Ryan v. Leavenworth, 21 Kan., 270.

Excerpts from the Aforesaid Cases.

Tenth. For the convenience of the Court, the following excerpts are taken from a few of the above mentioned leading authorities cities by complainants:

In Metropolitan, etc., Railway Co. v. Manhattan Railway Co., et al., 11 Daly, 375, the Court say:

706 "The language used by the Court in its opinion in Twin Lock Oil Co. v. Marbury, 91 U. S. Sup. Ct., 587, seems, certainly, to sustain the views of the learned counsel for the defendant upon this point. The court says 'That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court, and in others. Koehler v. Black River Falls Iron Co., 2 Black, 715; Drury v. Cross, 7 Wall., 299; Luxemburg R. R. Co. v. Maquay, 25 Beav., 586; The Cumberland Co. v. Sherman, 30 Barb., 553; 16 id., 456. The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represened by the party claiming under it. We say, this is the gneral rule; for there may be cases where such contracts would be void ab initio; as when an agent [so] sell buys of himself and by his power of attorney conveys to himself that which he was authorized to sell. But, ever here, acts which amount to a ratification by the principal may validate the sale."

Again:

"I think, therefore, that the undoubted rule of law in this state is, that every contract entered into by a director with his corporation may be avoided by the corporation within a reasonable time, irrespective of the merits of the contract itself.

But we are asked, does this disability extend to the case of a contract between two corporations, some of whose directors hold that office in each corporation?

I can see no difference in principle between the case of a director contracting with his corporation and that of directors of one corporation contracting with themselves as directors of another corporation. The evils to be avoided are the same; the temptations to a breach of trust are the same; the want of independent actions exists, and the divided allegiance is just as apparent."

In Fitzgerald v. Fitzgerald & Mallory Const. Co., 41 Neb. 374, a part of the syllabus is as follows:

"Where the officers of a corporation responsible for its management, are shown to have abused their trust, to the great damage of such corporation, in the interest of another corporation, of which they were then, and still remain, managing officers, any
707 stockholders of the corporation wronged may bring an action in his own name for the benefit of the wronged corporation against the other corporations above referred to for the redress of such grievance, and for an accounting between said corporations; and for these purposes may properly join both corporations as defendants."

The Court says:

"The trial court found, as we have seen, that since April 6, 1887, the organization of the Denver, Memphis & Atlantic Railroad Company had been under the control of the Missouri Pacific Railway Company, and that its officers and directors had acted in the interests and under the direction of the said Missouri Pacific Railway Company. To complete the responsibility of the Missouri Pacific Railway Company for the unwarranted discount of $500,000 enforced against the Construction Company, it is necessary to note but another finding of the Court, which was that since November 3, 1886, "Three of the Directors of the Construction Company, together with its treasurer (R. J. Cross), have been directly or indirectly interested in the defendant railroad company; have acted in the interest of said railroad company, in all matters concerning the management of said Construction Company where the interests of the railroad company and the Construction Company came in conflict." This finding is, of course, upon conflicting evidence, but it has ample support. It would subserve no useful purpose to fortify these facts as to the domination of the Missouri Pacific Railway Company over the Denver, Memphis & Atlantic Railway Company by an extended analysis of the testimony which would be indispensable for that purpose, but which, while scattered through an immense volume, which gathered and considered, fully sustains the findings made."

Again:

"In argument, it is tenaciously contended, however, that the long acquiescence of the Construction Company effected the same result. There was no finding of such acquiescence by the Court. Indeed, there could not be, consistently, with the finding that the Construction Company was dominated in all things by the officers of the Missouri Pacific Railway Company."

In Rehearing, Fitzgerald v. Fitzgerald & Mallory Co., 44 Neb. 463, it was held:

"Persons who are directors of two corporations have no implied authority to bind either by contracts with respect to subjects
708 in which their interests are adverse, and all such agreements, unless subsequently ratified, may be avoided at the suit of non-consenting stockholders."

Again:

"Acquiescence in a fraudulent transaction is, in effect, a new agreement, made consciously with an intent to condone the wrong done, and will not be inferred from doubtful evidence, but should be established like any other material fact by the party asserting it. We are referred to no positive actindicating acquiescence in this instance, the only claim being that it should be inferred from the time intervening between the date of the action complained of, and the institution of the suit, to-wit, 1 year, 10 month- and 17 days. Time alone, unaffected by other circumstances, will not bar the right to rescind a voidable transaction, since it is not for a wrong doer to impose extreme vigilance and promptitude as conditions to the exercise of the rights of the injured party. Pol. Cont., 546; Pence v. Langdon, 99 U. S., 581; Montgomery v. Pickering, 116 Mass., 227; Tarkington v. Purvis, 128 Ind., 187, 25 N. E., 879; Moxon v. Payne, 8 Ch. App., 881; Foley v. Hoity, 41 Neb., 563, 59 N. W., 781.

See also Missouri Pacific Ry. Co. v. Fitzgerald, 160 U. S. 556, for report of this case in the Supreme Court of the United States."

In Wardell v. Union Pacific Railroad Company, 103 U. S., 651, the Court say:

"Hence, all arrangements by directors of a railroad company to secure an undue advantage to themselves at its expense by the formation of a new company as an auxiliary to the original one with the understanding that they, or some of them shall take stock in it and then that valuable contracts shall be given to it, in the profits of which they as stockholders in the new company are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration. Great Luxembourg Ry. Co. v. Magnay, 25 Beav., 586; Benson v. Heathorn, 1 Y. & Col. C. C., 326; Flint R. R. Co. v. Dewey, 14 Mich., 477; European Ry. Co. v. Poor, 59 Me., 277; Drury v. Cross, 7 Wall., 299."

In Dickerman v. Northern Trust Co., 176 U. S., 204, the Court say:

"In those cases where the scheme or organization gives the pro-

moters the power of selecting the directors who are to repre-
709 sent the company in the proposed purchase, they are bound to select competent and trustworthy persons who will act honestly in the interests of the shareholders. A purchase made from the promoters under these circumstances will not bind the company unless it was a fair and honest bargain. Morawetz, Priv. Corp., Sec. 546; New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div., 73; Brewster v. Hatch, 122 N. Y., 349, 25 N. E., 505; Simons v. Vulcan Oil & Min. Co., 61 Pa., 202, 100 Am. Dec., 628; Twycross v. Grant, L. R. 2, C. P. Div., 469, 503; Whaley Bridge Calico Printing Co. v. Green, L. R. 5 Q. B. Div., 111; Thompson, Liability of Officers & Agents, 218, Sec. 20".

In Bridgens v. Savings Bank, 66 Fed. Rep., 9, Judge Philips in that case stated the general rule applicable in equity as follows:

"It is a settled rule of equity jurisprudence that the directors and agents of two companies are disqualified from representing both companies in a transaction where the interest of the two companies are opposed, nor will one corporation be permitted to form a company ancillary to the original one, and contract with it to the disadvantage of the creditors and stockholders of one of the companies. Mor., Priv. Corp., Secs. 529, 530. And a court of equity will, in such case, notwithstanding the apparent legal effect of such transfer and transaction between two such corporations, treat the same according to the real facts and equities of the case. McVicker v. Opera Co., 40 Fed., 861; Interstate Tel. Co. v. Baltimore & O. Tel. Co., 51., Fed., 49; Trust Co. v. Kneeland, 138 U. S., 414, 11 Sup. Ct., 357; Day v. Telegraph Co., (Md.) 7 Atl., 608."

In Meeker v. Winthrop Iron Co., 17 Fed. Rep., 48, the Court says:

"The ownership of a majority of the capital stock of a corporation invests the holders thereof with many and valuable incidental rights. They may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests to the injury of other corporators. Any contract made by them in behalf of their principal with themselves or with another for their personal gain, would be voidable at the option of the company."

In Thomas v. Peoria & R. I. Ry. Co., 36 Fed. Rep., 808, the Court say:

710 "The court cannot, consistently with any sound principle of equity or of public policy, recognize the contracts between the Western Car Company and the Peoria & Rock Island Railway Company, one dated March 1, 1872, and the other dated October 1, 1873, as the basis of accounting between the parties to this cause. The officers and individuals dominating the Car Company were substantially the same officers and officials that dominated the railroad company. For every purpose of business, the masters of the lessor company were also masters of the lessee company. Those who con-

trived and directed the making of the leases in question in behalf of the car company must, under the circumstances disclosed by the record, be deemed to have contracted simply with themselves in reference to the monthly rental of its cars, and the terms upon which they were to be used by the railroad company."

In Jackson v. McLean, 36 Fed. Rep., 213, (Circuit Court, Eastern Division, Eastern District of Missouri), the Court say:

"From the foregoing statement of the contents of the bill it appears that the profits of the enterprise, to which the complainant lays claim, and with respect to which he desires to have an account taken, were all realized from a contract made by himself and McLean with the railroad corporation, for the building and equipment of its road, and beyond all question that contract was constructively fraudulent. Complainant himself was one of the directors of the corporation when the contract was executed. The remaining directors were clerks of McLean, who had become directors at his request, merely to represent his interest and execute his orders. They had no personal interest in the corporation or in the enterprise in which it was engaged, and were not even the beneficial owners of the respective shares of stock that stood in their names. According to the showing made by the bill, Jackson and McLean were the real managers and directors of the company, but, notwithstanding that fact, they caused the company to enter into a contract with themselves, or rather with their representatives, for the building and equipment of the road, by which the company parted with all of its stock, mortgage bonds, and other available assets, for what plainly appears to have been an inadequate consideration. The contract was manifestly an improvident one, so far as the corporation was concerned, but, without reference to that fact it was obviously fraudulent and unlawful, for the reason that both Jackson and McLean, by virtue of their relation to the corporation, were incapable of making an agreement with it. It is hardly necessary to add that the law would lend no sanction to the agreement made by them with the
711 corporation, even though the bargain had not been detrimental to the company".

In Currier v. New York, etc., R. R. Co., 35 Hun. (N. Y.), 355, the Court say:

"If it was the fact that those defendants did control the actions of the railroad company, either through their own acts or those of their associates as directors thereof, it is plain that since they also controlled the Construction Company they were simply contracting with themselves, and that the railroad company was helpless in their hands. It requires no argument to demonstrate that a contract made under such circumstances was presumptively fraudulent." Citing N. Y. Cent. Ins. Co. v. Nat. Protection Ins. Co., 14 N. Y., 85, and other cases.

In Lowenstein v. Diamond etc., Company, 88 N. Y., Supp., 313, in an action by the minority stockholders of the Diamond Company, on behalf of the company, the Court, in granting similar relief, say:

"The facts stated in our other opinion show that the Diamond

Company is dominated and controlled by the American Company, a rival corporation engaged in the same line of business. The contracts made and relations established between the Diamond Company and the American Company were made and established by the directors, who were such at the time of the commencement of this action. The relief demanded and awarded is the cancellation of the contracts between the companies, the severance of their relations, and an accounting to the Diamond Company, for the damages sustained by those contracts and relations which the directors made, established or ratified, and the execution and continuance of which they permitted."

In Memphis etc., Railroad Company v. Woods, 88 Ala., 630, 16 Am. St. Rep., 81, the Court say:

"Although, as we have said, directors of a pecuniary corporation may not be trustees in the technical sense of that term, they are under the same restraints, and labor under the same disabilities, which rest on trustees proper, so far as questions raised by the present bill are concerned. When personal interest antagonizes the disinterestedness and impartiality which the law, as well as morality, exacts in the exercise of fiduciary trusts, this is per se, a disqualification, not by reason of any abuse committed, but in fear that weak human nature will yield to temptation. Justice Field, speaking of the conflict between duty and interest, says: 'Constituted as humanity is,
in the majority of cases duty would be overborne in the strug-
712 gle.' March v. Whitemore, 21 Wall., 178; Nathan v. Thompkins, 82 Ala., 437; Gr. Luxembourg Ry. Co. v. Magnay, 25 Beav., 586."

In Gilman etc., R. R. Co., v. Kelly, 77 Ill., 426, a portion of the syllabus is as follows:

"It is illegal for directors of a railway company to become members of a company with whom they have made a contract to build and equip the road, so as to share in the profits, and if they do, they will, in equity, be compelled to account for profits realized."

Again, the Court say:

"No ratification will estop the principal, unless he has been made aware of all the material facts and circumstances of the transaction that would in any way influence his mind *of* affect the value of the contract. Hofman Steam Coal Co., v. Cumberland Coal and Iron Co., supra; Cockrell v. Cholmelly, 1 Russ. & Mylne, 418."

In Atalla Iron Ore Company v. Virginia Iron Company, 111 Tenn., 527, 77 S. W., 774, the Court say:

"The principle here announced authorizes the annulment of a contract such as the present one, if seasonably challenged, without regard to whether it is favorable or unfavorable to the complaining principal."

In O'Connor v. Coosa Co., 95 Ala., 614, the Court say:

"If the same persons, as directors of two different companies, represent both companies, in a transaction in which their interests are opposed, such transaction may be avoided by either company, or at the instance of a stockholder in either company, without regard to the question of advantage or detriment to either company. Both

the corporations are armed with the right to repudiate such a transaction no matter how fair and open it may be shown to be. Railroad Co. v. Woods, 88 Ala., 630, 641, 7 South. Rep., 108. But the duty which disqualifies the directors from binding the corporation by a transaction in which they have an adverse interest is one owing to the corporation which they represent and to the stockholders thereof."

In Glengary Mining Company v. Boehmer, 28 Colo., 3, 62 Pac. Rep., 839, the syllabus is as follows:

"Where a mining corporation purchases a majority of the stock of another mining corporation, and by so doing is able to elect a directory under its control, and secure a bond and lease of the property of such corporation on its [*oen*] terms and conditions, such lease
713 and bond will be set aside at the suit of minority stockholders of the latter corporation, though obtained without any actual fraud."

In Pittsburg etc., Railway Co. v. Dodd, 115 Ky., 176, 72 S. W. Rep., 822, the court say:

"In this case the complaint shows a contract between two corporations having directors in common, both dominated by the same controlling interest, and that one of them has reaped material advantage over the other because of the former's breach of the contract, which the directors of the latter refuse to sue to redress. * * * To close the doors of the courts to a single stockholder in such a case upon the theory that the majority must rule, and that, having embarked in a common enterprise with them, he must abide the judgment of the majority, would be to turn over to a possible wrong doer the adjudication of his own case. In such an unequal struggle between duty and interest, it would more frequently happen that 'duty would be overborne in the conflict.' It is clear to us that upon the allegations in the petition in this case a cause of action was shown against the Pan Handle Company."

In Miner v. Belle Isle Ice Co., 93 Mich., 97, a portion of the syllabus is as follows:

"A ratification of his own act by a majority stockholder and his dummies, who constitute a board of directors, cannot purge it of its fraudulent character."

In Thompson's Commentaries on the Law of Corporations, Vol. 3, Section 4079, the author says:

"A contract between two corporations, where the same persons are directors and officers in both, is probably not bad in law; since by a fiction of law the corporation is a person distinct from the individuals who compose it. But here, as in most other matters in respect of corporations, the weakness of what is called law, in clinging to fiction, is supplied by the strength of that part of the law which is called equity, in cutting through forms and getting at the substance of things."

In Section 4081 the author says:

"A better view is, that such contracts are voidable, although there was a quorum in each board of directors who were not directors in the other. This view is founded upon experience and rests upon

the well known opportunities for fraud which exist where all the members of each contracting body are not in a situation to think and act freely for their own constituents without being swayed by any considerations in behalf of the other, and upon the right of
714 those directors who are disinterested to be able to consult with a full board, whose allegiance, like their own, is clear. Accordingly it has been held that a contract between a railroad and a construction company is void, in the sense that it cannot be made the foundation of equitable relief when any of the directors of the railroad company are members of the construction company; and that the fact of long acquiescence on the part of the stockholders of the railroad company makes no difference. Citing Thomas v. Railroad Co., 109 U. S., 522, s. c., 1 McCrary, 392, and 2 Fed., 887; Barr v. New York R. R. Co., 5 N. Y. Supp., 623; s. c., 52 Hun., 555; also Bunnell v. Empire Laundry Co., 24 N. Y. St., 675; s. c., 5 N. Y. Supp., 591."

Section 4082 of the same volume, is as follows:

"Clearly a contract between two corporations is voidable in equity at the suit of either corporation or its representative, where the same persons were directors of both corporations. Citing, Bill v. Western Union Tel. Co., 16 Fed., 14."

In Morawetz Corporations, 2nd Ed., Vol. 1, Sec. 520, the author says:

"It is clear that the directors of a railroad company have no right to make contracts on behalf of the company for the construction or equipment of its road by a construction company in which they are interested as shareholders, and even if they were not interested in the construction company at the time when the contract was entered into they would have no right to become shareholders thereafter and continue to act as directors of the railroad company. Their interest in adding to the profits of the construction company by allowing the railroad to be built cheaply and imperfectly would be opposed to their duty to the railroad company to insist upon a strict performance of the contract and a careful construction of the road."

In Clark & Marshall, Corporations, Vol. 3, Sec. 760, the authors say:

"No principle in the law of corporations, therefore, is founded on sounder reasons, or more surely settled, than the principle that the directors, trustees, or other officers of a corporation, who are intrusted with its interests, and occupy a fiduciary relation towards it, will not be allowed to contract with the corporations, directly or indirectly, or to sell property to it, or purchase property from it, where they act both for the corporation and for themselves. In such a case the transaction is, at the very least, voidable at the op-
715 tion of the corporation; and, it may be voided and set aside, or affirmed and any profits recovered, without proof of actual fraud, or of actual injury to the corporation * * * It has also been held in a number of cases that the doctrine applies to a contract or other transaction between two corporations, where the directors or other officers of one of them, or some of the directors or officers

of one of them, are also stockholders or directors or officers of the other."

In Dickerman v. Northern Trust Company, 176 U. S., 181, the court say:

"The promoter is the agent of the corporation and subject to the disabilities of an ordinary agent. His acts are scrutinized carefully, and he is precluded from taking a secret advantage of other stockholders. Cook, Stock & Stockholders, Sec. 651." * * *

"In those cases where the scheme of organization gives the promoters the power of selecting the directors who are to represent the company in the proposed purchase they are bound to select competent and trustworthy persons who will act honestly in the interests of the shareholders. A purchase made from the promoters under these circumstances will not bind the company unless it was a fair and honest bargain."

In Yeiser v. U. S. Board & Paper Co., 107 Fed., 340; 46 C. C. A., 567; 52 L. R. A., 724, the opinion by Severens, C. J., Circuit Court of Appeals, Sixth Circuit, is in part as follows (p. 344):

"It is a well settled principle of equity that those who participate in bringing about the organization of an incorporated company, and in getting it in condition for transacting the business for which it was organized, assume the obligations of a trust toward the company and those who shall be invited to come into the enterprise as stockholders and share in its fortunes. The latter have the right to rely on the good faith and fair dealing of those who have promoted the company, and to assume that they have not perverted the organization by secret means to the accomplishment of selfish purposes, and the destruction of that equality of right which in the absence of some known modification, all the stockholders are entitled to enjoy. Indeed, some of the decided cases hold a wider doctrine, and declare that whether the promoter becomes a stockholder himself or not, he owes a like duty to those who became such, and cannot, by covert manipulation of the company while it is under his control, and without the faculty of acting for itself, take a personal profit from his dealings with it. The recognition of a fiduciary relation in such circumstances is merely for the application
716 of a familiar principle of equity, which fastens a trust upon one who has such power over another and his affairs as to give the former an opportunity to make personal gains in his dealings with them * * * Of course these observations do not apply to a case where the corporation, having knowledge of the facts and freedom of action, consents to a contract proposed by another, even though he may be a stockholder or director. The corporation could not in such case complain, nor could a stockholder, if there had been no actually fraudulent purpose towards him * * *. When, on August 23, 1896, Browne and Stuart made their proposition to sell the mill to their company, and they and their co-operating associates, acting as the board of directors, accepted it for the company, the company was completely in fetters. While it was made to be a purchaser, it was dominated by the seller. It had no organ for seeing, hearing, or even knowing what was going on.

Its whole constituency was engaged in bringing about the sale for the sellers. We have, on several occasions, held that where one who assumes to act as the agent of another in a given transaction is really acting as the agent of a third person, or in behalf of some scheme of his own, his apparent principal, having no knowledge of such alien purpose, is not bound by such pretended agent's acts, nor by any notice or knowledge of facts which such agent had at the time the transaction was going forward. Thompson-Houston Electric Co. v. Capitol Electric Co., 12 C. C. A., 643, 22 U. S. App., 669, 65 Fed, 341; Wilson v. Pauly, 18 C. C. A., 475, 37 U. S. App., 642, 72 Fed., 129, 134; Louisville Trust Co. v. Louisville N. A. & C. R. Co., 22 C C. A., 378, 43 U S. App., 550, 75 Fed., 433, 469."

In Hayward v. Lesson, 176 Mass., 310; 57 N. E. Rep., 656; 49 L. R. A., 725, the Court say:

"The defendants say that they did disclose the fact to the East Tennessee Land Company and they did get the consent of the East Tennessee Land Company to the payment of this $700,000 of stock to them for their remuneration as promoters, and that is not only enough, but it is final. It is true that the vote authorizing the issue of this stock to them as the profits which they were to have out of the organization of the company was voted unanimously by all the incorporators of the East Tennessee Land Company, and all who were then subscribers to its capital stock; that is, by all the persons who then had any interest in that corporation. That is to say, it is true that the fact that the promoters were to receive $700,000 of paid up capital stock as remuneration for their services was disclosed and consented to by all the persons who then had any interest in the corporation. But it is also true that at that
717 time, no person except the promoters had any interest in the corporation, barring one Mason, in whose name some of the options were subsequently taken, and who was plainly a mere nominee of the promoters, and that at that time no capital stock of the corporation had been issued to the public. Payment to promoters or remuneration for their services, is not made valid by a vote passed by the corporation, when the corporation is in the sole control of the promoters, before the capital has been issued to the public. Phosphate Co. v. Erlanger, 5 Ch. Div. 73; Erlanger v. Phosphate Co., 3 App. Cas., 1218; In re Olympia, (1898) 2 Ch. Div., 153; in re British Seamless Paper Box Co., 17 Ch. Div., 467, 471, 472. The persons to whom the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters; that is to say, the future stockholders."

In Morgan et al., v. King, 27 Colo., 539, 63 Pac. Rep., 416, the Court say:

"Conceding, however, that by the exercise of ordinary diligence upon the part of the plaintiff in connection with the affairs of the bank, he could not have acquainted himself with the sale, we are not aware of any rule of law which would require him to take these steps. He certainly was not required to assume that the agents of the bank charged with the management of its affairs would make

a wrongful disposition of its assets, nor does the law impose upon him any obligation to examine into the affairs of the bank for this purpose. If, in fact, the defendant directors have been wrongdoers, their relation to the plaintiff and the bank was such that they are not in a position to impose upon the plaintiff any considerable degree of vigilance in ferreting out their wrongs, as a condition precedent to his right to maintain an action against them on account of their wrongful acts. Fitzgerald v. Construction Co. (Neb.) 62 N. W., 899; Jenkins v. Hammerschlag (Sup.) 56 N. Y. Supp., 534; Light Co. v. Lahey Ala.) 25 South, 1006."

In Bent v. Priest, 86 Mo., 475, the Court say:

"Our statute of limitations applies to equitable, as well as legal causes of action, and we agree with counsel for the defendant that this cause [*underation*] should be considered in the light of the former equity rules, the place of which, in many respects, at least, it was designed to take. * * * Much, we think, depends upon the fact whether the fraud is a secret or open one. If the sub-
718 stantial facts constituting the fraud, in cases like the one under consideration, were open, it is believed, under the equity rules, the statute of limitations would have been applied at once, but if these facts were in their nature secret and were unknown, it is believed the statute would not begin to run until they were discovered, there being no want of diligence on the part of the complainant."

In Bryan v. Kales, 134, U. S., 126, Justice Harlan says:

"If, as contended by the defendants, a court of equity may deny relief because of laches in suing, although the plaintiff commenced his action within the period limited by the statute for actions at law, still the granting or refusing relief, upon that ground, must depend upon the special circumstances of each case."

In Galliher v. Cadwell, 145 U. S., 368, the Court say:

"But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the property or the parties."

In Rhinelander v. Barron, 17 Johns, (N. Y.), 538, the Court say:

"The Chancellor, therefore, correctly ordered the special reference to the master as before stated. Numerous cases go to show that accounts have frequently been ordered to be opened after a longer period than the present; where, as in this case, it appeared that undue advantage had been taken of the peculiar situation of the party. In Bosanquet v. Dashwood, (Cases temp., Talbut, 37), usurious agreements were made and repeated from 1710 to 1724. The accounts were ordered to be opened, and the demands reduced to money really lent. So in Vernon v. Vawdy, 2 (Atk., 119), the whole account was opened after a period of 23 years. The same principles governed the decision in a number of cases cited by the respondent's counsel, in the argument of this cause in the court below. (1 Johns, Ch., 555)."

In Ryan et al., v. Leavenworth, 21 Kansas, 270, the Court say:

"It was not necessary to allege that the Missouri River Railroad Company and the Leavenworth, Atchison & Northwestern Railroad Company, or either or them, did not discover the frauds of the defendants until within two years next before the suit was com-
719 menced, as the allegations of the petition show satisfactorily that these companies were, and continue to be under the actual potential control of the wrongdoers, who are necessary defendants, and knowledge on the part of the guilty officers and agents of the corporations of the fraudulent acts and conduct of themselves and guilty associates, is no notice to the corporation or its stockholders so as to give the advantage of this notice to such agents and associates."

In O'Brien v. Wheelock, 184 U. S., 450, the Court say (p. 493):

"The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief."

In Pomeroy on Equity Jurisprudence, 3rd Ed., Vol. 2, Secs. 917, 965, the author says:

"Sec. 917: Promptness—Delay through ignorance of the fraud.—The most important practical consequence of the two principles above mentioned is the requisitte of promptness. The injured party must assert his remedial rights with diligence and without delay, upon becoming aware of the fraud. After he has obtained knowledge of the fraud, or has been informed of facts and circumstances from which such knowledge would be imputed to him a delay in instituting judicial proceedingss for relief, although for a less period than that prescribed by the statute of limitations, may be, and generally will be, a bar to any equitable remedy. To this rule, there is one limitation; it applies only when the fraud is known or ought to have been known. No lapse of time, no delay in bringing a suit however long, will defeat the remedy, provided the injured party was, during all this interval, ignorant of the fraud. The duty to commence proceedings can arise only upon his discovery of the fraud; and the possible effect of his laches will begin to operate only from that time.

Sec. 965: Acquiescence and lapse of time—A second mode by which the remedial right may be destroyed and the transaction rendered unimpeachable, is acquiescence. The term "acquiescence" is sometimes used improperly. It differs from confirmation on the one side; and from mere delay on the other. While confirmation implies a deliberate act, intended to renew and ratify a transaction known to be voidable, acquiescence is some act, not delib-
720 erately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intending, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it. The theory of the doctrine is, that a party, having thus recognized a contract as existing, and having done something to carry it into effect, and to obtain or claim

its benefits, although perhaps only to a partial extent, and having thus taken his chances, cannot afterwards be suffered to repudiate the transaction and alleges its voidable nature. It follows that mere delay, mere suffering time to elapse, without doing anything, is not acquiescence is thus a recognition of and consent to the contract or for refusing equitable relief, either affirmative or defensive. As acquiescence is thus a recognition of and consent to the contract or other transaction as existing, the requisite to its being effective as a bar are, knowledge or notice of the transaction itself, knowledge of the party's own rights, absence of all undue influence or restraint, and consequent freedom of action; a conscious intention to ratify the transaction, however, is not an essential element. When a party with full knowledge, or at least with sufficient notice or means of knowledge of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. Even where there has been no act or language properly amounting to an acquiescence, a mere delay, a mere suffering time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands; laches are often a defense wholly independent of the statute of limitations. Promptness in asserting a remedial right against fraud is sometimes required; but no delay will prejudice a defrauded party as long as he was ignorant of the fraud. Each case involving the defense of delay or lapse of time must, to a great extent, depend upon its own circumstances."

Cases cited by Complainant Classified and Distinguished from the Case at Bar.

721 1. There are distinguishing features between the case at bar and that class of complainant's cases in which dissenting minority stockholders sought to prevent, by speedy, seasonable resistance the consummation or execution of an oppressive contract or course of conduct by the majority, by instituting proper proceedings to rescind a contract before its execution and before the status quo has changed, and in nearly all which cases, the prayer was for injunctive relief against offending directors. Of this class are the following cases, cited by complainant.

Met. Ry. Co. v. Manhattan, etc., Co., 11 Daly, 375;
Bridgens v. Bank, 66 Fed., 9;
Bill v. Western Union Tel. Co., 16 Fed., 14;
Meeker v. Winthrop Iron Co., 17 Fed., 48.

Earle v. Seattle R. R. 56 Fed., 909.
Pearson v. Concord, R. R., 62 N. H., 537.
Memphis R. R. v. Woods, 88 Ala., 630.
Glengary Mining Co. v. Boehmer, 28 Cal., 3.
Robothorn v. Prudential Ins. Co., 64 N. J., Eq., 673.
Pacific R. R. v. Mo. Pacific R. R., 111 U. S., 505;
and many other cases cited by complainants.

For example, in the case of Bridgens v. Savings Bank, 66 Fed., 9, decided by Phillips, Judge, the transaction challenged occurred on July 17th, 1893, and on the same day a receiver was appointed in insolvency proceedings. Within one month, the receiver demanded a rescission of the transaction which on its face was a gross fraud not only on stockholders but existing creditors. The transaction was a secret one, had never been entered on the books of either company, had never been reported to or ratified by the directors of either corporation, and the offending officer knew at the time of his wrongful act that the concern was on the eve of insolvency.

2. Nor is the case at bar analogous to that class of cases relied upon by complainants and involving secret and concealed frauds, and to which class belong Wardell v. U. P. R. R., 103 U. S. 651; Attala Iron Co. v. Virginia Iron Co., 111 Tenn., 527; Bridgens v. Bank, 66 Fed., 9, and many other cases cited by complainant's counsel. For example, in Wardell v. U. P. R. R. Co., supra, the contract had been entered into by the Executive Committee of the railroad company, had never been reported to the Board of Directors and had never been approved by them. This feature of that case was made the basis of distinguishment by Mr. Justice Harlan in Jesup v. R. R., 43 Fed., 483.

3. Nor is there any decided similarity between the case at bar and those relied upon by complainant's counsel, wherein the
722 corporation defendant was enabled to keep itself in control of the injured corporation through its ownership of a majority of the shares of the other company, and where the action was instituted by a diligent minority.

In the case at bar, the Trust Company at no time owned voting control of the railroad companies involved in this proceeding. To this class of cases belong Pittsburg R. R. v. Dodd, 115 Ky., 176; Miner v. Belle Isle Ice Co., 93 Mich., 97; Pacific R. R. v. Mo. Pacific Ry., 111 U. S., 505; Hoffman Co. v. Cumberland Co., 16 Md., 456; Farmers Loan & Trust Co. v. N. Y. & N. R. R., 150 N. Y., 410; s. c., 34 L. R. A., 76; McGourkey v. R. R., 146 U. S., 536, and other cases cited by complainant's counsel.

4. It has been strongly contended by counsel for the Trust Company that the class of cases cited by complainants, respecting the "liabilities of promoters", has no application to the case at bar, that such cases are simply declaratory of the well established doctrine that, where promoters buy property at a certain price and afterwards sell it for a greater price to a corporation, organized by them for the purpose of acquiring the property, they are legally bound to disclose to the corporation the price at which they bought; in other

words, while such promoters are prohibited from making a secret profit, they are not debarred from making a profit on their sale to the corporation, provided they make proper disclosures to it.

In this case it is questionable whether any of the transactions of the Trust Company with the Belt Company could be even inferentially brought within the application of the "secret profits doctrine", but, later on, further reference will be made to this subject in connection with certain items, which have been designated in the ancillary bill as of a promotion character. As an additional reason against the applicability of the promotion cases to the facts in this case, it is contended by respondent's counsel that no showings were made in those cases as to acquiescence, laches or long lapse of time, such as are proven to exist in the case at bar.

III.

The Master's Conclusions as to Certain Propositions of Law Applicable to the Facts in the Record.

After a careful examination of the cases, submitted by counsel for both parties, the Master has reached the following conclusions, in respect to the principal propositions of law, which have to be determined, preparatory to his findings upon the various questions to be decided in this cause.

723 First. "Rights of Receiver".

The rights of the complainant, as received of the Belt Company, being wholly derivative, are neither greater nor less than those of the Belt Company itself, and, hence, if the latter is barred or estopped by reason of the proofs in the record, so likewise is its receiver.

The receiver is authorized to sue in his own name to recover any assets of the company from one who has wrongfully misappropriated or wasted them with the connivance or assistance of the company's officers, under circumstances, similar to those stated in Alexander v. Relfe, 74 Mo., 495.

Generally speaking, however, and in the absence of an intention to defraud the corporate creditors, a receiver has no right of action for an alleged improper diversion of corporate funds, which was made by and with the consent of the stockholders, or subsequently ratified by them, while the corporation was solvent, and still a going concern. In an action by the receiver on any claim or demand, which is part of the receivership estate, any defense which might have been set up to an action by the corporation, may be asserted against the receiver.

Kessler v. Ensley Land Co., 148 Fed., 1019.
Graham v. R. R., 102 U. S., 148.
Lawrence v. Greenup, 97 Fed., 906.
Alexander v. Relfe, 74 Mo., 495.

Second. "Common Directors."

Where two corporations enter into a contract, through their re-

spective boards of directors, in which a majority of such directors are common to each board, such contract will not, necessarily, be declared void on that account, regardless of its fairness or of the benefits accruing to both or either of the contracting corporations, nor will the common directors, under such circumstances, necessarily come within the rigid rule of those cases, which hold that one, who acts in a fiduciary capacity, cannot deal with himself in his individual capacity; in other words, the right of two corporations to contract with each other is not absolutely impaired or destroyed by reason of the fact that a portion or a majority of the directors are common to both corporations, and to which corporations such directors owe fidelity. There is a marked distinction between the "want of power" and the "abuse of power."

Complainant's authorities, hereinbefore cited; and

724 Twin Lick Oil Co. v. Marbury, 91 U. S., 587.
Pneumatic Gas Co., v. Berry, 113 U. S., 322.
Omaha Hotel Co. v. Wade, 97 U. S., 13.
Jesup v. R. R., 43 Fed., 483.
Coe v. E. & W. R. R., 52 Fed., 531.
Robison v. McCracken, 52 Fed., 726, c. c. 57 Fed. 375.
Gould v. R. R., 52 Fed., 531.
Leavenworth v. C. R. I. & P. R. R., 134 U. S., 688.
R. R. v. Keokuk Bridge Co, 131 U. S., 381.
Barr v. R. R., 125 N. Y., 263.
San Diego, etc., R. R. v. Pacific Beach, etc., R. R., 112 Cal., 53, s. c. 33 L. R. A., 788 (and see elaborate note to this case in 33 L. R. A., collecting all the authorities).
Roberts v. Bank, 11 Wash., 550.
Davidson v. R. R., 11 App. Div. (N. Y.), 28, s. c. 58 Fed., 663.
Richardson v. Green, 133 U. S., 30.
Kitchen v. R. R., 69 Mo., 224.

In Twin Lick Oil Co. v. Marbury, supra, the statement is made that, "the property in controversy had been appropriated and used for the production of mineral oil from wells, a species of property which is, more than any other, subject to rapid, frequent and extreme fluctuations in value. The director who bought it committed no actual fraud, and the corporators knew at the time of his purchase all the facts upon which their right to avoid it depended. They refused to join him in it, or to pay the assessments then made on their stock; and it was nearly four years thereafter when the hazard was over, and his skill, energy and money had made his investment profitable, that any claim to, or assertion of right in, the property was made by the corporation, or the stockholders. Held that the court below properly dismissed the bill of complaint of the corporation."

Mr. Justice Miller, delivering the opinion of the Court, says:

"The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest had been so represented

by the party claiming under it. We say, this is the general rule; for there may be cases where such contracts would be void ab initio; as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell, But, even here, acts which amount to a ratification by the principal may validate the sale.

725 The present case is not one of that class. While it is true that the defendant, as a director of the corporation, was bound by all these rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open, and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those much interested in giving aid judiciously, and best qualified to judge of the necessity of that aid and of the extent to which it may safely be given.

The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may reasonably be done, after the party with whom the right is optional is aware of the facts which gave him that option, are numerous and well collected in the brief of appellees' counsel. The more important are as follows: Badger v. Badger, 2 Wall. 87; Harwood v. R. R. Co., 17 id., 78; Marsh v. Whitman, 21 id., 178; Vigers v. Pike, 8 Cl. & Pin., 650; Wentworth v. Lloyd, 32 Beav., 467; Follansbee v. Kilbreth, 17 Ill., 522."

In Jessup v. R. R., supra, a railroad company had leased all of its property to another railroad company, and the question involved was respecting the validity of the lease, which was the only transaction in controversy between the two companies, and not a series of transactions, as in the case at bar. Both of the companies had common directors, and the transaction was attacked on that account.

Mr. Justice Harlan, delivering the opinion of the Court, says:

"But to avoid misapprehension it is well to say that, in the judgment of the court, the lease would not have been void, even if a majority of the directors of the Dubuque Company occupied the same relations to the Cedar Falls Company that Jesup, James, Frost, and Smith did when the lease was made. It would, at most, have been simply voidable at the election of the Dubuque Company, or, in a proper case, at the suit of its stockholders, and that election must have been exercised, or that suit brought, within such time as was reasonable, taking into consideration the facts and circumstances of the case, including the nature of the property that was the subject of the lease."

726 In San Diego, etc., R. R. v. Pacific Beach, etc., R. R., supra, the syllabus, is as follows:

"1. The fact that some, or a majority, of the directors of two corporations, are common to both, does not make a contract between the companies absolutely void or prevent its ratification.

2. Ratification of a contract between corporations having common

directors is shown where one company has entirely performed its part of the contract, and the other has performed a part of it and cannot restore anything or place the other party, in whole or in part, in statu quo,—especially when the stockholders have expressly approved the contract.

3. Unanimous consent of all the stockholders is not necessary to the ratification of a voidable contract which a majority of them could have authorized in the first instance."

The Court say:

"The main contention of appellant for a reversal arises out of these facts; The respondent had five directors, and the appellant nine; and at the time the contract was made four of the directors of the appellant were also directors of the respondent, and it is also claimed that, before the completion of the contract, a fifth director of appellant—D. C. Reed—became a director of the respondent. A majority of the directors of both corporations were also stockholders in both, and the contention of appellant is that, because they were common directors of the two corporations as aforesaid, therefore the contract was absolutely void, and incapable of ratification. Respondent contends that upon the facts the contract was, at the most, only voidable, and that the appellant ratified it. Appellant also contends that, even though ratification were possible there was none. In this cause, there is no actual fraud, either alleged or found; and this distinguishes it from many of the cases cited by appellant. The contract seems to have been a fair, open one, and carried into effect before the eyes of all persons interested. Neither is there any question of ultra vires; and he also distinguishes the case from the cases cited by appellant. The court found that appellant's charter expressly gave it the power to make such a contract. See also on this point Vandall v. South San Francisco Dock Co., 40 Cal., 83. The contentions, therefore, at this point of the case, is that the mere fact that there were common directors, as above stated, of the two corporations at the time of the contract, makes it absolutely void; and this contention cannot be maintained.

727 Where two corporations, through their boards of directors, make a contract with each other, the directors who are common to both are not within the rigid rule of the cases which hold that one who acts in a fiduciary capacity cannot deal with himself in his individual capacity, and that any contract thus made will be declared void, without any examination into its fairness, or the benefit derived from it to the cestui que trust. Two corporations have the right, within the scope of their chartered power, to deal with each other; and this right is certainly not destroyed or paralyzed by the fact that some, or a majority, of the directors are common to both. Of course, if such directors should wrongfully and wilfully use their power to the prejudice of one of the corporations, their actions, if not acquiesced in, and if contested at the proper time, could be avoided, as in any other case of actual fraud. But such common directors owe the same fidelity to both corporations, and there is no presumption that they will deal unfairly with the other. Therefore, their acts as such common directors are not void.

In the notes to Section 658, Cook, Stock & Stockholders, 3rd Ed., there are many cases cited on the subject. They are not all in perfect harmony, but they abundantly warrant the statement in the text that 'this class of contracts certainly are not void.' See also Booth v. Robinson, 55 Md., 119; Kitchen v. St. Louis, K. C. & N. R. Co., 69 Mo., 224. The decisions of this court and of other courts, cited by appellant, are mostly in cases where trustees attempted to contract about the trust property directly with themselves, for their individual benefit, and not cases where corporations dealt with each other through common directors; or in case of ultra vires in the strict sense; or in cases where actual fraud was the ground of the alleged invalidity of the contract."

It has been suggestively stated, in Bill v. Western Union Telegraph Company, 16 Fed., 14 (cited by complainants) that the theory that common directors are incompetent to vote on a contract between the two corporations, arises from confounding the distinction between "want of power" and the "abuse of power."

In Leavenworth v. C. R. I. & P. R. R. Co., supra, the cardinal facts were: The Rock Island Company, had guaranteed the bonds of the Southwestern Company, and for a number of years, it, through its officers, owned and voted a majority of the stock in that company, but finally foreclosed the bonded indebtedness on the company's properties, and through a new corporation, organized in its interest, purchased at the foreclosure sale the Southwestern railroad. A bill was filed by a stockholder of the Southwestern
728 to set aside the decree for fraud, mainly upon the grounds that,

(*a*) One of the trustees in the mortgage was a director in the Rock Island;

(*b*) The President of the Rock Island was the President of the Southwestern;

(*c*) A majority of directors in the Southwestern were directors in the Rock Island;

(*d*) The President of the Rock Island held a majority of the stock of the Southwestern;

(*e*) The attorney who represented the Southwestern, had been attorney for the Rock Island, and after the foreclosure again represented the Rock Island;

(*f*) One of the attorneys in the foreclosure was at one time a director in the Southwestern.

The finding of the court was that at times the officers of the Rock Island did control the Southwestern Company for the purpose of making it a feeder for it, "but that this purpose was not necessarily a bad one." At the end of two or three years, it was found that the Southwestern Company owed the Rock Island Company over $1,000,000 for repairs, besides the interest on bonds, paid by it. Mr. Justice Miller, in delivering the opinion of the court, said:

"If it could be shown that the Southwestern Company did not owe this interest, or that the Rock Island had in its hands the means of the Southwestern Company to meet this obligation, and that by reason of collusion between those who controlled both companies,

this fact was suppressed or concealed, it would present a strong case for relief. But this would be actual fraud, and one not necessarily growing out of the influence of the Rock Island directory over that of the Southwestern. Notwithstanding this commingling of officers, the corporations were distinct corporations. They had the right to make contracts with each other in their corporate capacities, and they could sue and be sued by each other in regard to the contracts, and the question is not, could they do these things, but, have the relations of the parties—the trust relations, if, indeed such existed—been abused to the serious injury of the Southwestern?"

Relief was denied to the complainant.

It will be observed that in this Leavenworth case, the quotation from the opinion of the United States Supreme Court is in respect to actual fraud, such as collusion between those who controlled both corporations, to suppress or conceal something, and is not 729 intended to apply to the ordinary conditions which necessarily grow out of the influence of either directory upon the other, where two corporations are involved. In fact, the learned Judge recognizes and states that the corporations, being distinct corporate entities, have the right to make contracts with each other in their corporate capacities, and to sue and be sued in respect to such contracts so made, and it would seem to follow on principle, as the logical result of such authorities, even though the distinction has not been clearly made, that two corporations, having common directors, can make binding contracts with each other, just as two individuals could do, but subject to be avoided in case actual fraud is shown in their mutual transactions; in other words, that the corporate ability to act is complete and binding except only in cases of actual fraud to the detriment of the injured corporation.

In most of the "Common Director" cases, the controversy is between the injured corporation and the director, standing in a fiduciary relation to it and charged to have abused or violated his trust, and is not between two corporations, having such common directors. Complainants insist that there is no substantial difference, as affecting the principle involved, whether the injured corporation deals directly with the director, or through him with another corporation, which he serves to the detriment of the complaining corporation, Cases have been cited sustaining the view of complainant's counsel, and, yet, in the various ramifications of corporate transactions, and the division of the responsibilities cast upon each member of a directory, it does seem that there should be a difference between dealing with an unfaithful director, who has received all the benefits of the particular transaction, and, undertaking to open up and rescind transactions had with another corporation, simply because the two companies happen to have directors which are common to both; but in the determination of the issues in this cause, and the proofs in the record, as they appear to the Master, it is, perhaps, immaterial whether a distinction exists or not, respecting the measure of liability, in either case.

Third.—"Equity Rule." It is a well settled rule of equity jurisprudence that the directors, common to two corporations, are so far

disqualified to represent both, when the corporate interests are antagonistic, that they cannot absolutely bind either company, but that a court of equity will, "notwithstanding the apparent legal effect of the transfer and transaction between the two corporations, treat the same according to the real facts and equities of the case"; and, further, that a corporation will not be permitted to form an ancillary company and then contract with it to the advantage of
730 creditors and stockholders interested. Bridgens, v. Savings Bank, 56 Fed. Rep., 9, and cases therein cited.

Fourth.—"Aquiescence of Stockholders." In case a contract between two corporations, having a majority of directors in common, is of such nature that a court of equity would have set it aside, if it had been seasonably contested by non-assenting stockholders, yet if such stockholders either knew of such contract, or having the means of knowledge easily within their reach, "lie supinely by," and take no proper means to prevent its execution, they will be deemed to have acquiesced in the transaction, represented by the contract, and will be held estopped from attacking it. In the language of one of the leading cases, shareholders in such case "are not allowed to speculate at the risk of others on the unauthorized acts of their agents, with the privileges of adopting their acts, if the result prove favorable, and of repudiating responsibility in case of loss."

Morawetz Corp., Sec. 630.
Jesup v. R. R., per Harlan, J., 43 Fed., 483.
Foster v. R. R., 36 Fed., l. c., 637.
Pneumatic Gas Co. v. Berry, 113 U. S., 322.
Leavenworth v. C. R. I. & P. R. R., 134 U. S. 688.
Kessler & Co. v. Ensley & Co., 123 Fed., 546, s. c., 129 Fed., 397.
Twin Lick Oil Co. v. Marbury, 91 U. S., 587.
Coe v. R. R., 52 Fed., 53.
Kelly v. R. R., 141 Mass., 496.
10 Cyclopedia Law & Procedure, 1075.
San Diego, etc., R. R. Co. v. Pacific Beach Co., 112 Cal., 53, 33 L. R. A. 788.

In Jesup v. Illinois Cen. R. R. Co., supra, Mr. Justice Harlan says:

"Now it is said that during the whole period of 20 years while the Cedar Falls Road was controlled by the Illinois Central Railroad Company, Jesup was either president or in control of the Dubuque Company, had possession of its records and papers, and dominated its proceedings, and that it was not until he and the directors whom he controlled resigned in 1887 that the Dubuque Company was in a position or was able, to ascertain the facts, and take such steps as would right the wrong alleged to have been done to it in 1866. * * * "What facts?", the court asks, "It is inconceivable that the fact of the lease of the Cedar Falls road to the Dubuque Company, as well as the terms of the lease, were not known, or could not easily have been known, to every director and stockholder in
731 the Dubuque Company. If directors or stockholders of that company were ignorant for 20 years of the terms of the lease,

it was because they were guilty of the grossest negligence in not making inquiry on the subject."

Again:

"The proof satisfactorily shows that this report went to the stockholders of the Dubuque Company. But if there was no proof on the subject, it would be presumed at this late day that it was known to them, or that every stockholder could know, if he tried to know, all the facts. During all that time, the Debuque Company its offices and stockholders, have remained silent, not only leaving the Illinois Central Railroad Company to treat the lease of September 27, 1866, as valid and binding upon the Dubuque Company, and therefore to be assumed by the former company during its possession of the Cedar Falls road, but inducing, as may be reasonably inferred, the holders of the stock and bonds of the Cedar Falls Company to believe that the rental agreed to be paid by the Dubuque Company could be looked to as a security for the full term of 40 years. This silence and delay upon the part of the Dubuque Company cannot be excused upon the ground suggested in its answer, namely, that so long as the Illinois Central Railroad Company agreed to pay, and paid, the rent of the Cedar Falls road, it was of 'no moment' to the shareholders of the former company what was the amount of such rent. The suggestion assumes that the question of the continuance of the lease concerned only the Dubuque Company. But it was of moment to the Cedar Falls Company, its bondholders and creditors, to say nothing of its stockholders, to know whether that lease was to be carried out according to its terms, and whether the Dubuque Company intended to dispute its binding force. If, at the instance of the latter company, or of its stockholders, the lease had been abrogated shortly after it was executed, it may be that the Cedar Falls Company could have made with the other railroad corporations arrangements quite as favorable as those set forth in the lease.

The Dubuque Company had no right, therefore, to treat it as valid lease, to be respected by the Cedar Falls Company and by the Illinois Central Railroad Company, so long as the latter retained possession of the Dubuque road, but to be repudiated as soon as the Illinois Central Railroad Company ceased to be under obligation to assume it.

The suggestion that the acts entitling the Dubuque Company to a decree cancelling the lease could not have been discovered by it until its own road was turned back to it by the Illinois Central Railroad Company, and until after the election of new di-
732 rectors in 1887, has no substantial grounds upon which to rest. Here is a lease of a railroad which was treated as valid, and acted upon by all the parties concerned for more than twenty years. At the expiration of that long period, the lessee company asks a cancellation of the lease because of certain facts which it claims to have just found out, but which its stockholders and directors either knew or could easily have ascertained at any time within the past twenty years * * * Even if such ignorance existed upon the part of some of those who became stockholders of

the Dubuque Company after that corporation resumed possession of its road, but circumstance cannot shut out of view that those who were in any wise interested in the Dubuque road, either as directors or stockholders, when the lease of 1866 was made and for 20 years thereafter, knew or could easily have ascertained, all the circumstances attending the execution of that instrument, as well as the nature of its terms and conditions."

Again:

"Seasonable resistance cannot be predicated of a case of a merely voidable contract, where the party complained has not simply been silent for 20 years, but with knowledge of the facts, or with full opportunity to ascertain them, has enjoyed the fruits of the contract, and treated it as valid.

The court is of the opinion that, independently of any question as to the statute of limitations of Iowa, in which state the contract of lease was made, and was to be executed, the Dubuque Company is estopped to dispute the binding force of the lease of September 27, 1866, and, therefore, is not entitled to a decree of cancellation."

In the case of Pneumatic Gas Co. v. Berry & Another, supra, the court said:

"A release by a corporation of its directors of all claims equitable or otherwise, arising out of transactions under a contract between the corporation and the director, made in excess of its corporate powers, is valid, if made in good faith, and without fraud or concealment."

This is a case in which the corporation sought an accounting, not with another corporation (as in the case before us), but with certain directors with whom it had contracted, and afterwards asserted that such contract was void by reason of the fiduciary relation of the directors.

The Court said, again:

"A court of equity does not listen with much satisfaction to the complaints of a company that transactions were illegal which
733 had its approval, which were essential to its protection, and the benefits of which it had fully received. Complaints that its own directors exceeded their authority come with ill grace when the acts complained of alone preserved its existence.

But it is not necessary to rest our judgment of affirmance of the character of those transaction-. After seven years' acquiescence in the lease, something more must be shown than that it was executed in excess of the powers of the directors, before the lessee will be required to surrender the profits he has made under it.

The lease expired June 1, 1874; the disposition of the property was settled by the agreement of March 15, 1876; and the release is an answer to all claims for the profits made by the defendants. The release is of itself sufficient to justify the dismissal of the bill. There is no evidence that it was obtained by any fraudulent representations. Nothing was kept from the parties when it was executed. Indeed all the transactions between the defendants and the company, from the time they took from Frost an assignment of the lease, were open and well known. There was no concealment either had or

attempted, of anything that was done, and no just reason can be given for disturbing the settlement made."

In San Diego, etc., R. R. Co. v. Pacific Beach Co., supra, the court said:

"The contract, therefore, was not void; and assuming that it was voidable, and might have been avoided by the appellant at the proper time and in the proper manner, it is clear that it was no attempt to avoid it, nor any intimation of such intention, until long after the time mentioned in the contract had expired, and respondent had performed all its covenants therein provided, until long after appellant had received all the benefits coming to it from respondent's performance, and until long after it had become impossible to restore anything to respondent, or to put it, in whole or in part, in statu quo. And during this time appellant without objection paid, from time to time, the greater part of the principal and a large part of the interest which by the contract it had promised to pay; thus inducing respondent to perform the whole of its part of the contract in confidence that appellant would do the same. This, we think, under the circumstances of the case, constitutes ratification by acquiescence; for the rule is that a party can-
734 not repudiate the burdens of a contract while enjoying its benefits."

Fifth. "Actual Knowledge." Actual knowledge by the stockholders of the transactions in question is not essential, either to convict them of laches, or to conclude them by acquiescence. "Means of knowledge plainly within the reach of stockholders by the exercise of the slightest diligence is in legal effect equivalent to knowledge."

Kessler & Co. v. Ensley & Co., 123 Fed., 546.
Jesup v. R. R. 43 Fed., l. c., 503.
Wood v. Carpenter, 101 U. S., 143.
Porter v. R. R., 36 Fed., l. c., 637.
San Diego R. R. v. Pacific Beach, 112 Cal., 53.
Morawetz Priv. Corp., Sec. 630.

Morawetz says, in Sec. 630, of his work on corporations:

"Nor can the shareholders of a corporation avoid responsibility for the unauthorized acts of their agents by abstaining from inquiry into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefits of their acts in case of success. If a shareholder fails to take the trouble of inquiring into the affairs of the corporation of which he is a member, or to attend the meetings, it seems no more than just that his supineness should be construed as an acqui-scence in the proceedings of the majority."

In Jesup v. Illinois Central R. R. Co., supra, Mr. Justice Harlan makes this statement:

"Taking all the evidence together, the court must proceed upon the ground that means of knowledge, plainly within reach of stockholders by the exercise of the slightest diligence, is in legal effect equivalent to knowledge, and that the fact of the lease, as well as

its terms, were fully known to each stockholder and to every officer of the Dubuque Company for 20 years and more prior to this litigation."

Sixth. "Ratification." The contention of counsel for complainant that the transactions challenged could not be ratified except by the unanimous consent of all the shareholders of the Belt cannot be maintained. The corporation may ratify a transaction of its directors "either by the unanimous acquiescence of the shareholders, or by a vote of the majority, if the transaction is of such a charcter that the majority might have authorized it at the outset."

1 Morawetz Priv. Corp., Sec. 525.

Hotel Co. v. Wade, 97 U. S., 13.

735 Twin Lick Oil Co. v. Marbury, 91 U. S., 587.

San Diego R. R. v. Pac. Beach Co., 112 Cal., 53; 33 L. R. A., 788.

Kessler & Co. v. Ensley & Co., 123 Fed., 546, s. c., 129 Fed., 397.

In San Diego R. R. Co. v. Pacific Beach Co., supra., the court say:

"The contention of appellant that the contract could not be ratified except by the unanimous consent of all the stockholders cannot be maintained. The principle does not apply to acts which might have been authorized by a majority in the first instance. 'The corporation may, however, ratify an unauthorized transaction of its agents, and this may be done either by the unanimous acquiescence of the shareholders, or by vote of the majority if the transaction is of such a character that the majority might have authorized it at the outset.' 1 Morawetz Priv. Corp., 2nd Ed., Sec. 525, and the cases there cited. The rule is that the majority governs, and every stockholder contracts that such shall be the rule.

There is nothing in the contention that the ratifications were made without knowledge of what they meant. In the first place, this is not an action by individual stockholders to set aside a contract made by the corporation. The point is made by the corporation itself in a defense in which it seeks to violate its own obligation; and it would be absurd to say that it did not know what it was doing. But, if we assume in this action the corporation could shield itself between the ignorance of a few of its stockholders, it is clear that the latter knew, or ought to have known, the nature of the contract, and the circumstances attending it."

The counsel for the respondent Trust Company contend that under the authorities, it is not necessary that ratification by the Belt Company should be shown by any particular or peculiar act, but that a course of conduct and the retention of the benefits may be sufficient to make a valid contract by acquiescence; and, further that if a contract is bad for fraud, then it is voidable as a whole and cannot be adopted in part, and repudiated in part, by the Belt Company or its receiver, that they cannot play fast and loose with the rights of the Trust Company. Citing Barr v. R. R. 125 N. Y., 263, and authorities supra; and Sec. 632 of Morawetz on corporations, in which the author says:

"After a corporation has enjoyed the benefit of a contract or other arrangement, made in good faith, with any of its regular agents, it is but fair that every reasonable presumption should be
736 made in order to hold the transaction binding upon the company. Under these circumstances the acquiescence of the shareholders may often be presumed."

Seventh. "Duties of promoters." The foregoing classified contentions of complainants, as to the duties, liabilities and responsibilities of promoters, individual, or corporate, and especially as to the duty of providing the companies, promoted by them, with independent and impartial boards of directors, free from the control of the promoters, and, also as to the necessity of making full disclosures of all material facts to such boards, are sustained by the cases hereinbefore cited by complainants, in connection with such propositions.

Eighth. "Domination and Control." The authorities, submitted by complainants, go to support their propositions of law, to the effect that one corporation may, under proper circumstances, dominate and control another corporation through their common directors, and, also, that the dominating influence of a majority stockholder may actually control a board of directors, and, in such case, he stands in a fiduciary relation to the controlled corporation in like manner as does its board of directors.

Other legal questions in respect to the items in dispute, and the accounting generally, will be considered in connection with an examination of such items, and the liability, if anything, therefor, by the Trust Company, as charged in the ancillary bill.

IV.

As to Alleged Trust Company Domination of the Belt Company and other Companies.

The underlying theory, upon which complainants' bill is grounded, is that the Trust Company dominated and controlled the Suburban Company, afterwards the Belt Company, and its constituent companies, and also, the subsidiary companies named in the bill, by virtue of causing the employees, officers and directors of the Trust Company to be elected officers and directors of the Suburban Company, and other corporations, and thereby placing the agents, employees and officers of the Trust Company in charge of such companies, respectively, so that these companies might be dominated and controlled at the behest and in the interest of the Trust Company and, which complainants allege was done, continuously, through the period of years intervening between the incorporation of these companies and April, 1900, when what was known as the Stilwell management of the Belt and allied companies, lost control, and the Southern Company, and those associated
737 with it, acquired control thereof through the receivership and foreclosure proceedings, mentioned in the bill.

It is charged in substance, that the Trust Company caused the

incorporation of each and all said companies, and, at the outset, caused its own officers and employees to be elected as officers and directors of such companies, and that they became and were merely the agents or dummies of the Trust Company for the purpose of carrying out the objects of that company, and that such condition continued down to April, 1900, as above stated; that, by reason of such domination and control, the Trust Company caused the making and issuance of the stocks and bonds by the corporations named in the bill, and the delivery thereof to the Trust Company, and their sale and disposition by it, as stated in the bill; and, that, as a result of such domination, the Trust Company itself attended to the disbursement of all moneys which were realized from the sale of these bonds and stocks, including the disbursements in the construction and building of the lines of railroad of these companies, the nature of all of which charges of domination and control will more fully appear in those portions of the bill hereinbefore mentioned; and further, that all the items contested in this cause are subject to the same infirmity of Trust Company domination and control, and by reason of which, no proper accounting was ever had between the Trust Company, and the other companies interested, although the forms of accounting were had, from time to time, between them, and hence that, in a court of equity, an inquiry can be made into the merits of such items, and an accounting be had based upon the result thereof.

It will be observed that the allegations as to this domination and control are mostly of a general character, and are somewhat of the nature of conclusions from the proven fact that generally speaking, the majority of the directors of the corporations involved in this bill, were the agents, officers, or employees of some character, of the Trust Company. It is not disputed that elections were held, from time to time, by the stockholders of these various companies, and that, outside of their first corporate organizations, which were provided for in their articles of incorporation, the new directors were invariably elected by the stockholders in the ordinary way, but, it is claimed that the dominating control of the Trust Company, which began at the very beginning of the corporate life of these companies, continued throughout all their dealings with the Trust Company. It is proven, as hereafter shown, that at no time did the Trust Company, as a stockholder, own or have anything like a majority of the stock of any of the corporations involved
738 in this accounting; hence, its alleged influence and control over these companies were not derived from a majority stock ownership, and if they existed at all, they must be traced to some other cause.

It is difficult to understand how any particular set of directors and officers could continue to act for years for the Belt Company and other companies, if they were in fact under the pernicious domination of the Trust Company, and without a protest from either the majority or the minority stockholders. In this large record, covering a great part of all the transactions between the Trust Company and these other corporations, there is not disclosed

a single protest from any stockholder, prior to April, 1900, in respect to any of the dealings of the Trust Company with said corporations, and for that rason, it is difficult now, after the lapse of so many years, and changed conditions, to go back ten or more years prior to 1900 and endeavor to uproot a part or all such Trust Company transactions, when those then interested therein apparently acquiesced in them or expressly ratified them, and that, too, regardless of any Trust Company influence and domination over these corporations.

It has been suggested by counsel that a corporation has no more inherent right to complain that it was caused to be incorporated than a man has to complain that he *caused was* to be born, the difference between the two being that, while the human product is helpless at birth, and incapable of binding himself by contract, the corporate product is capable of acting on the day of its birth, the same as after many years of existence. The point intended to be made is, so it is claimed, that the bill does not show in what way or manner the Trust Company caused the Belt Company, and other companies, to be incorporated, or to do any of the acts complained of. While the bill may not be specific, perhaps, in respect to the methods used by the Trust Company, a small minority stockholder, and as to the motives that actuated it in so causing the incorporation of the various companies involved herein, yet the obvious meaning of the bill, as gathered from its recitals and the character of the transactions between the Trust and the Belt, and the other companies, as shown in the record, is that the Trust Company intended, in the organization of these companies, to bring into existence corporations, whose business transactions with it would inevitably lead to the benefit and advantage of the Trust Company, in the sale of their stocks and bonds, and otherwise in the numerous dealings, which are shown to have been entered into between it and these other companies. For the purposes of this cause it may be stated that the Trust Company is shown to have had a sufficient legitimate
739 interest in the future business of each and all of the companies alleged to have been incorporated by it, but which were really organized by friends of the Trust Company in the ordinary way, to have justified its active concern in assisting in their incorporation at the outset, by advancing the necessary expenses thereof, and otherwise endeavoring to place said companies upon a business basis, for all these things had to be done before they could possibly be made useful, either as feeders to the Trust Company or otherwise carrying out the business purposes, designed by their actual incorporators.

The Trust Company was the central and important and controlling corporation of the aggregation, known as the Stilwell companies, and which, in large measure, was influential in bringing into existence all the corporations, whose operations are involved in complainants' Bill, and which were substantially financed by it.

If there was any dominating control exercised in the controverted transactions between the Trust Company and any of these other companies, by reason of the mutuality of the officers and directors

representing the companies, so dealing with each other, it is evident from the proofs in the record, that such domination must have been on the part of the Trust Company, and not on the part of the subordinate companies.

From the foregoing statements of the witnesses, Cone and others, it cannot be questioned that A. E. Stilwell was the influential and dominant personage, who, more than any other person connected with it, outlined the polic-es of the Trust Company, and likewise, with E. L. Martin, and other associates, practically determined those of the railroad companies interested in this accouting.

It was his brain and genius and wonderful promoting and organizing ability, which conceived the idea of changing the original real estate corporation, known as the Real Estate Trust Company, into a great brokerage and commercial company, known as the Guardian Trust Company, for the very purpose of financing the large railroad interests which he saw could and must be built up in Kansas City, and which afterwards culminated in the Gulf and Belt systems. In the nature of things, the commanding influence of such a man must necessarily have been felt in all the enterprises, in which the Trust Company became interested, and his opinions and wishes were very influential whether intended to be of a dominating nature or otherwise, respecting the dealings of such companies with the Trust Company; and, while his opinions and wishes were at all times respected by his business associates,
740 yet, after a thorough examination of the large and cumbersome record in this cause, the Master is convinced that, in the conduct of the Trust Company, in its dealings with the Belt and other companies, in respect to the items in controversy, the proofs do not show such conditions as should authorize a finding to the effect that the Trust Company has been unfair and oppressive in such transactions, in view of the surroundings of the parties at the time thereof, notwithstanding the fact that [*if*] may have received, and did, in fact, receive large compensation for its services, in the way of commissions, trustee fees and bonuses. The Trust Company was instrumental in the making of these other companies, financing their enterprises, and thereby materially aiding their business activities by successfully manipulating the sale of their stocks and bonds.

A striking feature, respecting the relations of these companies with the Trust Company, is the fact that they were all, in a sense, more or less inter-dependent upon each other; for example, the Suburban railroad, and other roads, comprising the Belt system, were all built by separate corporations, and each contributed to the importance and earning capacity of the others. The same thing may be said as to the Southern and Belt systems, in their relations to and with each other. The subsidiary companies were likewise organized to serve supposedly useful purposes in connection with the building up of the business of the railroads, which were the more important corporations. Hence, there was a gigantic combination of friendly interests to be cared for, harmonized and made productive of substantial earnings for the stockholders who had made

investments in the securities of these different companies. The depreciation of the securities of one company would materially influence or affect the market value of those of one or more of the other companies, and so on through the series of companies, to a greater or lesser degree. Hence, it will be readily seen that the Trust Company, in order to harmonize and preserve the best interests of all these companies, as an aggregation of friendly, and not antagonistic, corporate interests, must necessarily have been more or less influential in the affairs of each and all of them, but it does not follow that, in carrying out the beneficial interests of such companies in a legitimate business way, their respective directories were controlled in the interests of the Trust Company, or were unfaithful to their trust, and authorized or sanctioned the making of contracts with the Trust Company, which were unfair, oppressive or inequitable. It was to the self interest of all such companies to assist and encourage the Trust Company in all proper ways, in its efforts to market their securities, so as
741 to provide the funds necessary for their respective business operations. In the judgment of the Master, that was the intention of all the interested parties, at the time the disputed transactions were conducted, though it is evident from the testimony of E. L. Martin and others, that there was at all times manifested a friendly disposition to deal "liberally" with the Trust Company. In view of the then prevailing financial conditions shown in the record to have existed at the time that the Trust Company financed these companies, by disposing of their stocks and other securities, it is very doubtful whether it would have been possible for these companies, as separate institutions, and wholly disconnected with the combination or union of interests, providing for an entire system of railroad transportation, and known as the Stilwell roads, to have made any substantial headway in selling their securities. As individual roads, standing alone, "commencing nowhere, and going nowhere," as stated by one of the witnesses, the securities of the different roads comprising the Belt system could not reasonably have been sold on the market for as much as they did bring as a part of the entire system. The promotion and financing methods of Stilwell's were unique and pushed so aggressively that foreign, as well as domestic markets were opened up for these securities, and the expenses, attendant upon his successful exploitation of such securities, were exceedingly large, and way beyond the ordinary range of commissions for selling the securities of going and established concerns, as is abundantly shown by the proofs in the record.

A thoughtful consideration of all the facts and circumstances connected with the promotion, construction and operation of the railroads known as the Stilwell system, will reasonably lead to the conclusion that, while the Trust Company was the principal or central institution, around which all the Stilwell enterprises and activities more or less revolved, and was intended to be liberally compensated for its great services financing such enterprises, yet that the stockholders interested in these various companies were satisfied with what was done, and, so far as shown by this record, did not indicate that they

had any just ground of complaint against the Trust Company by reason of anything which it had done, or caused to be done, in connection with the promotion or development of any of the enterprises, on account of which the items in controversy have arisen.

The proofs in the record materially distinguished this case from the following line of cases:

742 (*a*) Where a coterie of men get the controlling interest in a corporation, then elect themselves, or their dummies, or agents, as directors for it, and, with fraudulent intent, caused these companies to enter into contracts or transactions with themselves, or others conniving with them, to the ultimate prejudice of the minority stockholders; or

(*b*) Where a set of men, having the voting control of two corporations, in one of which they have a larger stockholding interest than the other, cause, with fraudulent intent, such corporations to enter into contracts with each other, which are grossly favorable to the one, in which they are more largely interested, and to the prejudice of the other, and thereby enriching themselves at the expense of such other company and its stockholders; or

(*c*) Where one company purchases or otherwise controls a majority of stock in another company, and then, through the election of its own agents, directors or officers, as the officers and directors of the other company, and with fraudulent intent on the part of such persons, causes mutual contracts to be executed, and of such nature as to directly result to the advantage of all the stockholders of the one company, and to the prejudice of the minority stockholders of the other company; or

(*d*) Where a set of men organize a corporation, and having themselves elected as directors of it, cause it to purchase of them certain property at a price which is prejudicial to the rights of other stockholders; in other words, the promoters' class of cases.

In this connection it will be noted that there is no allegation in the bill to the effect that the Trust Company, during the period of its alleged domination, was either a majority stockholder, or even a large stockholder, in the Belt; on the contrary, as will be hereinafter stated, the Trust Company was, comparatively, a small minority stockholder.

It will be readily observed that, in all of these suppositious cases, the power to dominate or control arises from the voting right or power to control the election of the directors and officers of the dominated company, who in turn dominate and control it in the interest of the parties, having such voting control.

When certain persons own the voting control of two corporations, they may dominate both, and cause contracts to be signed, and transactions to take place, between themselves as officers of one corporation, with themselves as officers of the other corporations, to

743 the gross disadvantage of either corporation, and these contracts will ordinarily be binding unless set aside by a court of equity. The corporations themselves were, in fact, the mere instruments of the men committing the wrong, though it seems to be recognized by the authorities that such acts are nevertheless corpo-

rate acts, and in that way, one corporation may be said to dominate the other.

It is not alleged in the bill that the Trust Company possessed voting control of the Belt Company, or of any of the corporations involved in this controversy, and, for that reason, its alleged domination and control must have been exercised, if at all, through its influence over its employees, agents or stockholders, who were elected, from year to year, as directors and officers of the Belt and other companies, in which they were likewise stockholders.

It seems then, that, in connection with the proven fact of Stilwell's strong personal influence and following among his business associates and investors (the latter being generally interested, more or less, in the securities of one or more of the other companies, as well as the Trust Company), the chief point relied upon by complainants is the dual capacity in which the directors of the contracting corporation acted, as is so fully stated in the bill.

There are, also, allegations in the bill, which relate to transactions had between two of the other companies, and not between the Trust Company and one of them, and which are to the effect that the Trust Company caused the Belt Company to enter into contracts with the other company, by reason of which loss resulted to the Belt, and for which loss the Trust Company should be held responsible, for the reason that the directors and officers, common to both the Belt and Trust Companies, were also elected directors and officers of such other company.

A Few Controlling Facts.

There either appear on the face of the bill, or are practically undisputed in the proofs, the following facts which serve to materially distinguish the case at bar from any cited by learned counsel in support of the complaints in the bill.

(*a*) This action is not instituted by one or more stockholders against unfaithful directors, but is against one corporation by the receiver of another corporation, the receiver having been appointed at the instance of a creditor, whose cause of action accrued long after the occurrence of the transactions complained of; nor is
744 there any creditor before the court, whose claim existed at or before such time.

(b) The bill does not attempt to excuse the long delay in seeking an accounting, but is wholly silent upon this subject, though counsel for complainants contend that, so long as the Trust Company domination existed, which they claim continued until April, 1900, the Belt Company could not be legally bound to assert its rights, as it was in "bondage", and not free to act.

(*c*) No stockholder has at any time objected to any of the transactions complained of in the bill, as has been heretofore stated.

(*d*) When this bill was filed, the sole stockholder of the Belt Company was the Southern Company, which had acquired all of the Belt stock in the execution of a plan *or* reorganization by the usual exchange of new securities for old, the details of which re-

organization plan are hereinafter fully stated in this report as to the intervening petition of the Southern Company.

(*e*) If, at any time, any stockholder of the Belt Company was ignorant of the transactions in question with the Trust Company, and did not participate or acquiesce in, approve them, the name of such stockholders does not appear in the record.

(*f*) The transactions in dispute were open, not secret or concealed, and were either known to the stockholders, or could have been, if they had been at all diligent in trying to understand such transactions, which are spread with much explanatory detail, not only on the books of the Trust Company, but also on the books of the railway companies. (See Wright's compilation in Rec. Vol. 44); and the very nature of the transactions, their magnitude and the long period of time over which they extended, tend thoroughly to negative the idea of ignorance on the part of any stockholders.

(*g*) The transactions now attacked in the bill, were expressly ratified by the stockholders, as shown by the minutes of the corporate meetings (see Bell minute book, in Rec. Vol. 52); and there was manifested, throughout many years, the most complete acquiesence in these transactions by the shareholders as a body, that is, so far as concerns any formal or open protesting on their part.

(*h*) The statutory period of limitations has run against the transactions in question, as will be hereinafter shown, unless by
745 reason of the alleged Trust Company domination, the statute has been inoperative.

(*i*) The transactions in question are executed contracts, closed and consummated years before the original bill was filed, and, as the accounts between the Trust Company and these other companies were settled, from time to time, the Belt Company gave its notes for the balances due, and which notes were also paid off, from time to time.

(*j*) It is shown by the record that the book-keeping was full, complete and accurate as to all original entries, and otherwise, and that the accounts between the companies were regularly stated and audited each month by formal certificates exchanged by their respective auditors, and that the books tallied to a cent.

(*k*) The successive and repeated re-elections by the Belt stockholders, under conditions well known to every one, of the same men to the Belt Directory, is in itself the strongest evidence of complete acquiescence on their part in the management, which is now for the first time attacked.

(*l*) The Belt in the transactions, which are now attacked, received therefrom certain benefits and advantages, which the complainants have never offered to return, and, in the nature of things, cannot return. The status quo cannot be restored, which fact, if true, becomes a most important one in the final determination of the issues involved in the bill, and, especially so, in the absence of fraudulent intent, or actual fraud, on the part of the Trust Company, which is not shown by the proofs in the record.

(*m*) The legal power to name directors is the power of the majority of the stockholders, and neither the Trust Company, nor the di-

rectors in question, at any time, held even a substantial minority of the stock of the Belt Company. The Trust Company at no time owned control of the Belt, and was therefore not in a position to dominate it by reason of any stock ownership (Vol. 53-32395). The mere fact that the majority of the directors of the Belt Company were during most of the period in question, the same persons who were directors of the Trust Company, was not necessarily the result of any controlling power of the Trust Company, but was because the representatives of the majority Belt stockholders, thought it to their interest to maintain the intimate relationship between the Trust Company and the Belt Company, indicated by their common directors.

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V.

History of Belt Transactions with the Trust Company and as Explanatory of Their Dealings.

1. In the first paragraph of the second ancillary bill, including the subdivisions thereof, complainants allege, in substance, that the Suburban Company, though organized on or about January 8, 1887, did nothing in the way of constructing its road, or in issuing or selling its securities, until about May 31, 1889; that, prior to that date, A. E. Stilwell, vice-president of the Trust Company, and his associates, among the officers and directors thereof, came into control of the Suburban Company, and through them, the Trust Company undertook to promote and finance the Suburban Company, and to construct, or cause to be constructed, its line of railroad; that the plan adopted by the Trust Company for that purpose, was to cause the Suburban Company to issue a large amount of securities, consisting of stock and bonds, to be used in securing money with which to construct the railroad, and, for that purpose, to organize as its agency, a construction company, which directly, or through some contractor, should construct the line of the Suburban railroad, and take the securities in payment therefor; that it was the intention and purpose of the Trust Company, as a part of such plan, to cause the Suburban Company to issue securities in excess of the value of the work, and to cause such securities to pass through the hands of the Trust Company, which in turn would exact large and exorbitant amounts, under the guise of commissions, for promotion and other services, and also to cause the securities finally to be distributed among the officers and directors of the Construction Company, which itself was organized largely from the officers and directors of the Trust Company, so that the profits arising from the enterprise might inure to the benefit of the Trust Company, its officers, directors, friends and associates, and that, in accordance with the aforesid plan, the Trust Company caused the Suburban Company, on or about May 31, 1889, to enter into a contract with A. E. Stilwell, dated June 1, 1889, by the terms of which he, or his assigns, agreed to organize a construction Company to be called the Kansas City Terminal Construction, and to cause said company to

build the line of the Suburban Railroad from Broadway and Second Streets, in Kansas City, to Cecil Station, near the Blue River, the road to be double track the entire distance, and to be first
747 class in all particulars. It was further alleged that it was provided in said Stilwell contract that the Construction Company should buy such ground as might be necessary for the use of the railroad company, for depot purposes, pay for all rights-of-way remaining unsecured by the railroad company, should build a depot of such dimensions and costs, and locate the same at such point, and equip the road in such manner as might be deemed to be for the best interests of the railroad company, and to pay all the expenses incurred in the building of such road; and that, in consideration for the building of said road, the Suburban Company agreed to issue its first mortgage bonds in the sum of $500,000.00, $450,000.00 thereof to be placed in escrow with the Trust Company, with $900,000, face value, of the capital stock of the Suburban Company, both to be delivered by the Trust Company as trustee for Stilwell or his assigns, upon the faithful completion of the road, as provided in the contract.

It was further alleged that, on the date of the execution of said contract, the said Stilwell transferred and assigned the same to the Trust Company, in consideration of the sum of $10,000.00 and the latter, as his assignee, undertook to comply with and perform the terms and conditions of said contract; that, in pursuance of the duty and obligations cast upon it by said contract, the Trust Company organized the Construction Company, which complainants allege was dominated and controlled by the Trust Company in the same manner as the other companies named in the bill, the stockholders of the Construction Company being made up of the stockholders, employees, officers and directors of the Trust Company, and such of their friends as were willing to come in and enjoy the fruits and profits of the plan; that the Construction Company began the construction of the railroad of the Suburban Company between the points above designated, and had only partially completed such construction and the acquisition of the right-of-way, and the performance of the duties required under the terms of said contract, when, on or about May 9, 1890, the officers of the Construction, Suburban and Trust Companies (who were alleged to have been substantially the same persons, and having the same purposes and objects in view), caused the Construction and Suburban Companies to go through the form of an agreement, by which the Suburban Company agreed to receive and accept the uncompleted railroad, then partially constructed by the Construction Company, as a full compliance with the requirements of the Stilwell contract, and to authorize and direct the Trust Company to turn over to the Construction Company the stocks and bonds described therein; and that, accordingly, by virtue of the control and domination so exercised
748 by the Trust Company over the Suburban Company, the latter went through the form of accepting the uncompleted railroad, and directed the Trust Company to release said securities, and the Trust Company did release and turn over to the Construction Company the Suburban bonds in the amount of $400,000.00 face

value, and stocks in the Suburban Company in the amount of $600,000.00, face value, retaining for itself and its officers $50,000, par value of the bonds and $300,000.00, par value, of the stock and that said stocks and bonds in the amounts of $600,000.00 and $400,000.00, respectively, were thereupon distributed by the Trust Company and the Construction Company, to the stockholders, employees and officers of the two companies and their friends; and that the action of the Trust Company in so causing the Suburban Company to accept a partial compliance, and in causing said securities to be so issued, was contrary to the best interests of the Suburban Company, and oppressive and inequitable, and, by virtue of such domination and control, ought not to be permitted to stand as against parties interested in the Suburban Company.

The Complainants, in the subdivisions of paragraph 1, have set out, in some detail, the respects in which it is claimed that the Stilwell contract was not complied with by reason of the domination and control of the Trust Company over the Suburban Company as hereinbefore stated, all of which will more fully appear by reference to the second ancillary bill.

The series of itemized damages, on pages 25 to 43, which are alleged to have occurred to the Belt Company from a failure to complete said construction contract, or from causing the acceptance of the road in its alleged uncompleted condition, may be briefly summarized as follows:

In item (*a*) it is claimed that the cost of the road was $292,000, or less, and that the value of the securities turned over were worth $480,000.00, leaving a profit of $188,000.00, and for which, with interest, complainants ask a credit on the Trust Company account.

In item (*b*) it is stated that the total original bond issue was $500,000.00, $400,000.00 of which were, as above stated, turned over to the Construction Company, and that the balance of said bonds to-wit, $100,000.00, was fraudulently, wrongfully and unlawfully taken and appropriated by the Trust Company for its own benefit, and that said $100,000.00 bonds were reasonably worth $90,000.00; that the original stock issue was $1,000,000.00, $600,000.00 of which was turned over to the Construction Company, as above stated, and the balance of $400,000.00 was fraudulently, wrongfully and unlawfully taken by the Trust Company to
749 its own use, and that the value of said $400,-00.00 stock was $80,000.00. Wherefore, it was stated that the Trust Company should credit the Belt Company with $170,000.00 (being the $90,000.00 and the $80,000.00), and interest thereon from May 9, 1890.

The other items (*c*) to (*n*), pages 26 to 41, relate to actual damages alleged to have resulted to the Belt Company, by reason of various outlays for the completion of the road, which, it is alleged, should have been paid, as provided for under said construction contract, such as contractors' bills, right-of-way, main depot grounds, other depot grounds, switching yards, etc., "and which" it is alleged, "would have been so furnished but for the unlawful action in causing the Suburban Company to accept a partial compliance."

Item (*n*) relates to the De Goeijen claim of $89,333.33.

In some instances, they were paid by the Suburban Company, such as items (*c*), (*e*) (*f*), (*g*), (*i*), (*l*) and (*n*); in other instances, payments were made by the Trust Company and charged to the Belt, and admittedly appear on the Trust Company statement of account, as in items (*d*), (*h*), (*j*) and (*k*).

The general nature of these items, or expenditures, are as follows: (*c*) for right of way and construction work; (*d*), (*e*), (*f*), and (*g*), for right of way; (*h*) and (*i*) for rental of lands alleged to be necessary for right of way use; (*j*) for main depot, Second and Wyandotte Streets; (*k*) for other station depots, platforms, sand house, round house and labor and material furnished; (*l*), Second Street Improvement Company "right of way and switching yards," and Trust Company "causing" the Improvement Company to execute a lease to the Consolidated Company, yearly rental of $3,000.00, the total alleged rental paid being $26,250.00, and the alleged value of the land (44,125.00). Complainants ask that both said items should be credited to the Belt Company, with interest. (*m*) for rental to said Improvement Company for other depot grounds (2nd and Wyandotte), total rent paid, $26,733.64, and value of lots, $26,750.00; and credit is asked for the Belt Company for both said items, with interest. As to item (*i*) $313.76, it is said that the Trust Company caused the Belt Company to pay an overdraft of the Construction Company, amounting to that sum, on May 9, 1890.

All these various items are based upon the theory that the settlement of the Construction contract, May 9, 1890, did not bind the parties, and can be thus collaterally set aside and inquired into after ten years' lapse of time.

750 *Defenses of Trust Company.*

2. The defenses are as follows: first, that no cause of action is stated in the bill; that the settlement of the Stilwell contract was binding between the Belt and Construction Companies, and that the Trust Company did not dominate or control such settlement. Second, that the accounts admittedly rendered from time to time, bar consideration of said items which were included therein, and if not so included, they were waived by not having been put into the accounts rendered by the Belt Company, from time to time. Third, laches. Fourth, ten year statute of limitations. Fifth, in the alternative; five year statute of limitations—in case any items are not covered by the ten year statute. Sixth, the Trust Company relies upon the acquiescence of the Belt Company and its stockholders, and an express ratification by them entered into corporate records. Seventh, the defenses to the De Goeijen item will be hereinafter stated.

Record of Facts as to Relation of Suburban Company and Construction Company in Building "First Division of Belt."

3. The Suburban Company was incorporated under the laws of Missouri, on January 8, 1887, the incorporators being E. L. Martin, L. R. Moore, T. B. Bullene, S. F. Scott, George W. McClelland, Conrad Stumpf, Theodore Peltzer and John W. Beebe, all of Kansas City, Missouri, and John Kelly, of Leavenworth, Kansas, and such incorporators were also directors for the first year (Rec. 18-9138-'39).

The articles of association provided that "the railroad of said corporation is to be constructed, maintained and operated from or near the Union Depot in the City of Kansas, Jackson County, Missouri, thence in an easterly direction to Cecil station, near the Blue River, thence in a southwesterly direction, by the most practicable route along said Blue River, and along Brush Creek in said Jackson County, to a point near Westport in Jackson County, thence in a northwesterly direction by the most practicable route to a point at or near said Union Depot.

The object was to build a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas, and the number of shares of the capital stock was to be 10,000, of the par value of $100 each (Rec. 52-31301-'05).

At a meeting of the directors of the Suburban Company, January 13, 1887, the following officers were elected: E. L. Martin, president, L. R. Moore, vice-president; George W. McClelland, treasurer,
751 and S. F. Scott, secretary and general manager, and no other officials were elected until June 1, 1889, being a date subsequent to the time that the contract for the building of the First Division of the Suburban Company's railroad was entered into between that company and A. E. Stilwell.

The franchise granted the Suburban Company by Kansas City, Missouri, had been secured on or about October 20, 1887, authorizing the company to maintain and operate a double track railroad upon Second Street from the west line of Broadway to the east line of Harrison Street, and over and across the streets intersecting the same. The franchise further provided that the construction of the railroad should commence within three months after the acceptance of the ordinance, and that the road should be completed and operated within 24 months, barring certain legal delays. The Suburban Company was to plank the tracks with three inch oak planks, and keep the space between the tracks paved, etc. (see copy of ordinance, Vol. 21-10923-'29).

As shown by the testimony of both Martin and Scott, there was prior to May 31, 1889, only a small amount of work done towards the building of the Suburban Company's railroad, just enough to prevent a forfeiture of the franchise, that is, there was some little grading work done, and preliminary surveys made (Martin's testimony, Vol. 53-32708, and Vol. 55-33643; and Scott's testimony, Vol. 18-9136). Nothing was done by the Suburban Company

towards the issuance or sale of its securities prior to May 31, 1899 (Suburban Company stock ledger, Vol. 45-25582-'87).

From the testimony of S. F. Scott, it appears that up to June 1, 1889, none of the capital stock of the Suburban Company had been issued, though it had been subscribed for (Vol. 18-9142); and that the first issue of the Suburban Company's bonds was authorized July 24, 1889 (Vol. 52-31241-'44). It also appears from Scott's testimony, that he and Martin, about the time of the organization of the Suburban Company, also organized a railroad known as the Kansas City, Rich Hill & Southern Railroad, and the organization afterwards of the Kansas City, Nevada & Fort Smith Railroad, by change of name called the Kansas City, Pittsburg & Gulf, embraced the idea of Scott and Martin in their contemplated building of the Kansas City, Rich Hill & Southern Railroad (Vol. 18-9135-'6).

Prior to May 1, 1889, Scott and Martin held the majority interest in holdings of the Suburban Company. It also appears from said Scott's testimony that, prior to June 1, 1889, A. E. Stilwell,
752 then vice-president of the Trust Company, acquired all of Scott's interest in the Suburban Company, and in the Kansas City, Rich Hill & Southern, and, in payment therefor, Scott was to receive part cash, and part bonds and stock of the Suburban Company, that were to be issued. By such purchase, the control of the Suburban Company was given to Stilwell and Martin (Vol. 18-8140-'43).

Martin states, in his testimony, that along or about the time of the making of the Stilwell contract, June 1, 1889, Stilwell and himself, and their associates, controlled the majority of the Suburban Company's stock (Vol. 55-33643-'44), A. E. Stilwell being first vice-president, director and member of the executive committee of the Trust Company, and E. L. Martin being second vice-president, director and member of said committee (Vol. 11-5694).

At the time that Scott sold his interest to Stilwell, Moore likewise disposed of his interest to Stilwell on the same basis offered Scott (Vol. 18-9143).

June 1, 1889, the contract for the construction of the Suburban railroad from Second and Broadway to Cecil Station, was entered into between A. E. Stilwell and the Suburban Company, by E. L. Martin, its president. At that time, Stilwell was first vice-president, general manager and member of the executive committee of the Trust Company, and Martin was second vice-president, director and member of the said executive committee. By the terms of the Stilwell contract, Stilwell or his assigns, agreed to organize a company within sixty days from the date of the contract, to be called the Kansas City Terminal Construction Company, hereinafter referred to as the Construction Company, and to cause said Construction Company to build a line of railroad for the Suburban Company from Second and Broadway, in Kansas City, Missouri, and along Second Street to Harrison Street; thence in a northeasterly direction along said survey as near as may be, to Cecil Station, near the Blue River; said railroad to be double track the entire distance, of not less than 60 pound steel rails, and to be built in all particulars in a first class

manner. It was further provided in said contract that the work should begin not later than the 1st day of September, 1889, and be completed within twelve months from that date; that the Construction Company should buy such grounds as it might deem necessary for the use of said railroad company, for depot purposes, and pay for all rights-of-way remaining unsecured by the railroad company; that the Construction Company should build a depot of such dimensions and cost, and locate the same at such point and equip the road in such manner, as it might deem necessary for the best
753 interests of the railroad company, and to pay every nature of the expense incurred by the building of the road. In consideration for the building of such railroad, the Suburban Company agreed, in said contract to issue its first mortgage bonds upon that portion of its line above described, in the sum of $300,000.00, bearing six per cent interest, the bonds to be of such form and denomination, and to run such length of time, as said Stilwell or his assigns might designate; that of this issue of bonds the Suburban Company should place in escrow with the Trust Company $450,000.00 of the same, face value, along with $900,000.00, face value, of the stock of the company, to be delivered to said A. E. Stilwell, or his assigns, upon the faithful completion of said road, as provided in said contract (see copy of contract, Rec. 14-7124-'26). On the said day that said contract was entered into, Stilwell duly transferred and assigned it to the Missouri, Kansas & Texas Trust Company, the consideration recited in the assignment being $10,000.00 (Rec. 14-7126). According to Martin's testimony, the body of this assignment was in the handwriting of Robert B. Cone, an employee of the Trust Company, and the signature subscribed to said contract as witness, was the signature of Robert B. Cone, and the signature to the assignment was that of A. E. Stilwell (Rec. 55-33706).

The Trust Company, as the assignee of said Stilwell, thereupon undertook to comply with all the terms of said contract imposed upon said Stilwell (Rec. 53-41743-'44).

Ratification of Stilwell Contract and Authorization of the Bonded Indebtedness of the Suburban Company.

At a Stockholders' meeting of the Suburban Company, held July 4, 1889, the Stilwell contract was reported to the stockholders by Mr. Martin and approved (Rec. 52-31240-'46). At said meeting, E. L. Martin as proxy, held 110 shares of the 155 shares then outstanding (Rec. 45-25416-25451). At said stockholders' meeting it was provided that the Suburban Company issue its bonds to the extent of $500,000.00, for the purpose of liquidating the floating indebtedness of the company, and for the "purpose of building, completing and equipping its railroad from Second and Broadway to Cecil Station," the bonds to be 1000 in number, of $500.00, par value, each, with six per cent interest from April 1, 1890, first interest payable April 1, 1891, and after that to be payable semi-annually. All the bonds, to bear date July 1, 1889, and payable

to bearer on April 1, 1920, and, also, that a mortgage be executed and delivered by the Suburban Company to the Trust Company, as trustee, conveying to the trustee the right-of-way of the Suburban Company from Second and Broadway to Cecil Station, and
754 all the assets of the company then owned, or thereafter to be acquired, for the purpose of securing the payment of said bonds. It was, also, provided that $450,000.00, par value, of said bonds, and $900,000.00, par value, of the capital stock, be delivered to the Trust Company in escrow, to be held until the contract was fully completed or fulfilled, then to be delivered to him or his assigns (Rec. 52-31240-'46).

At a directors' meeting of the Suburban Company, held on May 31, 1889, it was provided that said stocks and bonds of the Suburban Company should be placed in escrow with the Trust Company, and held by it, and then delivered to Stilwell or his assigns, upon the completion of the railroad under the terms of said contract, and that said stock was to be issued in the name of E. L. Martin, trustee, to be voted by him until the delivery thereof under the terms of said Stilwell contract (See Suburban minutes, Vol. 52-31238-'40). The plan, adopted by the Trust Company in promoting and financing the Suburban Company, was to cause the latter to issue a large amount of securities, consisting of bonds and stocks, to be used in securing money to construct the railroad, and for that purpose to organize as its agency a construction company, which, through the aid of sub-contractors, should construct the railroad of the company, and nominally take the securities of the Suburban Company in payment therefor (Rec. 53-31743-'44).

It is claimed by the complainants that it was a part of the plan of the Trust Company to cause the securities of the Suburban Company to be issued largely in excess in value of the cost of constructing the line of railroad of the Suburban Company, and to cause such securities to pass through the Trust Company (which would exact large amounts for its services, under the guise of commissions), and then to cause such securities to be distributed [*dinally*] among the stockholders and directors of the Construction Company, which was organized largely from the officers, directors and stockholders of the Trust Company.

For the cost of the road to the Construction Company, see Telfer's testimony, Rec. 17-8715-'18, showing cost not to exceed $292,000.00 paid Construction Company; for securities delivered, see Stilwell contract, Rec. 14-7124-'26.

It is shown by Willey's testimony (Rec. 1-138) that the Construction Company received $400,000.00, par value of Suburban bonds, and $600,000.00, par value, in Suburban Company stock. The rec-
ord stockholders of the Trust Company, on May 9, 1890,
755 (being the date the Stilwell contract was declared completed) held 1,998 shares of the 3,000 shares of the Construction Company stock, and for which, later on, in 1890, they received the stock and bonds of the Belt Company.

Incorporation of the Kansas City Terminal Construction Co.

In pursuance of the duty and obligation cast upon the Trust Company by the Stilwell Contract, there was organized a corporation, called the Construction Company, for the purpose of building the Suburban Company's railroad (Rec. 53-31743-'44). The articles of association of the Construction Company were filed July 6, 1889, the capital stock being $300,000.00, divided into 3,000 shares of the par value of $100 each. One of the purposes of the incorporation was to build, construct and equip railroads, depots, station houses, machine shops, in the States of Missouri, Kansas and elsewhere, for other corporations, or persons, etc. The names of the incorporators and of the board of directors were largely persons interested in the Trust Company (Rec. 13-6967-'71). All the incorporation fees, including attorneys' fees, and other expenses, were advanced and paid by the Trust Company (Rec. 13-610).

At a meeting of the directors of the Construction Company, on December 2, 1889, "the question of extending the road from the point to which present contract was let to this company, to the junction with the Kansas City, Nevada & Fort Smith R. R. now in process of construction, were discussed, and the decision arrived at to recommend to the stockholders of this company, and to the stockholders of the Suburban Belt R. R. Co. that the bonded indebtedness of the R. R. Co. be increased to $750,000.00, and it is estimated that the additional $250,000.00 will complete the road to a point from which a profitable Suburban business can be secured and important connections made with other roads, particularly the Kansas City, Nevada & Fort Smith, which is dependent upon our road for terminal facilities. The right-of-way to our part of this was reported to have been already secured, and it is very important to push the work as rapidly as possible." (See Construction Company's minutes, Rec. 13-6980-'81).

The $300,000.00, par value, of the Construction Company's stock, was paid in full by the subscribers to such capital stock (Rec. 53-32714; also Construction Company journal entry, Rec. 14-7179).

The Trust Company opened up subscription books for the stock of the Construction Company, and credited the amount of money so received upon its books with the Construction Company,
756 and which was paid out upon vouchers for various purposes of the Construction Company (Rec. 11-6109, 6116, 6155). The Trust Company's account with the Construction Company shows that it collected from various subscribers to the stock of the Construction Company $287,783.34, and disbursed the same amount (Rec. 45-25249 to 25300, and Vol. 11-6158).

Construction of First Division of Belt by Construction Company.

The Construction Company, shortly after the Stilwell contract had been entered into, began the construction of the Suburban Company's railroad between the points Broadway Street and Cecil

Station (Rec. 53-32714). After the Stilwell contract was entered into, there was a change of officers and directors of the Suburban Company. The officers and directors, on June 1, 1889, were, president, E. L. Martin; vice-president, L. R. Moore; treasurer, George W. McClelland, and secretary and general manager, S. F. Scott, and the directors were E. L. Martin, and others, as hereinbefore stated.

At meetings of the Suburban Company directors, held on July 25, 1889, December 2, 1889, and April 10, 1890, a large part of the old directors resigned their [*officers*] as directors, and their places were filled by officers of the Trust Company. At this time, the officers of the Suburban Company were as follows: E. L. Martin, president; A. E. Stilwell, vice-president; M. C. Curtis, treasurer; W. S. Taylor, Secretary; A. L. Howe, assistant secretary.

At this time, as disclosed by the stock ledger of the Suburban Company (Rec. 45-25588), there was standing in the name of E. L. Martin, trustee, 1,995 shares of Suburban stock, having been transferred to said Martin on May 5, 1890, from an old trustee account (see Rec. 45-25588, for shares on Suburban Company stock ledger).

Alleged Acceptance, in May, 1890, *of Uncompleted Suburban Company's First Division and Facts Leading Up to May* 9, 1890.

At a meeting of the stockholders of the Suburban Company, on April 10, 1890, there were represented 9,009 shares. At this meeting the bonded indebtedness of the Suburban Company was increased from $500,000.00 to $1,000,000.00, and a resolution offered by director John Kelly was duly adopted, which was to the effect that $50,000.00 in bonds, and $84,500.00, par value, of the stock of this company be [—] aside and delivered to L. P. Moore, as
757 trustee, with which to settle all claims of whatsoever nature that were standing against this company at the time the contract was entered into with the Kansas City Terminal Construction Company for the construction of a road from Broadway to Cecil Station (Rec. 52-31250). At the time of the adoption of this resolution, Martin held in his name as trustee, 9,000 shares of the Suburban Company stock, which he was authorized to vote until delivery to Stilwell of the stocks and bonds, called for in the contract with him (Rec. 52-31237 and Rec. 45-25588).

On April 10, 1890, Stilwell had standing in his own name one share of Suburban Company stock (Rec. 45-25582), E. J. Davison, A. L. Howe and N. C. Curtis, the other shareholders present at the meeting, had one share each standing in their names (Rec. 45-25588). This would account for 9004 of the 9009 shares present. The only other stock that could have been outstanding at that time, would be the stock called for in the articles of incorporation in favor of Martin, McClelland, Stumpf, Peltzer and others, a total of 155 shares, and as disclosed by the Suburban Company stock ledger (Rec. 45-25582), the stock issued to those persons *were* supposed to be cancelled in January, 1890.

At a directors' meeting of the Construction Company on May 9, 1890, there were present Martin, Stilwell, Curtis, Trimble, and Taylor, and Mr. Taylor, theretofore appointed as a committee to negotiate with the Suburban Company for the acceptance by it of the railroad, right-of-way, etc., reported by offering the following resolution:

"Whereas, this company has complied with the spirit of its agreement made with the Kansas City Suburban Belt Railroad Company for the construction of its double track belt railroad from Second and Broadway Streets to Cecil Station, although a portion of said railroad is not fully completed; therefore, be it resolved that the president appoint a committee of one member of this board to submit to said Kansas City Suburban Belt Railroad Company the following proposition, viz:

That this company will now deliver to the said railroad company all the right-of-way procured, road bed, railroad and materials, moneys and assets on hand, in the condition in which they now are, and will release the said railroad company from any liability to this company on account of any and all moneys paid out by this company for it: if the said railroad company will accept such right-of-way, road bed and materials, moneys and assets in the condition in which they now are in full satisfaction and fulfillment of this company's said contract, and will pay to this company the full
758 contract price provided for in said contract; and release this company from any further liability under said contract, and will assume and pay all this company's outstanding liabilities incurred on account of said railroad." (Rec. 13-6990-'91.)

Following said meeting of the directors of the Construction Company, a meeting of the stockholders of the Suburban Company was held on May 9, 1890. There were present Martin, Stilwell, Moore, Curtis, Taylor and Kelly; and at said meeting, Mr. Trimble stated that he was authorized by the Construction Company to make a proposition to the Suburban Company looking to the delivery and acceptance of the railroad, right-of-way, materials, moneys and assets of the Construction Company, to the Suburban Company, upon the terms stated in his proposition, which is embodied in the following resolution, offered by Mr. Stilwell:

"Whereas, the Construction Company has made this company the following proposition, viz: The said Construction Company will now deliver to this company all of the right-of-way now procured by it for this company's railroad, the road bed, the railroad now constructed, or in process of construction, and all material, moneys and assets which it now has on hand, and will release this company from any liability to it for any and all moneys paid out by it for this company; if this company will now accept said right-of-way, road bed, material, railroad, moneys, and assets in the condition in which they now are as and for the fulfillment of said Construction Company's contract with this company, and will pay to said Construction Company the full price and compensation which was agreed to be paid to it upon the fulfillment of said contract, and release said Construction Company from any and all further liability under and by

virtue of its said contract; and promise to assume and pay all of the liabilities of said Construction Company incurred on account of the building and equipping of this company's railroad; and, whereas, it appears to be to the best interest of this company to accept said propositions; now, therefore, be it resolved, that the said proposition be and the same is hereby accepted, and that the officers of this board be, and they are hereby authorized and empowered to receive and accept from the Kansas City Terminal Construction Company the right-of-way now procured, the road bed, and the railroad in its present condition, and material and assets and money now on hand, as and for a fulfillment of the contract of said Construction Company, in full satisfaction thereof; and that the officers of this board be, and they are hereby directed and empowered, to pay to the said Construction Company, or its assigns, the full contract price, which this company promised to pay for a fulfillment of this con-
759 tract; and the payment to be made in the bonds and stock of this company at the times, in the amount and in the manner promised and contracted to be paid; and to assume, on behalf of this company, and pay all of the outstanding liabilities of said Construction Company incurred in building and equipping this company's railroad; and that the officers of this board be, and they are hereby fully authorized and empowered to take all steps and do all things needful or convenient to carry out the spirit of this resolution and effectuate the acceptance of this proposition, and consummate satisfaction and cancellation of the said construction contract in the manner herein indicated."

The resolution, on motion of Mr. Moore, was unanimously adopted, and thereafter the resignation of George W. McClelland, and Conrad Stumpf were offered and accepted (Rec. 52-31259-'61).

It was by these two sets of resolutions, shown in the Construction Company's minutes, and the Suburban Company's minutes, that the Suburban Company's first division was, as contended by complainants, accepted by the Suburban Company in its uncompleted state, in lieu of the complete performance of the Stillwell contract, and at this time, all the officers of the Construction Company, to-wit, Martin, president, Stilwater, vice-president, and Taylor secretary and treasurer, were all stockholders and directors of the Trust Company, and all of the directors of the Construction Company at that time were stockholders of the Trust Company, and were also directors of the Construction Company, excepting two. Of the six directors present at the Suburban Company's meeting, May 9, 1890, that acted upon the proposition of the Construction Company, five of them were either Trust Company directors or officers, or both, and all five were directors and stockholders of the Construction Company (Rec. 45-25248 to 25300, and Rec. 42-22472 to 22581).

A resolution was also adopted by the directors of the Suburban Company (Rec. 52-31255), calling for the setting aside and delivering to L. R. Moore, trustee, $50,000.00 in bonds, and 845 shares of stock, to settle all outstanding claims against the Suburban Company at the time the Stilwell contract was entered into. The acceptance of the Suburban Company's first division by that Company

from the Construction Company, was finally consummated at a directors' meeting on August 4, 1890, there being present directors, Martin, Stilwell, Waterall, Lucas, Curtis and Taylor, and Mr. Martin as president, reported "that the railroad company had taken possession of the properties of the Kansas City Terminal Construction Company, as set out in a resolution passed at the meeting held
760 on May 9, 1890, and that he had accepted the same as fulfillment of the construction contract, and had released the Construction Company from any further liability under said contract;" and thereupon his report was ratified and approved.

A resolution was also adopted, requesting the Trust Company to distribute the bonds and stocks of the Suburban Company, which it held in trust for the stockholders of the Construction Company, among those who are entitled to receive the same in proportion to their interest, and further, that the Trust Company requests the stockholders of the Construction Company to transfer and assign their stocks on the books of the company, to A. E. Stilwell, trustee for the Construction Company (Rec. 52-31269).

Of the Suburban Company directors present and ratifying the action of president Martin in releasing the Construction Company from further liability under said Stilwell contract, all of them were directors and stockholders of the Trust Company, and Martin, Stilwell and Curtis were officers of the Trust Company, and members of the executive committee (see list of Trust Company officers and directors, Rec. 11-5695; and list of Trust Company stockholders, Rec. 48-28944 to 29071, inclusive).

All of the Suburban directors present were directors of the Construction Company, and stockholders of the Construction Company, Martin, Stilwell and Taylor constituting the officers of the Construction Company (see construction Company minutes, Rec. 13-6989).

At the time of the adoption of said resolution by the Construction Company and the Suburban Company, the Suburban Company stock was held as follows: Trust Company, 2446 shares; Trust Company, trustee for C. E. Grannis, 554 shares; Trust Company, trustee 4000 shares; E. L. Martin, trustee 1000 shares; and one share each standing in the names of Stilwell, Taylor, Curtis, Howe and Davison, the whole aggregating 10,000 shares, and from which it appears that the Trust Company, for itself, as trustee, held 7000 shares of Suburban Company stock.

In respect to the physical condition of the first division of the Suburban Company's railroad on May 9, 1890, at the time the resolution was adopted, declaring that the Stilwell contract had been complied with, and the road was accepted as and for a full compliance thereof, E. L. Martin stated (Rec. 55-33707-'08), that the plan set out in the articles of incorporation of the Suburban Company in general, contemplated the railroad scheme that the Suburban
761 incorporators had; and that the action of the Consolidated, Union and Suburban Companies, in the building of the first and second subdivisions of the Belt road, was in line with such plan, it being the intention of all the parties, including Stilwell and Martin, to eventually extend the Belt road around Kansas City, and that

that was the scheme in mind at the time of the Stilwell contract. Martin further stated (Rec. 55-33544 to 33645), that on May 9, 1890, when the Suburban Company's railroad was turned over to that company, it was not completed, and that certain rights-of-way for tracks, lands for sidings and yard purposes, and certain depot work, had to be provided for and done after that date; that one of the reasons why the road was turned over to the Suburban Company by the Construction Company in its incompleted state, was that the Construction Company had run out of funds; and thereafter, the Suburban Company took over the unfinished road and went ahead and completed it.

Witness Telfer stated that the Construction Company had no money in its treasury as early as May 2, 1890, but had an overdraft of $313.00 and that the Construction Company had expended its $300,000.00 of capital stock in building the road (Rec. 17-8708 to 8712, and 8989-'90), and had no other funds with which to complete the work.

As a brief history of the Belt affairs, it may be stated that, at the time E. L. Martin and others conceived the idea of having railroad terminals in the north end of Kansas City, and incorporated the Suburban Belt Company, the incorporators were the only stockholders, and all the property that the company had was its franchise to operate a railroad from Second and Wyandotte Streets to Cecil Station, a distance of six miles. Mr. Martin went east to finance the proposition, but being unable to raise any money, he thereafter approached A. E. Stilwell, president of the Trust Company, and interested him in organizing a Construction Company, and getting subscribers to its capital stock, for the purpose of building the proposed railroad terminals. At this time, all the stock of the Suburban Company was standing in the name of E. L. Martin as trustee. Stilwell organized the Construction Company, which agreed to build said proposed railroad of six miles, which is known in the record as the "First Division of the Belt", in consideration as above stated, of $450,000.00 of the first mortgage bonds of the Belt Company, and $900,000.00 of the shares of its capital stock. When this contract was made, no director or officer of the Trust Company was a director or officer of the Belt Company, except E. L. Martin. The Construction Company built the first division of the Belt, and at that
762 time, $450,000.00, par value of the $1,000,000.00 bonded indebtedness, had been used in the building or construction, and leaving $550,000.00 of bonds in the treasury. The Construction Company was out of funds, having used, in the construction of the line, everything obtained from its subscribers to the capital stock, and at this juncture, in order that the Belt Company might continue its line six miles further to Brush Creek, the Construction Company bought the remaining $500,000 of bonds at 90c. on the dollar. At this time, in 1889 and 1890, when the Trust Company bought these bonds at 90c. on the dollar, receiving with them a stock bonus of 2178 shares of Belt stock, the second division of the Belt was built with the proceeds of the bond sales. Another corporation, called the Consolidated Company, was organized, with a view of extending the

railroad, from Second and Wyandotte Streets, to the packing houses in the west bottoms of Kansas City. It was a separate corporation, issuing its own capital stock and bonds, and all of which were sold to the Trust Company, or through the Trust Company to others, in 1890 and 1891. The Belt Company was still not a paying proposition, and those in control of it conceived the idea of extending its line of railroad so as to reach the stock yards, and the large industries in Kansas City, Kansas, and thereupon, the Union Terminal Railroad Company, a Kansas Corporation, was formed, which also issued its stocks and bonds, and, the Belt Company, pursuant to its statutory authority, contracted to build the Union Terminal line in consideration of its stocks and bonds which were turned over to the Belt, and by it sold to the Trust Company, or through the Trust Company to others. This was just prior to, or about the time, of the financial panic in 1893, and the success of Mr. Stilwell in the floatation of these securities was almost phenomenal. The $500,000.00 of Belt bonds remained in the Trust Company's hands unsold for about two and a half years, notwithstanding the most strenuous efforts on Stilwell's part, to dispose of them in the market, and at a time too, when the road was completed and in operation, and having a fairly good business. The Trust Company maintained offices in Philadelphia, New York, Amsterdam, Berlin and Paris, and almost forced the sale of the Belt securities, from time to time, and thereby furnishing it with the funds to prosecute its railroad building operations. In 1892, Stilwell and a group of capitalists associated with him, projected a trunk line of railroad from Kansas City to Port Arthur, in connection with a ship canal therefrom to the sea. At this time, the Belt had completed its line from Brush Creek to Argentine, and had built a number of spurs and extensions, and was
763 doing a good business. It was thought by the Belt directors that its earnings could be largely increased if some large transcontinental trunk line system could be induced to use the Belt terminals, and, in carrying out such idea, the Belt stockholders, at a stockholders' meeting, authorized the directors and Belt officers to enter into a contract for building the Connecting Company road, for a distance of 80 miles, from Kansas City to Pattonsburg, one of the main objects on the part of the Belt Company being to make the profits which would result to it as a contractor in the building of that road. The contract provided for the construction of the railroad by the Belt Company, in consideration of the stocks and bonds of the Connecting Company.

The original bill was filed September 6, 1900, six months after the Gulf road had been sold at foreclosure sale, and purchased by a committee of bondholders, and conveyed to the Southern Company, which was organized by the reorganization Committee, the plan of which provided for a refunding of the securities of the Belt and its constituent companies, which were to be deposited with the reorganization Committee, to hold as the agent of the Southern Company, which was to surrender its own stocks and bonds in lieu thereof, the details of the reorganization plan are fully discussed in the Master's report on the Southern Company's intervention.

The Cambria Steel Company, a judgment creditor of the Belt brought the original bill against defendants for the benefit of all Belt creditors who might wish to join therein. It was an action at law on a promissory note, dated in January, 1900, and upon which judgment was afterwards rendered against the Belt Company, and from which it appears that the Cambria Company was a subsequent creditor whose debt had arisen long after the dates of the transactions which are complained of in the second ancillary bill; and, so far as this record shows, the only other indebtedness against the Belt Company was on account of the deficiency judgment rendered in favor of the Provident Company, trustee in the Belt mortgage, that is, outside of the claims of the Trust Company against the Belt.

It is contended by respondent Trust Company that none of these transactions in the second ancillary bill can be attacked by a subsequent creditor, and that, inasmuch as the receiver stands in exactly the same attitude as the Belt Company, of which he is receiver, he has no greater rights than that company, and hence, if the Belt Company has by its action or conduct become estopped from seeking any relief, so also is its receiver estopped.

764 In Graham v. Railroad Company, 102 U. S., 149, it was held that where a solvent corporation, with no actual intent to defraud creditors, disposes of its lands for an inadequate consideration, or by a voluntary conveyance, the subsequent creditors cannot question the transaction, and also that where a corporation has waived or omitted its right to institute proceedings to recover lands of which it had been defrauded, such righ does not inure to the benefit of subsequent creditors or purchasers, the only exception to the rule so laid down being where the alleged fraudulent transaction was done with the intent to defraud future creditors; that is, if in the case at bar, it could be shown that the Stilwell contract was an arrangement made by the Belt with a view of defrauding some future creditor of the Suburban Company, and that the transaction consummated amounted to a fraud, then a different case would be presented from the one at bar. It is nowhere claimed in the record that the transactions complained of were done for the purpose or with the intent to defraud any creditors; in fact, the theory of the bill is that fraud has been committed by the Trust Company for the purpose of defrauding the Belt, with a view of enriching the Trust Company, and not for the purpose of defrauding any existing or future creditors of the Belt Company.

In the case of Lawrence v. Greenup, 97 Fed., 906, a national bank had become insolvent, and passed into the hands of a receiver, who brought suit against certain stockholders, etc. The court held that, inasmuch as there was not shown any intention of defrauding creditors, and the dividend having been paid in good faith, the receiver could not question the transaction.

The theory of the ancillary bill in this case is predicated upon the alleged domination of the Trust Company over the Belt, that is, to the effect that the Trust Company was in absolute control over the Belt, and caused it to do the different things alleged in the bill.

The testimony of Francis A. Wright, expert accountant, who

testified in behalf of the Trust Company, discloses the following facts: (See Rec. Vol. —, p. 32395).

On January 1, 1890, the total outstanding capital stock of the Belt was 9155 shares, of which the Trust Company held none. On January 1, 1892, the total amount of stock issued was 15,000 shares of which the Trust Company held 2068 shares. On January 1, 1894, the total outstanding stock of the Belt Company was 26143 shares, of which the Trust Company held 1114 shares. On January 1, 1896, the total outstanding stock of the Belt Company was
765 47500 shares, of which 3924 shares were owned by the Trust Company, and 34436 shares were owned by the Dutch partnership. On January 1, 1898, the total outstanding stock of the Belt was 47500 shares, of which the Trust Company owned 987 shares, and the Dutch partnership 43574 shares.

The undisputed evidence discloses that as early as 1894, the control of the Belt Company was in the Dutch Syndicate, they owning 43500 out of a total of 47500 shares. During the time that these railroad companies had business transactions with the Trust Company, a vast number of transactions took place between them, and in the statement of the ledger account between the Trust Company and the Belt Company alone, there are over six thousand items and, taking into consideration all the transactions that were had with the other companies, parties to this accounting, there must have been more than twice that number involved.

These records show that the first meeting of Suburban directors was held on January 15, 1887, at which officers were elected; another meeting on January 22, 1887, at which by-laws were adopted and that at a stockholders' meeting on May 31st, 1889, *and* the Stilwell contract was authorized all of the stockholders being present in person or by proxy, the object being to consider a resolution adopted by the directors, authorizing the president to enter into a contract with Stilwell for the formation of a construction company for the purpose of building a portion of the line of the Belt Railroad. Minutes of the directors' meetings were approved, and ordered spread upon the record.

Another stockholders' meeting was held July 24, 1889, all stockholders being present. Mr. Martin reported that he had entered into a contract with Mr. Stilwell, on behalf of the construction Company, for the building of the railroad from 2nd and Broadway to Cecil Station, on the terms named in the contract, and his report was accepted, and the contract made by him with Stilwell was approved, and the acts done by Martin in reference thereto were ratified. The directors were authorized to execute bonds to the amount of half a million dollars for the purpose of building and equipping the road, and to execute a mortgage to secure the bonds, and to deposit (450,000.00) of said bonds and 900,000 capital stock, full paid, in escrow with the said M. K. & T. Trust Company, to be held by it until completion of the Stilwell contract, and at which time the Trust Company was authorized to deliver the same
766 to Stilwell or his assignees, the stock to be issued in the name of E. L. Martin, trustee; and further, the directors, through

their officers, were directed and authorized to do any and all things which might be needful or convenient for the purpose of carrying out the Stilwell contract.

On July 25, 1889, it was ordered by the directors, in accordance with the resolution of the stockholders, that the company issue one half million in bonds, and its mortgage securing the same, and $900,000 of its capital stock, and deposit the same in escrow as provided in the resolution of the stockholders, and thereafter on December 2, 1889, a stockholders' meeting was called for the purpose of increasing the bonded indebtedness of the company from half a million to one million dollars, for the purpose of extending the railroad from Cecil Station to Brush Creek, and at which meeting 9000 shares of the Belt capital were represented, being all of the stock then outstanding. At a stockholders' meeting April 10, 1890, is was ordered that the company increase its bonded indebtedness to one million dollars, and that the half million in bonds theretofore issued, none of which had at that time been sold, but was still in the possession of the company, be recalled, and the mortgage securing same be released, and a new mortgage executed securing the million dollar issue.

It was at this meeting that $50,000.00 in bonds, and $84,500.00 of the stock of this company were set aside and delivered to L. R. Moore, trustee, with which he was to settle all claims standing against the company at the time the Stilwell contract was entered into with the Construction Company.

It is contended in the record that these $50,000.00 of bonds, and $84,500.00 of stock really went to the promoters of the company, that is, to the original incorporators. It appears in the record that at the time these bonds and stocks were delivered to L. R. Moore, trustee, all of the stockholders were present, and consented to what was done; 900,000 shares had been issued, but were then held in escrow, and could not be voted. On May 9, 1890, at a directors' meeting, Mr. Trimble, on behalf of the Construction Company, made a proposition to the Belt Directory, looking to the delivery and acceptance of the railroad right-of-way, material, moneys and assets of the Construction Company, to this company, upon the terms stated in his proposition, which was embodied in the foregoing resolution offered by Mr. Stilwell.

The next stockholders' meeting was on June 14, 1890, (Rec. p. 31262-265) to increase the capital stock from one million to
767 one and a half million dollars, which was done. On August 5th, 1890, there was a directors' meeting, and on March 31st, 1891, an executive committee's meeting, at which a stockholders' meeting, was called for May 15, 1891, to consider a proposition to sell the railroad to a new corporation, which should issue its bonds to build thep roposed extension from 2nd and Wyandotte Streets to the West Bottoms.

The complete minutes of the Suburban Company, as it existed prior to the consolidation with the Consolidated Terminal, the minutes of the Consolidated Terminal, and the minutes of the new com-

solidated Companies, are found in Vol. 53, constituting one separate volume of the record.

An inspection of these minutes will disclose that at the stockholders' meeting on May 15, 1891, the Suburban stockholders authorized and directed the officers of the railroad to take the necessary steps to consolidate the Suburban Company with the Consolidated Company, and thereafter the minutes are continued in the same record book, under the name of the new corporation the Belt Company which was the result of that consolidation. By an inspection of these minute book records, there are disclosed a series of directors' meetings, and meetings of the executive committee of the Belt, at which were authorized many transactions between the Belt and Trust Company, these transactions being in the nature of authorizing sales of securities to the Trust Company, fixing the rate of compensation, fixing the amount of commission that the Trust Company was to receive for selling the bonds, also covering many transactions, which are the items in this ancillary bill as grounds of complaint, some of them taking place at directors' meetings and some at the stockholders' meeting held July 3, 1894, (Rec. 51-31358-'9), at which were represented 27,268 shares. The secretary was instructed to read to those present the minutes of the meetings of the Board of Directors and the executive committee, as shown by the record books, from July 26, 1892, to the date of the meeting, and which, having been read in compliance with said direction, each and all of the acts of the Board of Directors and executive committee, as shown by the minutes on the books of the company, were ratified and approved by the unanimous vote of all present. There was an express ratification of everything that had taken place at the meetings of the executive committee and the Board of Directors, from July 26, 1892, down to July 3, 1894.

At another meeting of the stockholders, held July 2, 1895, (shown in Vol. 52-31369-'70), the stock represented was 29,322 shares, and at said meeting the records of the proceedings of
768 the executive committee and of the directors of the Belt Company since the date of the last stockholders' annual meeting, were by said stockholders ratified and approved. Similar resolutions were adopted at subsequent stockholders' meetings. It also appears that at another stockholders' meeting, of February 11, 1893 (Rec. 52-31379; and following), the following resolution was adopted:

"On motion it was resolved that Article III of the By-Laws be repealed, and that a new section be enacted in lieu thereof, which provides that the superintendent, having in charge the movement of engines, switching, etc., shall be appointed by a permanent committee created and chosen by the stockholders at this meeting, and the duties of such person shall be defined and fixed by this committee, and shall hold office at the pleasure of the committee, Mr. De Goeijen continued to act as chairman. It was resolved that a permanent committee, composed of the following named five persons be appointed: J. De Koeijen, C. M. Titsingh, Jacques T. Nolthenius, A. E. Stilwell and E. L. Martin, shall have exclusive power

for the next thirty years to appoint a person or persons, who shall superintend the actual operations of this company's tracks and property; that, for the purpose of inducing the Connecting Company and the Gulf Company to enter into a long time contract with the Belt for the terminal facilities, all of the capital stock of the Union Company and Air Line, which is now owned and held by the Belt Company, be, and the same is hereby transferred to the members of said permanent committee, with full power to vote the said stock and control the corporate acts of the said U. T. and the said Air Line, for the next thirty years, and that the president of the company be directed to transfer the said stock to the said committee and unto their successors in office, and that the officers of the Belt Company be authorized to enter into long time contracts as per form stated in the resolution, for the use of the Belt terminal facilities, and fixing the compensation for such services; as a part of said contract the Belt Company agrees to keep and maintain for the next thirty years the said permanent committee. It is further resolved that no contract shall be made for the next thirty years between the Belt Company, and any other railroad company for the use of the Belt Company's terminal facilities, except with the approval of said permanent committee. 42-867 votes were cast in favor of said resolution."

The Trust Company, while defendant in this proceeding, is also seeking affirmative relief in this litigation. It is the holder, and was at the time this action was brought, of eight promissory
769 notes, aggregating with accrued interest nearly one half million dollars, and it also holds an open account of the Belt Company, which accrued after the execution of those notes. The Trust Company also holds another account against the Belt, which grew out of the payment by the Trust Company of a judgment, rendered against it in a suit brought by the First National Bank of Kansas City, on a promissory note for about $30,000.00, which the Trust Company had indorsed solely for the accommodation of the Belt Company, in order to provide it with necessary funds, and which judgment the Trust Company afterwards paid to the Bank. In this case, the complainants are seeking to set aside the notes held by the Trust Company, and are proceeding upon the theory that this is an open, unsettled account between the Trust Company and the Belt Company. Complainants seek to be allowed to offset the Trust Company demands by and with the alleged damages, resulting to the Belt Company in the transactions, which transpired long prior to the execution of the notes.

On January 1, 1898, it is proven that the Belt Company owed the Trut Company $526.40, represented by an open account which had been running between the two companies for a series of years, beginning about March 26, 1890. This debit balance of $526.40 was increased by various advances by the Trust Company, largely to the Belt Company, until on March 31, 1899, the Belt was indebted to the Trust Company in the sum of $360,000.00. Of these advancements, the largest part consisted of interest on the funded debt, and the cost of construction of the Connecting Railroad. The Trust

Company kept a separate account of the items arising from the construction of the Connecting Railroad, and also separate accounts with its constituent companies. This method of accounting for the Connecting road was used until February 17, 1899, at which time, the Trust Company transferred into the general account of the Belt a debit of $247,481.56, on account of debt due to the Trust Company from the Belt Company for the Construction of the Connecting Railroad, and this item of $247,481.56, constitutes the larger portion of the $360,000.00, which the Belt Company owed the Trust Company on March 31, 1899. The Belt Company, pursuant to authority of its Board of Directors, executed to the Trust Company seven notes—six for the sum of $50,000.00 each, and one for the sum of $60,000.00, or a total of $360,000.00, and the Trust Company gave the Belt Company credit on open account for these seven notes. After the execution of these notes to the Trust Company, all previous transactions were merged into the notes, and the notes now held by the Trust Company represent renewals and readjustments of the seven notes given by the Belt Company to the Trust Company on March 31, 1899, so that on that date the
770 open account was closed, with the exception of a credit balance of $50.83, which was carried in the open account.

On September 21, 1899, the Belt Company executed another note to the Trust Company for the sum of $23,056.49, which closed the open account, the debits and credits balancing one another. The open account commenced again on September 25, 1899, and continued until September 28, 1900, showing a balance due on that date from the Belt to the Trust Company, in open account, of $31,809.49, and to which should be added the amount paid by the Trust Company to the First National Bank on said judgment rendered against the Trust Company on account of the Belt note, indorsed by the Trust Company, for the accommodation of the Belt Company.

On January 1, 1898, the Belt Company was indebted to the Trust Company in the sum of only $526.40, as above stated which was a general ledger balance, and outside of that balance, whatever indebtedness the Belt Company owed the Trust Company was made up solely and exclusively of the transactions of the Belt Company, growing out of the building of the railroad of the Connecting Company, which was kept in a separate account, and none of the indebtedness, which was charged into these notes is represented by any of the transactions of which the complainants complain and ask relief in this case. By reference to the statement prepared by Willey, and known as Willey's exhibit No. 5, contained in Vol. 1 of the record it will be seen that it is a statement of the ledger account between the Trust Company and the Belt Company during the whole course of their business. The Trust Company made various advances to the Belt Company, on account of payrolls, construction work and other legitimate expenses, and, in that way, the Belt would become indebted to the Trust Company, and such indebtedness would be evidenced by a note, which would be credited to the Belt Company in open account. For instance, on page 13 of Willey's Exhibit 5, the following credits are made to the Belt Company: "By note of K. C.

Sub. Belt. R. R. dated Oct. 1, 1891, taken to balance account of Oct. 1, 1891 including charge for interest $513.57, and discount $775.14, $30,149.00." In other words, the Belt Company would give notes in partial payments of its indebtedness to the Trust Company, and in that way balance the account. In this case the complainants are seeking to go behind these notes from the very inception of the dealings between these two companies, and including notes paid and settled many years theretofore, and the question is presented in this case whether these old notes can be attacked in a proceeding of this kind, as well as the notes now existent. The Belt Company
771 had an auditor, so did the Trust Company, both of whom were competent, capable book-keepers. It stands admitted by the bill of complaint and the records in this cause, that these auditors made regular examinations of the accounts and approved and settled them. These exchanges of accounts were made not only monthly, but were made frequently, both daily and monthly. These companies had daily transactions on account of their intimate connections with each other. On the first of each month a charge was made by the Trust Company against the Belt of any interest on daily balances, or if the Belt had a deposit, a credit was given to the Trust Company of interest on daily balances. Whenever a charge was made against the Belt Company, or a credit given to it by the trust company, the Belt was contemporaneously therewith advised of the transaction, and, thereupon, the executive officers of the Belt would have proper entries extended at large upon the Belt books. In the vouchers there will be found on the first day of each and every month during the long period of their transactions, a voucher containing the computation made by the auditors of the two companies of the daily balances. The officers of each company knew at all times how the accounts stood, and on the first day of each month, the auditors would get together and check up the entries and strike a balance. In this way the books of the two companies were kept in accord during the entire comporate *like* of the Belt Company. Every month a financial statement was taken from the books of the Belt, showing the earnings, expenses, liabilities, assets, etc., and on the first of every quarter, a more detailed statement was made, showing the assets of the company, stocks and bonds, what the company owed, to whom, and all other necessary business information or detail. Annual reports, were also made in still further detail, showing the operations of the company, and the substance of its transactions during the previous year. All these things will fully appear by reference to the statements of the witness Neal S. Doran, for the Trust Company. These statements were put into the hands of the executive officers of the Belt Company, and the proofs show that they were sent to the stockholders or to persons representing the stockholders of the Belt. It is also shown that, as prescribed by the laws of the United States, the Belt Company also prepared annual statements for the Interstate Commerce Commission, which were made upon the prescribed forms, and complied with the Federal Laws. These annual statements may be found on file with the proper officer in Washington, sworn to by the officers of the Belt Company.

When the Construction Company turned over the road to the Belt Company, the transaction was a matter of public concern. At
772 the annual stockholders' meeting, reports were made to Mr. Martin, in more or less detail, though it is urged by the complainants that the reports were so gotten up that they did not contain the information which stockholders should have had in order to understand what had been done by the company.

System of Book Keeping.

In this connection it is important to consider the course of dealing between the Trust Company and these other companies, inasmuch as it is alleged by complainant- that the frauds, perpetrated by the Trust Company, were not open, but were rather of a concealed nature.

The record shows that all of those companies employed the voucher system of book keeping. The accounting between the companies appears to have been very accurate and correct, and all of the data and information, upon which the complainants predict the right to an accounting, are shown on the books, both of the Belt Company and Trust Company. For every transaction that took place between those companies, a voucher advising as to the details of such transaction, was given by the Trust Company to the railroad company at the time, with the fullest details. The authority for every entry by the railroad company was in the shape of a letter from an executive officer, attached to a voucher, made up in the railroad company's office. If the Trust Company paid a bill, or a series of bills, for or on account of the railroad companies, the original bill, bearing the receipt of the party who got the money, passed to the railroad company's office and was there fastened to a formal voucher. All the transactions in the record are supported by a voucher, either cash or journal, and, in respect to the journal entries, in cases where the railroad company charged some account of its own, that voucher was made up with unusual fullness, and spread at large upon the books of the railroad company. From the testimony of all the expert accountants for the complainants and defendants, the master is convinced that, instead of *their* being any concealment on the part of either the Belt or the Trust Company, the entries made by both were unusually full of detail, for book entries, and were such as would either reasonably explain the transactions to others or put them on inquiry to find out what was meant by the entries, and from which it would seem, then, that the charge of concealed fraud could not be sustained by the proofs.

The exhibit in Vol. 44, prepared by accountant F. A. Wright, indicates clearly and explicitly just what the books of the railroad company shows with reference to these transactions, and for each
773 and every entry of charge or credit on the books of the Trust Company there is found on the books of the railroad company a corresponding entry, setting forth the transaction with clearness and fullness. Mr. Willey, in his exhibits from 1 to 5, made a

statement, showing in detail each and every item, which had ever been made a matter of open account between the Trust Company and each of the railroad companies, and their allied companies, beginning with the first item on March 18, 1890, and ending with the last item as shown in this account. In other words, in this Vol. 44, Mr. Wright has copied from the books of the railroad company each item and entry, shown in Willey's exhibits, representing the ledger account between the Trust Company and the railroad company, and in Wright's exhibit will be found, side by side, each item appearing on Willey's exhibit, and the corresponding entry on the books of the Belt Company. The object of Wright's exhibit was to show that nothing was concealed from the Belt Company, and that it had in its own office, and amongst its own files complete details of every transaction that took place between the two companies.

Attitude of Belt Stockholders and Bondholders.

The primary investors in the Belt properties, and who were specially active in putting through the organization plan, under which the Southern Company bought the Belt properties at foreclosure sale, were Stotesbury, Shipley, Smith, Merwin and others, who were bankers and bond and stock brokers, and men of affairs. It is evident from the record that all of these original stockholders and bond holders understood the Belt transactions, and there has never been any complaint on the part of any of them as to such transactions.

The complainants all seem to have arisen after the controversy between John W. Gates and associates, as against Stilwell, Martin and their followers, the culmination of such controversy being the institution of the Bierce case, in which a receiver was appointed for the Trust Company, and, about the same time the Cambria bill was filed in this case, the Cambria Steel Company holding the same character of collateral security for the payment of its debts as the collaterals held by the Trust Company.

It is contended by counsel for complainants that, before the stockholders of the Belt Company can be chargeable with laches or acquiescence, they must actually know of the transactions in question. It is answered by counsel for the Trust Company that each and all of the stockholders are not required to know, but it is sufficient as shown by the authorities, if a majority of them understood the
774 transactions. On January 1, 1898, the Dutch Syndicate owned 43500 out of a total of 47500 shares of the Belt stock, and they selected as their representatives J. De Koeijen and C. M. Titsingh, who made frequent trips to Kansas City. De Goeijen was not only here frequently, but he remained here much of the time, and carefully looked after all Belt transactions. He went into the question of the floating debt of the Belt Company. He was, in fact, the leading and controlling man of the Belt Company. The testimony of Mr. Heynecker, a friend of De Goeijen, is that the latter employed an accountant to check over the books. Heynecker was the confidential agent of De Goeijen in Amsterdam, and familiar

with his affairs, and De Goeijen became thoroughly familiar with the Belt affairs, not only from information he got from the books, but also such as he obtained from officers of the company, with whom he was in constant correspondence. He was the largest individual stockholder of Belt securities, and had more of his money invested in the company than any other individual, and, hence, it cannot be assumed that he was a creature of the Trust Company, or that he conspired to rob or defraud his own company. At any rate he was the chosen representative of the Dutch stockholders, who really were the beneficial owners of the Belt road, and there is nothing in this record to show that he was an unworthy representative, but, whether he was or not, he was chosen by them to represent them in this country, and they certainly should be bound by his acts. In this connection, attention is called briefly to these facts: first, the corporate records of the Belt Company, and the authority for most of the transactions complained of, show that such transactions were expressly ratified by the Belt stockholders; second, they show that these transactions were not concealed from the Belt Company, or from its stockholders, and that they can all be found upon the books of the company by any one, who will take the trouble to look for them; and third, they show that, during the entire corporate life of the Belt Company, when dealings were going on between the Belt and Trust Company, not a single dissent was heard by any of the stockholders as to any transaction, old or new; and Fourth, it is shown that, as a matter of fact, the Trust Company did not have the control of the Belt Company, but that it was vested in the stockholders, who lived in Amsterdam and who elected the directors. These transactions, which are complained of, were executed, closed and finished transactions, and long since settled by those interested in them. The accounts between these companies were accurately kept, vouchers were exchanged daily and monthly in the mutual transactions passing between them, and matters of account
775 were settled by notes given from time to time, and the accounts closed up in that way.

If by reason of the community of directorship between the two corporations, the transactions in controversy should be set aside, it could hardly be said that the Belt Company was or [*in is*] a position to make restoration to the Trust Company for finding a market for its stocks and bonds, and disposing of the same, and otherwise make good the responsibilities incurred by the Trust Company, from time to time, while backing it during the active years of its corporate existence; or in the case of the Construction Company contract, made with the Belt Company, is or would the latter be willing to give back to the Construction Company the railroad which it received under said contract, even though it may be that it was not economically constructed.

It is evident that, if the Belt Company in 1892 had sought to avoid the contract, made with the Construction Company, that the Trust Company could not have gone on making advances to the Belt Company, loaning its money, etc. A party cannot avoid a contract where he has received all the fruits of it, and is unable to restore

or replace them. The act of accepting and receiving the fruits, is in itself in the nature of acquiescence or ratification.

4. The foregoing facts abundantly show that the Belt Company was, to all intents and purposes, managed and controlled by the Dutch bondholders, but through Martin and his associates, working in harmony with the Trust Company management, but not dominated and controlled by the Trust Company, as alleged in complainants' bill.

It is an undisputed fact in the case, that De Goeijen was the representative of the Dutch bondholders, and, with them, was largely interested in the Belt securities, as hereinbefore stated. The combined holdings of others in the Belt securities constituted but a small minority. DeGoeijen, in his frequent trips to Kansas City, inspected and kept in touch with the Belt properties and condition of affairs. The Belt was what might be deemed a parent company to the Consolidated, Union, Air Line and Connecting Companies.

In the sequence of facts, the Suburban Company was the beginning of the Belt system, organized, as before stated, by Martin Scott and others, who failing to secure sufficient funds to finance the proposition, invited Stilwell to take charge of their enterprise and which resulted in the making of the Stilwell contract. It is conclusively shown that substantially all of the capital stock of the Con-
776 struction Company was used in building the first division of the Belt, and, when such stock was depleted, arrangements were made through the same Construction Company, to build the second division of the Belt, as has been hereinbefore shown. The various transactions involved in the making of the Stilwell contract, the building of the Suburban road, its acceptance by the Suburban Company, the turning over of the stocks and bonds, and, in fact, all the important details respecting these transactions, received the approval of the stockholders and directors controlling these companies. The claim made by the complainants that the Trust Company so dominated the whole situation that it compelled or caused the Suburban Company to accept the road when it should not have done so, is not sustained by the proofs. Considering the fact that the Suburban Company had nothing but a franchise from Kansas City, and, at that time, with no immediate prospects of additional railroad connections it is not surprising that it had to make sacrifices in connection with the Stilwell contract, and the completion of the first division of the Belt. These were matters, however, solely and entirely within the business judgment of the parties then interested in the promotion and development of the Belt properties, and there is nothing in this record from which the Master feels justified in reaching the conclusion that the transactions of the Trust Company in controversy, in respect to the construction of the first and second divisions of the Belt, were inequitable or oppressive to the extent that they should be set aside.

Conclusions of the Master.

With respect to the series of claims which are predicated upon the contracts for construction made with the Belt and Air Line Companies by the Construction Company, and also in respect to the manner in which those contracts were fulfilled, it is the opinion of the Master that these claims — without substantial merits, for the following, among other reasons.

1. At the time these transactions took place, the sole and only stockholder of the Belt and Air Line Companies was the Construction Company, and the persons to whom it had caused certain shares to be issued for the purpose of qualifying them as directors and it would seem that, as to the manner in which the Construction Company saw fit to divide up its interest in the proprietorship of the company, and to represent it in its shares, considered only the Construction Company and its shareholders, and that, too, notwithstanding the identity of directorships among the companies involved.

777 McCracken v. Robinson (C. C. A.) 57 Fed., 375, s. c., 52 Fed., 726.
Coe v. R. R., 52 Fed., 531.
Barr v. R. R., 125 N. Y., 263.
U. P. R. R. v. Credit Mobilier, 135 Mass., 367.

2. There was no fraud practiced by the Construction Company on the railroad companies. Adopting the language of one of the cases, it was "practically in this way the promoters of the railroad placed a valuation upon the corporate properties and franchises which the contribution and expenditures of their money created; and the fact that they were created for an expenditure less than the par value of the aggregate issues of stocks and bonds does not affect the question at all."

Barr v. R. R., 125 N. Y., 263.
Robinson v. McCracken, 57 Fed., 375.

3. If, however, the arrangements and practices on the part of the Construction Company with the railroad companies had been corrupt and illegal, then complainants' remedy would have been against such company, or its stockholders, and not against the Trust Company, which was not a party to such arrangements, that is, unless under the proofs and the law of the case, it should be satisfactorily shown that the Trust Company dominated and controlled all these transactions in its own interest, and to the prejudice of the other companies involved.

4. There is nothing illegal or unlawful in a corporation issuing its unpaid shares, as professedly paid up, as a bonus to bondholders in order to market its bonds, or other securities, and, where a corporation cannot sell its bonds at par without giving away an equal amount of its stock, and the value of the bonds is no more than equal to the actual value of the bonds and stocks combined, then

the purchaser cannot be compelled by creditors of the corporation, or by its receiver to pay the principal value of the stock.

Handley v. Stutz, 139 U. S., 417.
Coe v. R. R., 52 Fed., 531.
Christensen v. Eno, 106 N. Y., 97.

5. Substantially all of the claims set forth in the second ancillary bill are barred by the Statutes of limitations of Missouri (R. S. Mo., 1899, Section 6773-74-75). These statutes are known as the five and ten years statutes, and defendant invokes both in paragraph 118 of its answer to the ancillary bill, as follows

778 "As to so much of said amended ancillary bill as seeks an account of the money, property or effects of the said Belt, Union, Air line, Consolidated, Suburban, Kansas City Terminal Construction, Elevator, Improvement, Townsite or Northern Companies, coming into the hands of this defendant prior to the 6th day of September, 1895, or that seeks a satisfaction for or in respect of any money or property received by this defendant for or on account of any of the matters and things set forth in the said amended ancillary [*nill*] as having taken place or transpired prior to the said date, this defendant says that all of the said matters and things pretended to have transpired, and all of the said money, property and effects pretended to have been received by this defendant, if any such were received, transpired and were received by this defendant more than five years before the commencement of this action or any action whatsoever, and that if the said complainants in the said amended ancillary bill had any cause of action or suit against this defendant for or concerning any of the said matters, which this defendant does not admit, that such causes of action or suit did not accrue or arise within five (5) years before the *the* said amended ancillary bill or the said original bill herein was filed or this defendant was served with process, nor did this defendant at any time within five (5) years before the said bills were exhibited or process sued out against this defendant, promise or agree to come to any account or make satisfaction or agree to pay any sum or sums of money for or by reason of any of the said matters, nor was there any occasion for it so to do; and that by a certain act of the General Assembly of the State of Missouri, for the limitation of actions and suits at law, it was enacted as is shown by Sections 6773, 6774, and 6775, of the Revised Statutes of the State of Missouri, for the year 1889, as follows, to-wit:

SEC. 6673. "Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued."

SEC. 6774. "Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years

779 after the cause of such action shall accrue; third, actions for relief, not herein provided for."

SEC. 6775. "Within five years: First, all action upon contracts, obligations or liabilities, express or implied, except those mentioned in Section 6774, and except judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trepass on real estate; fourth, an action for taking, detaining, or injuring any goods or chattels, including actions for recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years, of the facts constituting the fraud."

The defendant states that the statutes have been in force during the whole time in which the said matters set forth in said amended ancillary bill are pretended to have transpired and ever since the said pretended cause of action are alleged to have accrued and this defendant pleads the several matters aforesaid in bar to so much of the said complainant's said demands as aforesaid and prays the judgment of this Honorable Court thereon."

The Complainant is not within the saving clause in the fifth subdivision of said section 6775, which provides that in actions for relief on the ground of fraud, the cause of action in such case is to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years of the facts constituting the fraud, because.

(*a*) There is no attempt made by complainants either in the bill or in the proofs to bring themselves within such clause. Wood v. Carpenter, 101 U. S., 140; Kessler & Co. v. Ensley & Co., 123 Fed., 546;

(*b*) On the contrary, it is shown that the Belt stockholders knew of, and acquiesced in, the transactions complained of, and that the Belt Company, through which its receiver derives all of his rights, expressly ratified them;

(*c*) The proof shows that the transactions were not secret or concealed, but were of more or less public character, and full information concerning them *with* within easy reach of any party in interest. As stated by Judge Black, in Bent v. Priest, 86 Mo., 475,
780 "Much, we think, depends upon the fact whether the fraud is a secret or an open one. If the substantial facts constituting the fraud were open, it is believed under the equity rules the statutes of limitations would have applied at once, but if these facts were in any other nature concealed, and were unknown, it is believed the statutes would not begin to run until they were discovered, there being no want of diligence on the part of complainant."

Mr. Justice Swayne, speaking of the same point, in Wood v. Carpenter, 101 U. S., 140, says:

"Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence, and, the means of knowledge are the same thing in effect as knowledge itself, and the

delay which has occured must be shown to be consistent with the requisite diligence."

Foster v. R. R., 36 Fed., l. c., 637.
Swift v. Smith, 79 Fed. 709.

6. The complainants are not in position to invoke the rule that the statutes of limitations do not run in favor of a trustee against his cestui que trust, and that the Trust Company, in selling the securities issued by the various railroad companies for their account, stood in the relation of a trustee towards the Belt Company, for the following reasons,

(*a*) The Trust Company was not such a trustee as to prevent the running of the statute of limitations in its favor, in as much as the relationship created by the controverted transactions was that of an implied or constructive trust, and the rule invoked by complainants applies only to express trust.

Young v. Mercantile Trust Co., 140 Fed., 61.
Miles v. Vivian, 79 Fed., 848.
Kane v. Bloodgood, 7 Johns. Ch., 90.
Landes v. Saxon, 105 Mo., 486.
Robinson v. Hook, per Storry, J., 4 Mason, l. c., 152.

In Robinson v. Hook, supra, Judge Storry said:

"But as to cases of merely constructive trusts created by courts of equity, or cases which in a sense are treated for some purpose as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted that the statute of limitations does not embrace them. If it were otherwise, there is scarcely a single case of bailment, or of moneys received to use, of factorage concerns, of general account, into whose service the doctrine might not be pressed."

781 (*b*) Even in cases of an express trust, the rule that neither time nor laches will bar the right to enforce the trust is subject to the exception that when the trust is disavowed by the trustee, or the trustee conducts himself in a manner wholly inconsistent with any admission of its further existence or means of knowing this, the case will be brought within the ordinary rules of limitations and laches.

Swift v. Smith, per Sanborn, J., 79 Fed., and cases cited.

In the case at bar, it is proven that the Trust Company rendered regular accounts of all sales of stocks and bonds of the different railroad companies involved in this accounting, and, in the ordinary course of business, proper entries were made upon the books of the railroad companies, as well as the Trust Company, and the usual papers and vouchers were systematically filed in evidence of such transactions. The principle has been stated in many of the authorities that the rendition of such accounts, under such circumstances, is wholly inconsistent with the further recognition of any trust, express or implied, with respect to the securities covered thereby.

28 A. & E. Enc. Law (2nd Ed.,) 1133-1135.

7. It was contended in the argument by complainants' counsel, that the statutes of limitations of Missouri have no application to this case and that courts of equity in the United States are not bound or controlled by the statutes of limitations of the several states in which they sit. The law, however, is to the contrary, the rule being concisely stated by the court in Miles v. Vivian, 79 Fed. l. c., 852, as follows:

"Statutes of limitations are equally obligatory upon the courts of equity and courts of law, in cases in which the jurisdiction is concurrent. In such cases courts of equity do not act so much in analogy to the statutes as in obedience to them. 2 Story Eq. Jur. (13th Ed.) 842. Although the ordinary chancery jurisdiction of the courts of the United States cannot be abridged by state statutes, they recognize those of the state in which the court is sitting, limiting the time for bringing suits, and adopt them, if they do not act in obedience to them. Coulson v. Walton, 9 Pet., 62; Harpending v. Dutch Church, 16 Pet., 455; Badger v. Badger, 2 Wall., 87-94; Clarke v. Boorman, 18 Wall., 493; Carroll v. Green, 92 U. S., 509; Kirby v. Railroad Co., 120 U. S., 130, 7 Sup. Ct., 430. Accordingly they will
782 adjudge in cases over which there is a concurrent jurisdiction by courts of law and equity, that lapse to be a bar in equity which would have constituted a bar if the action had been at law. Norris v. Haggin, 136 U. S., 391, 10 Sup. Ct., 942; Alsop v. Riker, 155 U. S., 448, 15 Sup. Ct., 162. In Boone County v. Burlington & M. R. R. Co., 139 U. S., 684, 11 Sup. Ct., 687, the rule was applied where the state statute barred an action for relief on the ground of fraud unless commenced within four years after the discovery of the fraud. Applying this rule to the present case, the six year statute of limitations, which has been pleaded by the defendant, would seem to bar the action. If it does not, the ten year statute applies. Hubbell v. Medbury, 53 N. Y., 98.

Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights unreasonably long, and shows no excuse for having done so. Recent applications of the doctrine by the Supreme Court are found in Hanner v. Moulton, 138 U. S., 486, 11 Sup. Ct., 408; Richards v. Mackall, 124 U. S., 183, 8 Sup. Ct., 437; Hammond v. Hopkins, 143 U. S., 224, 12 Sup. Ct., 418; Galliher v. Cadwell, 145 U. S., 385, 12 Sup. Ct., 873; Lane & Bodley Co. v. Locke, 150 U. S., 193, 14 Sup. Ct., 78; Abraham v. Ordway, 158 U. S., 416, 15 Sup. Ct., 849."

8. It has been contended by complainants that the items involved in complainants' bill are saved from the effect of the statutes of limitations by reason of Section 4278, of the Revised Statutes of Missouri, 1899, which provides as follows:

"In an action brought to recover a balance due on a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item in the account on the adverse side."

The defendant, however, insists that the contention of complainants in that respect is without merit, for the reason that this is not a suit on a mutual, open and current account, in the statutory sense.

It is true that in its answer, the Trust Company prays judgment, not only upon the promissory notes of the Belt Company, held by it, but also upon an unpaid book account, the first item of which is dated September 25, 1899, and the last item September 25, 1900, the balance due being $31,809.49. This book account commences, then, September 25, 1899. The remainder of the account claimed in this action by the Trust Company, consists exclusively of promissory notes executed by the Belt Company in its favor, and which notes are renewals and readjustments of notes for sundry amounts, executed by the Belt Company on March 31, 1899, and in
783 part by notes executed long prior to that date; said notes being given by the Belt Company to the Trust Company in settlement of the balance shown to be due by the book accounts (Vol. 1-128). The effect of the complainants' contention is to ask the Court to ignore the settlement of these accounts by notes, to treat such notes as mere nullities, and to regard the book showing of the Belt and Trust Companies as opened, unsettled and mutual accounts. It affirmatively appears on the books of both companies (see Willey's exhibit, Vol. 1-238) that from the origin of the dealings between the Belt Company and the Trust Company on March 26, 1890, to the time of the termination of such dealings in 1900, a period of over ten years, there were frequent settlements by the Belt Company of the balances due from it to the Trust Company, either by payments of cash, or by the execution of promissory notes, the entries on their face reciting that the notes were given "to balance account"; and further, that such notes were not only given, but actually paid by the Belt Company at their maturity, in the ordinary course of its business relations with the Trust Company. The complainants, in their bill, seek to disregard not only the notes now held by the Trust Company, but all the notes given long before the present ones were executed, and paid many years ago, in the ordinary business transactions between the Belt and the Trust Company; in other words, the Belt receiver is attempting to get behind these notes given by the Belt Company in settlement of book balances, and long ago satisfactorily adjusted between the Belt and the Trust Company. For example, page 52 of the record (Willey's exhibit) shows that on October 1, 1891, the Belt owed the Trust Company, on open account, $30,149.00, and that on that day the Belt executed its promissory note of that amount to the Trust Company, in settlement of the balance, and that on October 21, 1891, the Trust Company, by entry on its books, gave the Belt credit for that note. When this note became due, it was paid in part, and a renewal note given for the part not paid (see item of January 20, 1892, Rec. p. 54); and afterwards this last note was paid in full in the ordinary course of business. The books of both companies disclose frequent instances of like nature (see Willey's exhibits in Vol. 1-57 et seq., and accountant Wright's literal copy of the book showing of both the Trust Company and the Belt Company set out in parallel columns, comprising Vol. 44 of the record).

The Master is of the opinion that counsel for defendant are right in their suggestion that the statute upon which complainant relies expressly refers solely to actions brought to recover a balance due

on a mutual, open and current account, and provides that in
784 such action, the cause of action should be deemed to have accrued from the date of the last item, and, further, that the statute has no application to stated or settled accounts, whether settled by note, cash or otherwise; and that clearly the recovery sought by the Trust Company upon the promissory notes held by it is not an action on a mutual, open and current account. In support of this view, the following authorities are cited:

"An open account is defined to be "One which is continuous or current, uninterrupted or unclosed by settlement or otherwise."

Cyc. of Law & Proc., Vol. 1, 363.

"An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions."

Cyc. of Law & Proc., Vol. 1, 364.

"A settled account is one the balance of which, having been stated, is paid."

Cyc. of Law & Proc., Vol. 1, 364.

"A mutual account is terminated when a final balance is arrived at, which is to constitute an independent debt and on such a stated account the statute of limitations runs from its date."

So it appears that, when an account is stated and rendered, the statute of limitations begins to run against it from the date of such statement of account. Much more so does the statute run against such an account, when a note or other evidence of indebtedness is given by the party against whom the statement is rendered in settlement of the balance due. And it has been said:

"Where upon an accounting a party has given a note for the balance, or has allowed as an item of the account a note previously given by him, he cannot afterwards set up as a defense to the note matters fully within his knowledge at the time of the settlement."

1 Am. & Eng. Ency. of Law, 459 and case cited.

"An account stated is in the nature of a new promise or undertaking, and raises a new cause of action between the parties. In accordance with this principle it has been seen that a recovery may be had upon an account stated although there could be no recovery on the original debt."

1 Am. & Eng. Ency. of Law, 456.

785 Estes v. Hamilton Brown Shoe Company, 54 Mo. App., 543.

"Since the account stated is a new promise, the items of which the original cause of action was composed cannot be inquired into."

1 Am. & Eng. Ency. of Law, 456.

It would seem, then, that so far as affects the operation of the statute of limitations in this cause, there could hardly be an inquiry into the consideration of the notes now held by the Trust Company,

and if such is the case, that there could be no inquiry respecting the consideration of notes executed and paid by the Belt Company long prior to the existence of the principal notes.

The Master has, in his report on the intervention of the Southern Company, made special reference to the statutes of limitations as affecting the Trust Company in its relations with these other Companies, and also cited many of the leading authorities upon the subject, and to which reference is here made as a part of his conclusions on the limitations subject, as affecting the issues in this cause.

9. The fact that the Belt Company and the Trust Company had directors, a majority of whom were common to both companies, did not disable the Trust Company from loaning its money or credit to the Belt Company, nor from taking collateral security from the Belt Company to secure such indebtedness, and, before the Belt Company or its receiver, can rescind its action in giving such collateral security, payment of the debt is an essential pre-requisite.

Gould v. R. R., 52 Fed., 680.

10. By reason of the foregoing conclusions, respecting the law and the proofs in this cause, the Master is of the opinion, and so finds, that, (*a*) The Trust Company did not dominate and control the Belt Company, or any of the other companies involved in this controversy, as claimed by complainants in their bill; and, (*b*) that the statutes of limitations pleaded by defendant in its answer, are conclusive as to the transactions complained of in the bill, and occurring prior to November 20, 1896.

VI.

The De Goeijen $89,333.33 *Claim.*

In item (*n*) of paragraph 1, of the second ancillary bill, the complainants allege that on or about October 15, 1897, the Belt Company was embarrassed financially, and insolvent, had out-
786 standing mortgage notes for a large amount, its stock was depressed in value, and, by reason of these things, certain of the officers of the Trust and Belt Companies, and investors in Belt securities, became desirous of improving the Belt's financial condition, by cutting off its books certain bills payable, so as to improve its condition, and permit the declaration of a dividend; that an arrangement was made between certain Trust Company officers and J. DeGoeijen, Jr., by which the Trust Company assumed and agreed to pay certain real estate notes described in the bill, which included the amount now in controversy, and the amount of such items was by the Trust Company charged to the Belt Company on the books of the Trust Company, and the same appears as a debit to the Belt Company in the Trust Company's statement of account against the Belt; that, at the time of said transaction, and on or about October 15, 1897, pursuant to said plan, DeGoeijen purchased certain bonds belonging to the Belt Company, which were by the Trust Company credited upon its books to the Belt in an amount sufficiently large

to cover all of said notes, so that upon the Belt books, all of said bills payable had been eliminated, and the Belt Company was thereby enabled to make out and send to stockholders and financial publications a clean statement, showing an improved financial condition of its affairs; that, on or about the month of April, 1899, and after the appointment of receivers for the Gulf Company, the Trust Company had good reasons to believe, and did believe, that it would soon lose control of the Belt, and that other and independent directors and officers would be elected for the Belt, and thereupon, the Trust Company set about to relieve itself of its assumption and agreement to pay said notes aggregating $89,333.33 and made the claim that the credit therefore extended by it to the Belt on October 15, 1897, was on the understanding that the funds for such credit should be supplied by DeGoeijen, which he had failed to do, and, thereupon the Trust Company undertook, by an entry upon its own books, to relieve itself of said assumption and agreement, but failed and refused upon so doing, to credit the account of the Belt Company with said sum as it should have done; that, at that time, DeGoeijen was otherwise indebted to the Trust Company for a large sum, which he was unable to pay, or, by reason of their intimate financial relationship, the Trust Company was unable or unwilling to collect from him, and that thereupon it contrived the plan of causing the Belt Company to take over its worthless account against DeGoeijen, in lieu of crediting the Belt Company with such sum, as it should have done; that, at said time, the Trust Company knew
787 that the DeGoeijen account was worthless and uncollectible, and its action in causing said entries to be made was a fraudulent attempt to relieve itself of its assumption to pay said notes in the sum of $89,333.33; that, by reason of the premises, the Trust Company is estopped to deny that the credit it extended to the Belt Company, as above stated, was an absolute credit, and to say that it was a conditional one. Complainants claim that the charge of $89,333.33, appearing on the Trust Company account, should be eliminated therefrom, together with all charges of interest, and that the Belt Company should be credited with the same amount, and interest from October 15, 1897.

In paragraph 78 to 90, inclusive, of defendant's answer, admissions are made, respecting certain conveyances of the real estate therein described to Alfred L. Howe, treasurer of the Suburban Company, and W. S. Taylor, an officer of that company, and the execution of notes for the deferred payments thereon, and that the notes so executed by Taylor and Howe aggregated the principal sum of $89,333.33, and were secured by deed of trust upon said real estate, located at Second and Wyandotte Streets. It is denied that in October, 1897, the Belt Company was financially embarrassed or insolvent, or that its stock was depressed in value, or that it was desirous of manipulating its accounts, or that it did do so, or that any arrangement was made between any of the Trust Company officers and DeGoeijen, or between it and any other person, whereby it assumed to pay said real estate notes, which were a lien upon the property of the Belt Company, and including the notes

aggregating $89,333.33, or that the Trust Company at any time assumed and agreed to pay said notes, except upon the conditions and under the circumstances stated in its answer, but on the contrary, states that said notes were assumed by DeGoeijen. Defendant denies that in April, 1899, or at any other time. it had reason to believe, or believed, that it would lose control of the Belt Company, and states that at no time did it have control of the Belt Company; denies that it set about to relieve itself of any obligation to pay said $89,333.33, and states that at no time had it incurred any such obligation; denies that DeGoeijen was indebted to it in an amount in excess of said notes, or in any sum, or that he was unable to pay his obligations to defendant, or any other person, or that it caused the Belt Company to take over any account due the defendant from DeGoeijen, or that it knew that he was insolvent, and states that it had no account against him, and denies that it caused the Belt Company to make any entries on its books, or that the Belt Company or complainants, are entitled to any credit upon their indebtedness to defendant on account of said notes for $89,333.33, charged by the defendant to the Belt on October 15, 1897.

788 Defendant, further answering, states in substance, DeGoeijen, and associates, residents of Amsterdam, Holland, on October 15, 1897, were the owners of a large majority of the Belt stocks and bonds, and DeGoeijen, as the agent and representative of the Dutch investors, was chairman of a permanent executive committee appointed by the Belt stockholders, and with full discretionary power in the management of Belt affairs, and hence, interested in improving its financial condition, and for such purpose, came to Kansas City in 1897, the Belt Company being then indebted to various persons, aggregating upwards of $100,000.00, on account of purchase money mortgage notes for terminal and depot purposes, and was also indebted on account of floating liabilites; that, prior to October 15, 1897, the Belt Company owned 483 second mortgage Connecting Company bonds, of the par value of $483,000.00, and 82 Union Company bonds, of the par value of $82,000.00, and that, by written contract, dated July 1, 1897, the Belt sold to DeGoeijen the said 483 bonds at 45 cents on the dollar, or a total of $217,350.00, and also said 82 bonds, at par, or $82,000.00, and DeGoeijen agreed to pay the Belt for all said bonds on or before December 1, 1897; that the Belt Company, on its part agreed out of the proceeds of said sale, to pay or cause to be paid all its real estate mortgage notes and floating debt; that, thereafter, at the request of the Belt Company and DeGoeijen, the defendant agreed that it would act as the fiscal agent of the Belt Company in the collection from DeGoeijen of the purchase price of said bonds, and see that the same was disbursed in accordance with the arrangement made between the Belt and DeGoeijen, and that at the time of the making of the arrangement between the Belt and DeGoeijen, the said 82 Union Company bonds, and 483 Connecting Company bonds, were not in the possession of the Belt, but had been pledged by it with financial institutions as collateral security for the payment of its obligations, and it was known to all parties to the trans-

action that it would be necessary for such obligations to be paid before said securities could be delivered to DeGoeijen, and, for that reason, the defendant company was delegated by DeGoeijen and the Belt Company to pay off and discharge said obligations out of the proceeds of said securities bought by DeGoeijen; that, pursuant to said arrangement, the defendant placed to the credit of the Belt Company, on its books, on October 15, 1897, the sum of $217,350.00 and $82,000.00, representing the purchase price of said bonds by DeGoeijen; that, as said bonds were released by the persons holding the same as collateral security, the defendant would send them to DeGoeijen, who, from time to time, made payments on ac-
789 count of his purchase of said bonds, and defendant applied the payments so made by him in the discharge of the floating debt of the Belt Company; and that, finally, all of such real estate notes and the floating debt, were paid out of such proceeds, down to $89,333.33, which amount was still unpaid at the time the receivers were appointed for the Belt Company; that it was distinctly understood between the Belt Company and DeGoeijen and defendant, that defendant should not be required to pay said real estate mortgage notes held by the Provident Company and aggregating $89,333.33, until and unless DeGoeijen should pay defendant in full for the Belt Company, for the bonds purchased by him from it, as above stated, and that DeGoeijen at no time paid to defendant the full amount of said bonds, being behind exactly the sum of $89,333.33; that defendant denies that it had any interest in said transaction except to collect from DeGoeijen, and apply the proceeds thereof, in accordance with the directions of the Belt Company and DeGoeijen, as already stated, and that it acted solely as the agent for the Belt and DeGoeijen and that it credited each of them with all the moneys received by it from DeGoeijen; that the Belt Company at all times treated DeGoeijen as its debtor, by reason of his failure to pay the depot mortgages, or the balance on the purchase price of the bonds, and from time to time at regular intervals, it rendered bills against him for the said $89,333.33, and for interest, which it, the Belt Company, had to pay from time to time to the Provident Company, on account of the depot mortgages; that even though De Goeijen did not pay the full amount of the purchase price of said bonds to the Belt Company, through the medium of the defendant, yet that he did, in fact, pay the same to the receivers of the Belt Company, that is to say, that shortly after the Gulf Company went into the hands of receivers, in April, 1899, certain bondholders organized themselves into a committee of reorganization, assuming to act for and on behalf of the holders of the Gulf securities, who should join or participate with the Committee in the reorganization of the Gulf Company, and that a plan of reorganization was promulgated, and, as a part thereof, the Committee acquired all the stocks and bonds of the Belt and constituent companies, and also the right to adjust the floating indebtedness of the Gulf and the Belt Companies; that at the time the Gulf Company went into the hands of receivers, it was indebted to DeGoeijen in the sum of about $300,000.00, borrowed money, and for which he made a claim

against the Gulf receivers, and also against the reorganization Committee, and that, in the meantime, receivers were appointed for the Belt, pursuant to the reorganization plan, and the said Belt claim against DeGoeijen for $89,333.33, was referred to the Committee for adjustment, and that, thereupon, DeGoeijen and the
790 Committee entered into negotiations for a settlement of the mutual controversies pending between him and the Committee, acting on behalf of the Belt and Gulf Companies, and receivers; that a settlement was effected between DeGeoijen and the Committee, in which he was paid $150,000.00, in full settlement of the mutual demands existing between him and the Gulf and the Belt Companies, and the Committee, after taking into account as an offset, the said sum of $89,333.33; that the Belt Company and its receivers, having, by reason of such settlement, received full payment for the depot mortgages aggregating $89,333.33 are estopped to say that either DeGoeijen or defendant is indebted to them on account thereof, and that it was with the amount of money thus deducted by the Committee from DeGoeijen's claim, that the Belt receivers paid the Provident Company for said depot real estate mortgage notes.

In the answer of defendant, filed July 2, 1906, to the second ancillary bill, it has, in paragraph 4 thereof, supplemented the averments in paragraph 90 of its answer to the first ancillary bill, in which it makes more specific reference to the settlement between DeGoeijen and the reorganization Committee on behalf of the Gulf and Belt Companies, and their stockholders.

The facts in respect to this DeGoeijen matter, as they appear in the record, are so numerous that it is not deemed necessary to make specific references except to a few of them. In Johnson's testimony (Rec. 21-11242), he states that, at all times up to October 31, 1897, the Belt Company was insolvent, that the indebtedness on October 31, 1897, amounted to $380,000.00, after taking into account the advance of over $300,000.00 to the Belt by DeGoeijen and the Trust Company (Rec. 36-18979). As to the amount of notes outstanding, see the entries on Belt journals, appearing in Rec. 51-31007, consisting of $103,783.91 real estate notes, including the depot mortgages, and also $120,000.00, bills payable, appearing in Rec. 51-31011. Wilcox states that the Belt, on October 15, 1897, owned the Trust Company $45,000.00, was indebted to the banks $135,000.00, and something over $100,000.00 on real estate notes, which includes the $89,333.33 item (Rec. 34-18118); and that, when DeGoeijen came to Kansas City, in October, 1897, he was the representative of the Holland investors, and largely interested in the Belt Company (Rec. 34-18100); that it was desirous to make a better showing on the Belt books, in order to maintain the market for Belt securities. The matter was discussed between Stilwell and DeGoeijen and that Stilwell planned a series of transactions whereby the Belt would be supplied with funds, and from the proceeds of securities to
791 be donated by DeGoeijen, and from cash to be donated by him and the Trust Company, whereby the Belt indebtedness would be taken off the Belt books (Rec. 34-18101); that another

object in showing a better condition on the Belt books, was to place the company in condition to pay a dividend, and one was declared at the end of the year 1897, being a cash dividend, of which $65,-542.50 appears as a charge against the Belt Company in the Trust Company's account at page 117, Rec. 1, (Rec. 34-18254).

Doran, in his testimony, states that, from the donations of the Trust Company and De Goeijen to the Belt Company, amounting to $390,000.00, they were able to pay a cash dividend on the Belt stock amounting to $71,000.00; that one of De Goeijens objects in the October, 1897, transaction, was to declare a dividend, as it was thought that the declaration of such dividend would have a beneficial effect upon the stock market for Belt stock, and, had it not been for this $390,000.00, the financial condition of the Belt would not have warranted the declaration of the dividend (Rec. 51-30833 to 30842).

Johnson states that in June, 1896, De Goeijen subscribed, through the Belt, for 600 Connecting Company bonds at 45 cents on the dollar, amounting to $270,000.00 (Rec. 14-7794), and that in June, 1896, he paid his subscription for these bonds by delivering to the Belt Company 385-714/1000 first mortgage Gulf bonds (Rec. 14-7796), and that, in October, 1897, these second mortgage connecting bonds were donated by De Goeijen to the Belt (Rec. 14-7798), also De Goeijen's bill of sale for the bonds (Rec. 14-7800); that, after this gift to the Belt Company, the Trust Company purchased these 600 Connecting Company bonds from the Belt at 45 cents, also 82 Union Company bonds, at par, and gave the Belt Company credit, under date of October 15, 1897, as shown by Rec. 1-116, of the account, for these bonds so purchased, and thereupon sold 483 of said second mortgage Connecting Company bonds to De Goeijen at 45 cents, for which he was to pay the Trust Company in about three weeks; that under the same date, October 15, 1897, the Trust Company charged the Belt Company the $135,000.00 of bills payable owing by the Belt, also the $100,000.00 odd dollars of real estate notes above shown (Rec. 1-116) the same including said $89,-333.33 of depot mortgage notes; that the Trust Company, under date of October 15, 1897, gave the Belt Company a donation of $30,000.00 (see Trust Company journal voucher 12343, Rec. 7-3597), and, on the 20th day of October, 1897, De Goeijen gave the Belt Company a donation of $5,000.00, and the Trust Company an additional donation of $10,000.00 (Rec. 7-3623 and Rec. 1-116 and 117).

792 The entries upon the Trust Company books in relation to this transaction will be found in Rec. Vols. 49 and 34, and the vouchers in Vol. 7. On April 1, 1899, Trimble, Martin and Gillham were by the Circuit Court of Jackson County, Missouri, appointed receivers of the Gulf Company (Rec. 21-11312). It is shown by Wilcox's testimony (Rec. 34-18108-'11) that it was believed several weeks before April 1st, that the Gulf road would default in the payment of its interest, and that it was so closely allied with the Belt and associated lines that the bankruptcy of the one would probably involve the others. As shown by the Trust

Company's account upon the books of De Goeijen, Jr., account securities bought (Rec. 49-29957), the Trust Company, on March 31, 1899 being the day just preceding the appointment of receivers for the Gulf Company, charged back against the Belt Company the balance of $89,333.33, appearing on the books as due by De Goeijen to the Trust Company. On April 4, 1899, Wilcox wrote to Doran that it would be necessary for him to take again upon his books this $89,333.33 of notes, and, in pursuance of such instructions, Belt voucher of date August 31, 1899, was issued taking back upon the Belt books these notes (see Wilcox's letter and Belt journal voucher, appearing in Rec. 34-18176 to 18181). Wilcox also states, in substance, (Rec. 34-18182 to 18187) that De Goeijen had been considerably embarrassed by reason of — fact that he had furnished large sums to the Gulf road, which had gone into the receiver's hands, and it was not desired that his account should appear upon the Trust Company's books, after that receivership, as it was regarded as a slow account, and might be of long standing before it could reasonably be collected, and, for that reason, it was deemed advisable to take it from the Trust Company's books and place it upon the Belt books, as it was desired to have the Trust Company's accounts make as good showing as possible, as it was well known that the Trust Company had financed the Gulf Company, which had become embarrassed.

Some of the events leading up to a settlement by the Southern Company with the Arkansas Construction Company and De Goeijen are as follows: De Goeijen, in 1899, filed an intervening petition against the Gulf Company for $280,000.00, alleged to have been advanced by him for the Gulf, of which approximately $104,000.00 went to the Trust Company to reimburse it for funds that it had advanced to the Gulf (see De Goeijen intervening petition, Rec. 50-30330, and his amended petition in Rec. 50-30345).

In March, 1900, the Arkansas Construction Company also filed an intervening petition in connection with the Gulf receivership,
claiming large sums due them for construction work upon
793 the Gulf road (Rec. 50-30362 to 30374). It is claimed by
complainants that the memorandum attached to the minutes of the reorganization Committee in 1900 (Rec. 41-22331), discloses that after an informal discussion of the personal claims of De Goeijen account, it was expressed as the opinion of the Committee that the sum of $150,000.00 "be paid him in full settlement of his personal claims against the Gulf and its terminal companies, and that the reorganization Committee obtained from the Belt Company a release to De Goeijen of the claim of $89,333.33, and that the payment above shall be made after the agreement of arbitration of the Arkansas Construction Company claims has been signed by all parties, and that this suggestion be referred to the Kansas City Southern Railway Company, with the recommendation that such assent be given by the Kansas City Southern Railway Company, and it being understood that the above suggestion should be submitted to the Kansas City Southern Railway Company, and they advise the reorganization Committee of the action taken."

At this time, as shown by De Goeijen's letter, appearing in Rec. 56-34467 to 34473, the De Goeijen claims amounted to $407,478.00; of which $280,000.00 was covered by the intervening petition above cited.

On July 11, 1900, or the day after the meeting of the reorganization Committee, just above quoted, the chairman of the Committee, William F. Harrity wrote Harriman, Chairman of the executive committee of the Kansas City Southern, concerning suggestions of the reorganization Committee, as expressed by the minutes just above cited. See letter appearing in Rec. 56-34455-'6.

On July 12, 1900, at a meeting of the executive committee of the Southern Company, the suggestions of the reorganization Committee were agreed to, and provided, as shown by the minutes "this action was taken with the understanding that the agreement, in its form, to arbitrate the claims of the Arkansas Construction Company against the P. & G. Railroad Company, and the arbitrators selected shall be satisfactory to this committee" (see copy of the minutes of the executive committee of the Kansas City Southern Railway Company, Rec. 56-34462-¼-½).

It thus seems that the proposed settlement suggested by the organization Committee as to the release of De Goeijen by the Belt of the $89,333.33, and to which the Southern Company agreed, was upon the condition that the arbitration and the arbitrators should be satisfactory to it. It appears from letters in Rec. 56-34475 to
794 34486, that the arbitration was not satisfactory to the Southern Company, and that it protested to the Provident Company the payment of the $150,000.00, then on deposit with that company, to meet the claims of De Goeijen, according to the compromise adjustment, and, further, that the Southern Company filed a bill of injunction against the Provident Company and the reorganization Committee, asking for an order restraining the payment to De Goeijen of the $150,000.00 (see copy of bill Rec. 57-35039 to 35087).

Mr. Sielcken, in his testimony (Rec. 57-34617 to 34667), states that in June, 1902, there was a settlement of the claims of the Arkansas Construction Company and De Goeijen, whereby the Southern Company was to pay De Goeijen $150 000.00 for his claims, and to pay the Arkansas Construction Company $350,000.00 for its claims; that this agreement for a settlement of such claims was reached between Harriman and Sielcken in the early part of June, 1902, and that, during their discussions, nothing was said about the claim of $89,333.33 against De Goeijen; that the memorandum of the meeting of July 10, 1900, of the reorganization Committee was not referred to in the negotiations, that De Goeijen was a very large stockholder in the Arkansas Construction Company, and its claims and his were considered one in these negotiations, and that the $150,000.00 on deposit with the Provident Company was available for settling the controversy, and the question was as to how much more, in addition to the $150,000.00, was to be paid; that, during the negotiations, Harriman distinctly stated that he wanted to have all the litigation finished, and that after the

agreement was reached, it was left to the attorneys to prepare the necessary contract papers. The contract so drawn up as the result of the negotiations between Sielcken and Harriman appear- in Rec. 50-30388 to 30401, inclusive, of date June 16, 1902, and is signed by Arkansas Construction Company, by E. L. Martin, president, by the Kansas City Southern Railway Company, and by J. De Goeigen, by Heynecker, his attorney in fact. At a meeting of the executive committee of the Southern Company on June 13, 1902, Sielcken and Harriman being present, a draft of the agreement just referred to was submitted to the executive committee, and was approved (see minutes of Southern Company executive Committee, Rec. 56-34462-¾).

Heynecker, in his testimony (Rec. 50-30381), states that the settlement of the De Goeijen claim was made by Sielcken, representing De Goeijen, and Harriman, representing the Southern Company.

795 Certain book entries respecting this matter may be found in the record, as follows: Rec. 56-34229, 34339, 34244, 34342, 34264.

It was contended, by complainants' counsel, upon the argument of this case before the Master, that the proposed settlement with De Goeijen, provided for in the minutes of the reorganization Committee, of July 10, 1900, was abandoned by reason of the failure of the proposed arbitration agreement, and the fact that the arbitrators did not meet with the approval of the Southern Company, and, in lieu of this proposed agreement, the other agreement of June, 1902, was entered into, wherein Sielcken, represented De Goeijen, and Harriman the Southern Company, and by which De Goeijen received $150,000.00 in settlement of his $280,000.00 Pittsburg & Gulf claims and including the $89,333.33 due from De Goeijen on account of the securities purchased by him.

It is apparent from the foregoing statement of facts that the Trust Company, the Belt Company and De Goeijen all desired to bring about a better condition of Belt affairs, so as to pay off a large part of the liabilities, and make the Belt securities more saleable upon the market. After a rather careful consideration of all these records pertaining to this matter, the Master has been unable to see any reason why the Trust Company should have unconditionally assumed and agreed to pay this large amount of indebtedness, for which it was not primarily liable. It was obviously for the best interest of the Belt Company, and, incidentally, of the Trust Company, that some arrangement should be made by which the Belt securities could be more easily handled, and the money raised with which to pay off the liabilities. De Goeijen, as the representative of the Dutch bondholders, was more deeply interested than any other investor, and hence, it was natural that negotiations looking to that end should be had with him. It seems from the evidence that he had been largely instrumental in and connected with the contract by which the Belt Company had agreed to build the Connecting Company railroad, and in consideration of which the Belt was to receive the Connecting Company securities, and it

was by reason of this contract and the operations thereunder, that the Belt became deeply involved. He had already made a subscription for the second mortgage bonds of the Connecting Company, and when he came over to this country, he made the deal hereinbefore stated, by which he turned over to the Belt, on account of his subscription, 385 Gulf bonds, which, at the subscription price of 45 cents on the dollar, equalled $217,000.00, the price of the bonds, so that the Gulf bonds passed into the treasury of the Belt
796 Company, and De Goeijen became entitled to his 600 Connecting Company bonds; thereupon, pursuant to his plan for relieving the financial condition of the Belt, he turned around and made a donation and bill of sale to the Belt Company of these 600 bonds, so that the Belt Company thereby acquired De Goeijen's 385 Gulf bonds, and also the 600 Connecting Company second mortgage bonds. The proper bill of sale was made to effectuate the purposes of the parties at the time. The Trust Comapny, it seems, also at that time bought from the Belt 117 of the second mortgage Connecting Company bonds. De Goeijen then bought from the Belt Company 82 Union Comapny bonds at par, or $82,000.00, and bought 483 second mortgage Connecting Company bonds at 45 cents on the dollar, and for both of which he agreed to pay the Belt Company on or before December 1, 1897, and thereupon the Belt Company made an entry upon its books, showing the gift that had been made to it by De Goeijen of the 600 Connecting Company second mortgage bonds, which were again sold to him and to the Trust Company, as above stated.

In the testimony of F. B. Wilcox, one of the participants in the Belt Company consisted of promissory notes, which had been rediscounted at Philadelphia, and that these very securities which De Goeijen had bought, especially the 82 Union Company bonds, had been pledged by the Belt Company as collateral to its indebtedness. It was not deemed necessary at the time that these securities should be immediately taken up and turned over to De Goeijen, and, in view of the fact that the notes and mortgages which the Belt Company had given would have to be paid out of the proceeds of the bonds Which De Goeijen had purchased, it became necessary for somebody to act in the capacity of an agent or trustee, to get these securities, see to the payment of the indebtedness for which they were pledged, then send them to De Goeijen and collect the purchase price from him; in other words, to make proper payments to the pledges of these collaterals, so as to obtain the collaterals, and then comply with the contract made with De Goeijen by the Belt Company.

On October 15, 1897, it appears from Willey's exhibit that there is a Trust Company entry, which is "to credit by sale of 600 second mortgage bonds, Kansas City & Northern Connecting, at 45c., $270,000," and a like credit for the 82 Union Company bonds on the same date.

The Trust Company also charge the Belt Company various real estate notes, including said $87,333.33 in question. Mr. Wilcox

formerly an officer of the Trust Company, was asked to
797 explain the entries on the Trust Company's books, and answered that they were made to "simplify" book-keeping; and, in answer to the question whether there was any arrangement made whereby the Trust Company had agreed to *to* pay off these notes aggregating $89,333.33, or had assumed them, his answer was as follows: "The agreement was that the Trust Company should pay those notes only as and when De Goeijen remitted the money for that purpose, and paid for the securities he had bought." No other witness in the case testifies to a different condition of things, and when their testimony is analyzed, in view of those facts which are undisputed in the record, there is very little difference, if any, between the statements of the witnesses. Wilcox, assigns as a reason why these notes got on the books of the Trust Company, that the Trust Company had been delegated by De Goeijen and the Belt Company to pay off the debts in Philadelphia, with the proceeds of the securities sold to De Goeijen, get the collatral behind such bonds, forward the same to De Goeijen and collect from him, and with the proceeds so collected, pay off the floating debts of the company.

It is undisputed that the remittances made by De Goeijen, from time to time, to the Trust Company, reduced the total liability down to $89,333.33, which amount remained at a stand-still for some time, though De Goeijen was repeatedly requested, both by the Trust and Belt Companies, to pay the same, but in as much as the notes were held by the Provident Company, and were extended along, and the payment of them postponed for the time being, rather by the acquiescence of the parties, it finally reached the stage where the Trust Company notified the Belt Company that it had better take back the securities upon their own books, and credit mortgages payable with these various amounts, and charge De Goeijen's account, and they were then entered upon the books of the Belt Company, August 31, 1899.

The contention of the defendant is, in substance, that this De Goeijen debt was never the obligation of the defendant, and that its duties in the premises were of a ministerial character, in carrying out the arrangement between De Goeijen and the Belt Company, and that at all times, De Goeijen treated it as his own obligation, and so did his representative Heynecker, and further, that the Belt Company made demands upon De Goeijen to pay, and collected the interest month after month upon the depot mortgages from him, and never did make any demand upon the Trust Company
798 to pay the $89,333.33 or any part of it. It appears that this De Goeijen claim is not contained in the original bill, or in the first ancillary bill, and that its first appearance in this case is in the second ancillary bill, in 1905.

Conclusions of the Master.

The Master is satisfied, from all the evidence in the record, that the Trust Company did not unconditionally and absolutely assume the payment of these notes out of its own funds, but acted as the

mutual agent of De Goeijen, and the Belt Company, and in a ministerial way only; and further, that it was under no legal obligation to pay these notes except as and when De Goeijen furnished the funds for that purpose, and, in arriving at such conclusions, the Master makes references to the testimony of Wilcox, Vol. 34-18116 to 18191, inclusive; Heynecker, Vol. 50-30251 et seq.; Martin, Vol. 53-32775 et seq.; Doran, Vol. 51-30708 et seq.; for bills of sale, book entries, etc., see Vol. 14-7790 to 7802.

The Belt Company, having regularly collected interest on these notes from De Goeijen (Rec. 50-30317), and having shown on its books and on the stated financial reports of the company, that this item of $89,333.33 was due from De Goeijen (Vol. 51-30785), and De Goeijen having at all times recognized the obligation, and the Belt Company and its receiver, having, through the reorganization Committee, collected or made a settlement of some kind with De Goeijen in reference to the matter, it would seem that the complainant is not in condition to now assert that the Trust Company is its debtor on account of said item of $89,333.33, for, in doing the things last mentioned ,the Belt Company has placed a construction upon the transaction which shows that it treated De Goeijen as its debtor, and not the Trust Company.

It has been urged with much force by counsel for the Trust Company, that, by reason of the fact that this claim first appears in the second ancillary bill, filed in March, 1905, the complainants have caused the Trust Company to forego any remedy which it might have had against De Goeijen, in the event that the Belt Company had insisted upon defendant's liability for the De Goeijen indebtedness, and in such event, if it was entitled to hold the Trust Company liable therefor, it should have been a party to the transaction between the reorganization Committee and the Southern Company and De Goeijen, by which this claim was disposed of.

The Master is convinced that the contention of the complainants that neither they nor the Southern Company are bound by the agreement made by Harriman, representing the Southern Com-
799 pany, and Sielcken, representing De Goeijen, is not well grounded, for it is evident from the whole transaction that the Southern Company, as the successor of the Gulf and Belt systems, intended to release, and did release, De Goeijen from the payment of said $89,333.33, and that, as the result of the adjustment of this claim between the reorganization Committee, the Southern Company, the Provident Company, and De Goeijen, on June 6, 1902, the latter was fully released from all further claim on account of the depot mortgages aggregating $89,333.33, and that, in the accounting between the parties at the time, the claims which De Goeijen and the Arkansas Construction Company had against the same interests, were also settled.

These releases are executed by the Kansas City Southern, the reorganization Committee, and the Provident Life & Trust Company and will be found in Vol. 50-30385 of the Record, and should be read in connection with the depositions of McDougal, Hawkes, W. V. Rowe and Thomas L. Chadbourne, in Vol. 57.

It may properly be suggested, in this connection, as showing the interest of the parties, and the conclusiveness of the transaction entered into, that, at the time it executed the release to De Goeijen, the Southern Company was the sole stockholder and bondholder, of the Belt Company, and had become the purchaser of all the property and rights, legal and equitable, of the Belt Company, at the foreclosure sale.

Stuart R. Knott, then president of these companies, and who signed the release on behalf of the Southern, was one of the then receivers of the Belt, and a complainant in this cause. The reorganization Committee, when it signed the release, was then engaged in liquidating the affairs of the Belt Company, pursuant to authority conferred by the reorganization plan, which is hereinafter fully discussed in the Master's report upon the intervening petition of the Southern Company, and in connection with the liability of that Company to the Trust Company for the floating indebtedness of the Belt Company. The reorganization Committee had been more or less pursuing De Goeijen on this 89,333.33 claim most of the time since it was organized, and a settlement had been agreed upon about July 10, 1900 (Rec. 50-30385). The Provident Company, when it executed its release, was the depository of the reorganization Committee, and had been the holder of the notes in question, and was the judgment creditor in the deficiency judgment rendered against the Belt Company in the foreclosure suit.

800 In this connection, see the correspondence between the Committee and De Goeijen, (Vol. 56-34465 to 34468).

The Master is of the opinion, and so finds, that the charge of $89,333.33 should not be eliminated from the Trust Company's statement of account against the Belt Company.

VII.

Commissions, Trustees' Fees and Bonuses, Received by the Trust Company from the Suburban and Belt Companies, on Account of Services Rendered by Trust Company for Them, and Other Companies Controlled by the Trust Company.

In paragraphs 2, 3 and 4, of the second ancillary bill, the complainants allege that upon the organization of the Suburban, Consolidated, Union, Belt, Air Line, and Connecting Companies, the Trust Company caused them, respectively, to issue their stock and bonds, and undertook to dispose of the same, in some instances purchasing such stocks and bonds outright, and in other cases disposing of them to others, and, in connection therewith, it is charged by the complainants that the Trust Company made large and exorbitant charges to the Suburban and Belt Companies, under the guise of commissions, for its services so rendered in and about the sale of such securities. It is further alleged in the bill that at the time the Trust Company was so handling said securities, it absolutely dominated and controlled said companies, and was using them, and each

of them, as instrumentalities or dummies, for its own benefit or profit; that, by reason of the fiduciary relation existing between the Trust Company and said companies, the Trust Company did not have the right in law to charge them any commissions whatever, for the sale or handling of their securities, or for anything done, or services performed, for said companies, and that all contracts made between the Trust Company and said companies, providing for commissions, trustees' fees and bonuses for its services, as aforesaid, were unlawful, inequitable and oppressive; and finally, that all such charges contained in the statement of the Trust Company, should be eliminated therefrom, or should be credited, with interest thereon, to the Belt Company; and further, that in respect to all charges for commissions, not appearing upon said statement, the Belt Company should be entitled to a credit from the Trust Company, with interest thereon from the date of the payment thereof, and, also, for the value of all the stocks and bonds appropriated by the Trust Company, with interest thereon.

801 In the references herein made to the record, respecting the commissions, trustee fees and bonuses, received by the Trust Company, on account of its services, as above stated, the Master has adopted the subdivisions appearing in the bill, and under each subdivision will indicate the book and page of the record at which these items, respectively, may be found, but reserving, however, his conclusions as to the liability of the Trust Company therefor until later on, when these items, with others, will be grouped in a general finding.

1. Commissions.

(*a*) In the statement of the Trust Company (referred to in the bill as the "pretended statement" of the Trust Company", the following commission charges are made against the Belt Company, to-wit: August 8, 1890, $15,000.00; December 22, 1894, $4,000.00 October 10, 1894, $1,250.00; July 29, 1897, $1.58; February 8, 1899, $75.00; April 6, 1894, $22.50; November 20, 1895, $62.50.

The $15,000.00 item appears in Rec. 1-38, the Trust Company Journal Voucher 39, Rec. 4-1130. This charge is for 3% commission paid to the Trust Company on 500 Suburban Company bonds purchased by the Trust Company in August, 1890 (Rec. 17-8974; Suburban Company's minutes, Rec. 52-31257, authorizing the company's president and secretary to dispose of the bonds; also minutes of the Trust Company, executive committee, August 2, 1890, Rec. 11-5715, showing purchase of bonds and 3% commission).

The $4,000.00 item appears in Rec. 1-90, and is for commission [*on*] One Dollar, per share, on 4,000 shares of Suburban Stock purchased by the Trust Company from the Belt Company (see Belt voucher, Rec. 5-2664; minutes, Ex. Com., Sub. Co., Rec. 52-31366).

The $1,250.00 item appears in Rec. 1-67, Trust Company journal voucher 4870, Rec. 5-2532, and appears to be for a commission paid for a loan of $25,000.00 to the Belt Company by the Continental Trust Company (see Trust Company debit slip, and Belt voucher, Rec. 31-16448). There is some doubt as to the meaning of the

record entries as to this item, but it would seem that this commission was paid by the Trust Company to the Continental Trust Company, and that the Belt Company simply reimbursed the Trust Company for it, in which case, it is conceded by complainants that it would not be a proper charge in the bill as against the Trust Company.

The item of $1.58 appears in Rec. 1-113, and is a 5% commission to the Trust Company by the Belt, for the sale of a fractional Gulf bond belonging to the Belt Company.

802 The $75.00 charge appears in Rec. 1-126, and is for one-fourth of one per cent commission on $30,000.00 Belt coupons, charged by the Trust Company against the Belt Company (Rec. 23-12548).

The $22.50 charge appears in Rec. 1-79, being a brokerage of one-fourth of one per cent commission on account of a Belt note discounted by the Trust Company (Rec. 31-16275).

The item of $62.50 appears in Rec. 1-97, and is for one-fourth of one per cent commission on Belt note for $25,000.00, renewed by Central National Bank.

(*b*) The Trust Company, on or about November 27, 1891, charges the Belt Company $1,000.00, as a commission, in connection with the Belt Company, and, it is alleged in the bill, does not appear on the Trust Company's statement of account. It is admitted by the complainants, since the bill was filed, that this item was for a commission received for the sale of 1,000 shares of Suburban Company stock belonging to E. L. Martin, and should not be included in the accounting in this cause.

(*c*) In the Trust Company's statement, the following charges are made, in connection with the Consolidated Company:

Oct. 26, 1891, $522.50; April 4, 1892, $6,000.00; October 26, 1891, $30,000.00; December 17, 1891, $6,000.00; October 27, 1891, $402.50; October 26, 1891, $120.00; November 13, 1891, $320.00; November 2, 1891, $150.00; November 2, 1891, $80.00; November 12, 1891, $1,182.50; November 16, 1891, $463.18; November 21, 1891, $750.00; November 23 1891, $4,455.00; December 4, 1891, $24.00; December 7, 1891, $24.00; December 19, 1891, $300.00; January 9, 1892, $30.00; January 12, 1892, $300.00; January 13, 1892, $750.00; February 11, 1892, $90.00; February 26, 1892, $60.00; February 29, 1892, $225.00; March 11, 1892, $30.00; March 19, 1892 ,$60.00; March 19, 1892, $750.00; April 6, 1892, $2,802.60; April 12, 1892, $1,200.00; July 13, 1892, $240.00; August 2, 1898, $46.88; February 8, 1899, $46.00.

For all the items in the Subdivision (*c*), see Johnson's Exhibit 941, Rec. 21-11343 to 11351, showing his exhibit on commissions received by the Trust Company, and refer to the column of cash, under the heading "Consolidated Terminal Railway Company."

The item of $522.50 appears in Rec. 1-10, being for two items for $402.50 and $120.00, and is for 3% commission on sale of Consolidated Company bonds (Trust Company journal voucher 1057, 1058, Rec. 3-567 and 568).

803 The $6000.00 item appears in Rec. 1-14, and is a 12% commission to the Trust Company for disposing of Consoli-

dated Terminal bonds for $50,000.00 (Trust Company journal voucher 1405, Rec. 3-704).

The $30,000.00 item appears in Rec. 1-10, and is for commissions obtained by the Trust Company from the Consolidated Company as shown by the body of journal voucher 1052, Rec. 3,570, and "on account of trustees' services, in securing franchises and on account of all other services, including fee for placing bonds amounting to $50,000.00," which was approved by Consolidated Company, as shown by directors' meeting, under date October 27, 1891, in Rec. 52-31479, and at which meeting a resolution was duly adopted, authorizing the president of the Consolidated Company to pay to the Trust Company as full payment of its claim for all services rendered that company, in assisting in its promotion and negotiation of its stocks and bonds, a sum equal to 12% net of all the first issue of the Company's bonds, etc.

The $6000.00 item appears in Rec. 1-11, and is for the balance of fee due the Trust Company for all services to October 27, 1891, including the placing of the $500,000.00 worth of Consolidated bonds (Trust Company journal voucher 1144, Rec. 39-21582).

The $320.00 item appears in Rec. 1-11, and is for 5% and 3% commission, paid for disposing of Consolidated bonds (Rec. 3-590).

The $150.00 item appears in Rec. 1-11, and is for a 3% commission on Consolidated bonds disposed of by the Trust Company (Trust Company cash voucher 5164, Rec. 3-573).

The $80.00 item appears in Rec. 1-11, being 8/10 of one per cent commission on Consolidated bonds (Trust Company cash voucher 5167, Rec. 3-577).

The $1182.50 charge appears in Rec. 1-11, and is for a commission on sale of Consolidated bonds (Trust Company cash voucher 5233, Rec. 3-588).

The $463.18 item appears in Rec. 1-11, and is for commissions on subscriptions to Consolidated bonds (Trust Company cash voucher 5249, Rec. 3-592).

The $750.00 item appears in Rec. 1-11, and is for 3% commission on subscription to Consolidated bonds (Trust Company cash voucher 5268, Rec. 3-596).

The $4455.00 item appears in Rec. 1-11 ,and is for 3% commission to W. & P. Smith, on subscription on $148,500.00 Con-
804 solidated bonds (Trust Co. cash voucher 5271, Rec. 3-598).

The two items of $24.00 each in Rec. 1-11, are both on account of a commission of 2-4/10% on subscription to Consolidated bonds (Trust Company journal vouchers 1128 and 1133, Rec. 3-601 and 604).

The $300.00 item of date December 19, 1891, appears in Rec. 1-11, and is for 3% commission on subscription to Consolidated bonds (Trust Company cash voucher 5458, Rec. 3-615).

The $30.00 item of January 9, 1892, appears in Rec. 1-12, and is for commission on subscription of J. R. Jude (Trust Company journal voucher 1203, Rec. 3-629).

The $300.00 item of January 12, 1892, appears in Rec. 1-12, and

is for 3% commission on subscription to Consolidated bonds (Trust Company journal voucher 1209, Rec. 3-630).

The $750.00 item appears in Rec. 1-15, and is for 3% commission on $25,000.00 worth of Consolidated bonds (Trust Company cash voucher 5746, Rec. 3-670).

The $90.00 item appears in Rec. 1-13 and is for 3% commission on subscription of Virginia C. Perry for $3000.00 Consolidated bonds (Rec. 26-13836).

The $60.00 item appears in Rec. 1-13, and is for 3% commission on Consolidated bonds paid to March, Merwin & Lemmon.

The $225.00 item appears in Rec. 1-13, and seems to be for 3% commission on subscription to Consolidated bonds, paid to W. & P. Smith.

The $30.00 item of March 11, 1892, appears in Rec. 1-13, and is for 3% commission on subscription to consolidated bonds to W. & P. Smith.

The $60.00 item of March 19, 1892, appears in Rec. 1-13, and is for 3% commission on subscription to Consolidated bonds (Trust Company cash voucher 6140, Rec. 3-700).

The $750.00 item of March 19, 1892, appears in Rec. 1-13, and is for 3% commission on subscription to Consolidated bonds (Trust Company cash voucher 6148, Rec. 3-699).

The $2802.80 item appears in Rec. 1-13, and is for 4% commission to Hyde & Johnson, on subscription to $70,000.00 Consolidated bonds (Trust Company cash voucher 6270, Rec. 3-706).

805 The $1200.00 item appears in Rec. 1-14, and is for 4% cash commission paid to Hyde & Jackson, on subscription to $30,000.00 Consolidated bonds (Rec. 26-13916).

The $240.00 item appears in Rec. 1-15, and is for 3% commission on subscription to Consolidated bonds (Rec. 26-14014).

The two items of $46.88 each, appear in Rec. 1-121 and 126 and are each for commission charged by the Trust Company for paying for Consolidated Company coupons (Trust Company vouchers 14998, Rec. 7-3846, and 17112, Rec. 8-4047).

(*d*) It is charged that the Trust Company took and appropriated to its own use, the stock and bonds of the Consolidated Company, as commissions, as follows:

December 17, 1891, 1000 shares, of the value of $32,220.00; December 17, 1891, 30 bonds of the value of $25,410.00; March 17, 1892, 240 shares of the value of $7732.00; July, 1892, 3100 shares of the value of $103,333.33.

The item of $32,220.00, is on account of 1000 shares of the Consolidated Company stock, par value of $100 each, at $32.52 per share, entered on the Trust Company books at $32,522.23 (Johnson's Exhibit 841, Rec. 21-11343, under heading (Consolidated Terminal Railway Company"; also Trust Company's journal voucher 1181, Rec. 39-21559). Complainants, in their bill, make claim for 3100 shares of the Consolidated stock, 1000 shares of which was taken on December 17, 1891, thus leaving 2100 shares of the entry on Consolidated Company's books, showing the 3100 shares taken by the Trust Company. It is claimed that the Trust Company

placed a value of $32.50 each on the 1000 shares, as above stated, and the complainants place a value of $32.22 per share on the 2100 shares, making a total of $67,662.00 see Johnson's testimony, Rec. 15, 8129 to 8134).

The items of $25,410.00 and $7732.00 are on account of 30 Consolidated bonds, and 240 shares of Consolidated stock (see Johnson's Exhibit 841, Rec. 21-11343, under column of "first mortgage bonds" and "shares of stock," under the heading "Consolidated Terminal Railway Company", and Trust Company journal voucher 1148, Rec. 39-21560), the body of which shows that the Trust Company received 30 of the Consolidated bonds and 240 shares of stock, as the fee of the Trust Company for obtaining the franchise of the Consolidated Company, and all other fees and expenses up to October 27, 1891, including the placing of $500,000.00 worth of Consolidated Company bonds.

806 (*e*) In the Trust Company's statement, the following charges are made to the Belt Company, as commissions, in connection with the Union Terminal Company:

December 31, 1892, $500.00; January 13, 1893, $7500.00; January 23, 1893, $3200.00; January 26, 1893, $15,000.00; April 5, 1893, $6250.00; September 16, 1898, $50.00; October 6, 1898, $100.00; October 18, 1896, $50.00; January 18, 1899, $231.25; January 18, 1899, $277.50; February 17, 1899, $230.00; August 2, 1898, $90.63; February 8, 1899, $117.00.

In connection with the foregoing items, see Johnson's Exhibit 841, Rec. 21-11343-'44, under columns headed "cash", of heading "Union Terminal R. R. Co."

The $500.00 item is admittedly an error.

The $7500.00 item appears in Rec. 1-22, and is for 2-1/2% commission to the Trust Company, on 300 Union Terminal bonds (Trust Company journal voucher 2259, Rec. 3-883).

The $3200.00 item appears in Rec. 1-23, and is for 2½% commission on 128 Union Terminal bonds (Trust Company journal voucher 2314, Rec. 3-933).

The $15,000.00 item appears in Rec. 1-23, and is for balance of commission due Trust Company, as agreed upon, for negotiating sale of securities, etc. (Trust Company journal voucher 2358, Rec. 3-886).

The $6250.00 item appears in Rec. 1-62, and is for 2½% commission paid the Trust Company on 250 Union Terminal bonds, purchased from the Belt Company by the Trust Company (Trust Company journal voucher 2887, Rec. 5-1971).

The $50.00 item of September 16, 1898, appears in Rec. 1-122, and is for one half of one per cent commission on sale of 10 Union Terminal bonds (Trust Company journal voucher 15532, Rec. 7-3911).

The $100.00 item appears in Rec. 1-123, and is for one half of one per cent commission to the Trust Company for the sale of 20 Union Terminal bonds (Trust Company journal voucher 15790, Rec. 7-3944).

The $50.00 item of October 18, 1898, appears in Rec. 1-123, and

is for one-half of one per cent commission to the Trust Company for the sale of 10 Union Terminal bonds (Trust Company journal voucher 15905, Rec. 7-3951).

The $231.25 item is for 5% commission to the Trust Company on the selling price, $4625.00, (appearing in Rec. 1-125),
807 of 5 Union Terminal bonds (Trust Company journal voucher 16907, Rec. 8-4030).

The $277.50 item appears in Rec. 1-125, being 5% commission to the Trust Company, on selling price, $5550.00, of six Union Terminal bonds (Trust Company journal voucher 16931, Rec. 8-4036).

The $230.00 item appears in Rec. 1-126, and is for commission paid to Drexel & Company, on Union Terminal bonds (Trust Company journal voucher 17190, Rec. 8-4062).

The $90.63 item appears in Rec. 1-123, being fee of one-fourth of one per cent to Trust Company, covering payment of 1450 Union Terminal coupons (Trust Company journal voucher 14999, Rec. 7, 3874).

The $117.00 item appears in Rec. 1-126, being fee covering payments of 1872 Union Terminal coupons (Trust Company journal voucher 1712, Rec. 8-4047).

(*f*) The Trust Company charged the Belt Company as commissions, in connection with the Union Company, the following sums, which do not appear on the Trust Company statement, to-wit:

September 26, 1892, $4400.00; October 7, 1892, $500.00; November 10, 1892, $800.00; December 31, 1892, $550.00; January 7, 1893, $250.00.

It is claimed by the complainants that the $4400.00 item is omitted from Willey's Trust Company account, as appears by Ingel's Exhibit 38, in Vol. 49, which shows the items on the Trust Company ledger in account with the Belt Company, which were omitted from Willey's Trust Company account against it; this, $4400.00 being a 2½% commission to the Trust Company on subscription of 176 Union Terminal bonds; see also Trust Company journal voucher 1833, Rec. 49-29425, covering this charge, and entry on Trust Company cash book, showing receipt of $17,600.00, of which the $4400.00 was a part (Rec. 49-29426, and Belt voucher 46, in Rec. 21-11506, showing receipt of the $17,600.00 by the Trust Company).

The $500.00 item should be $550.00, and is explained in said Ingel's Exhibit 38, being a 2½% commission to the Trust Company on account of 22 Union Terminal bonds (Trust Company journal voucher 1862, Rec. 49-29427, covering this charge; also entry on Trust Company cash book, showing receipt of $22,200.00, Rec. 49-29428, and Belt voucher 1892, in Rec. 21-11508, showing receipt of this $2200.00 by the Trust Company).

808 The items of $800.00, $550.00 and $250.00 are all for 2½% commission on Union Terminal bonds, and are similar to the items last mentioned, as will appear by reference to Ingel's Exhibit 38, and the following records: Trust Company journal voucher 1992, Rec. 4-29429, entry, Trust Company cash book, Rec. 49-29430, and Belt voucher 6, Rec. 21-11510; Trust Company jour-

nal voucher 2217, Rec. 49-29442, entry, Trust Company cash book in Rec. 49-29443, and Belt voucher 47, in Rec. 21-11512; Trust Company journal voucher 2243, in Rec. 49-29444, entry on Trust Company cash book in Rec. 49-29445, and Belt voucher 13, in Rec. 21-11514.

The [complain-ts] claim that they are entitled to a credit upon the Trust Company's statement for these omitted items, aggregating $6550.00, and set out in this Subdivision (*f*), together with interest thereon, at 6%.

g. It is charged that the Trust Company took, appropriated and converted to its own use, under the guise of commissions, 300 shares of the Union Company stock, of the alleged value of $9864.00, which does not appear upon the Trust Company statement. The facts in regard to this item will appear in Johnson's Exhibit 841, Rec. 21-11343 to 11551, under columns of "shares of stock", under the heading "Union Terminal R. R. Co.", and under date of November 27, 1893, and also Trust Company journal voucher 676, Rec. 49-21572, the voucher showing that the Trust Company, in connection with the purchase of 31 Union Company bonds at 80c., from the Belt Company, took these 300 shares as commission. In column No. 1, of said Johnson's Exhibit, at page 11343, the value of these shares is placed at $32.88 per share.

(*h*) It is charged that the Trust Company took, appropriated and converted to its own use, under the guise of commissions for services rendered, the following stocks and bonds of the Union Company: October 21, 1892, 60 bonds of the alleged value of $54,000.00, and 1500 shares of stock of the alleged value of $49,320.00.

According to the statement of Johnson, Rec. 14-7308, there was an agreement between the Union Company and the Belt Company, and Stilwell, Trustee, on August 24, 1892, by which the Belt Company and Stilwell, agreed to build the Union Company railroad for 690 Union Company bonds, and that there should be issued to Stilwell 19955 shares of fully paid stock, the remaining 45 shares having been issued to the first Board of Directors of the Company (Rec. 11-6042, and Rec. 15-7871). As shown by the Belt books, the entire capital stock of 20,000 shares of the Union Company,
809 came to the Belt Company for building the Union railroad, and was carried on the Belt books at $15.00 per share. Without tracing this transaction through the records it appears that the foregoing bonds and shares of stock were taken by the Trust Company for its services in procuring the franchise and right-of-way, and building and constructing the Union railroad.

(*i*) It is charged that the Trust Company took, without consideration, and converted to its own use, 1000 shares of Union Company stock, of the value of $32,880.00. This item is very similar to the preceding one. As shown by entry on Belt voucher, Rec. 14,7311, under date of May, 1893, the Belt Company claimed to own the entire 20,000 shares of the Union Company's stock, and which were used in connection with the promotion and building of the Union railroad.

(*j*) It is alleged that in the Trust Company's statement, there are

the following charges to the Belt Company, in the nature of commissions, in connection with the Air Line:

March 17, 1892, $520.00; June 20, 1892, $50.00; July 6, 1892, $700.

The $520.00 item appears in the account of the Trust Company against the Air Line, Rec. 1-26, and is for 5% commission on the selling price, $10,400.00, of 13 Air Line bonds, sold by the Trust Company, the proceeds of which were taken by the Trust Company to wipe out the debt due it from the Construction Company, in building the Air Line (Rec. 36-19023-'24).

The $50.00 item is an error, and is not to be considered.

The $700.00 item appears in the Trust Company's account with the Air Line (Rec. 1-27) and Trust Company journal voucher 1573, Rec. 3-987), and is a 5% commission, on the par value of 15 Air Line bonds, bought by the Trust Company of the Air Line.

(*k*) It is alleged that the Trust Company appropriated and converted to its own use, on or about December 19, 1891, 13 mortgage bonds of the Air Line, of the value of $11,193.00, and 500 shares of stock of the Air Line, of the value of $15,950.00, for which no credit was given to the Belt Company in the Trust Company's statement of account. It appears from the statement of Willey, in his exhibit, at pages 193-194, Rec. 1, that these 13 bonds and 500 shares of stock were taken by the Trust Company from the Air Line for commission and services in securing franchises, right-of-way, etc.

(*l*) It is charged that the Trust Company took and appropriated to its own use, in the year 1892, 500 shares of Air Line stock,
810 of the value of $15,950.00. On June 1, 1891, 500 shares of Air Line stock was issued to A. E. Stilwell, trustee (Rec. 45-25137 to 25141), and he distributed between June 1, 1891, and April 29, 1892, this stock to 93 persons, all of whom were either directors, officers, stockholders, or employees of the Trust Company, except A. L. Howe. Willey, in Rec. 1-197, says these 500 shares of stock were "delivered to A. E. Stilwell, trustee, for promotion, and issued through him as trustee." In Trust Company journal voucher 1181, Rec. 11-5385, the Company under date of December 31, 1891, placed a value of $16,261.11 upon said 500 shares of Air Line stock.

(*m*) In February, 1895, it is alleged that the Trust Company took and converted to its own use, under the guise of commissions and services in connection with the Air Line, 80 shares of stock of the East Kansas City Land Company, the property of the Belt Company, and of the value of $8000.00. As shown by Johnson's testimony (Rec. 17-8715), the Construction Company owned this stock on May 7, 1890, and transferred it to the Suburban Company on that day. It was carried as an asset of the Suburban Company until February, 1895, at which time the proper entries were made to the effect that the stock had been turned over, in 1891, to the M. K. & T. Trust Company, as a part of its commission for services for promoting the Air Line. It appears, by Trust Company journal voucher 1181, Rec. 11-5835, under date of December 31, 1891, that the Trust Company had already taken this stock for commission, though there is some doubt as to whether it was taken as commis-

sion on account of services rendered the Air Line or the Suburban Company.

(*n*) It is charged that in the Trust Company's statement, the Belt Company is charged with the following amounts, under the guise of commissions, in connection with the Connecting Company, to-wit:

July 19, 1896, $400.00; July 29, 1896, $400.00; October 1, 1896, $50.00; December 10, 1896, $82.50; December 10, 1896, $3012.00; December 23, 1897, $50,000.00; December 23, 1897, $15791.50; December 23, 1897, $1250.00, February 9, 1898, $300.00; September 8, 1898, $950.00; December 27, 1898, $250.00; May 23, 1899, $62.50.

The two $400.00 items, dated in July, in error, appear in the record as in August, and will be found in the Trust Company's account against the Belt Constructing, in Rec. 1-145, both being for
2% commission allowed the London office of Kuehne, Loeb
811 & Company, agents, on the sale of 20 bonds of the Connecting Company.

The $50.00 item is an error and need not be considered.

The two items of $8250.00 and $3012.00 appear in the Trust Company's account against the Belt Constructing, Rec. 1-146, being a 5% commission for the sale of 165 Connecting Company bonds, but including under commissions, averaging from one half of one per cent to 3%.

The items of $50,000.00, $15,791.55 and $1250.00, appear in the Trust Company's account against the Belt Constructing, in Rec. 1-151, and it seems that $50,000.00 was charged by the Trust Company against the Belt Company on a sale of 1500 Connecting Company bonds, made by the Trust Company for the Belt, also under commissions paid on same of $15,791.55 and $1250.00. The history of this particular transaction will more fully appear in the Trust Company journal voucher 12899, Rec. 39-21577.

The $250.00 item appears in Trust Company's account against the Belt Constructing, Rec. 1-153, and is for 5% commission paid by the Trust Company to Winthrop Smith on the sale of 5 bonds (Trust Company journal voucher 13346 (Rec. 10-5192).

The $300.00 item appears in Trust Company account against the Belt Constructing, Rec. 1-154, and is for one half of one per cent commission paid to Waterall by the Trust Company for the sale of 60 Connecting Company bonds, the amount being charged to the Belt Company (Rec. 39-21580, Trust Company journal voucher 14420).

The $950.00 item appears in Trust Company's account with the Belt Constructing, Rec. 1-158, and is apparently for 5% commission charged against the Belt Company on account of the sale of Connecting Company bonds (Trust Company journal voucher 15431, Rec. 39-21586).

The $250.00 item appears in Rec. 1-161, and is a 5% commission paid to W. H. Lucas on the sale of 5 Connecting Company bonds, the Commission being charged by the Trust Company to the Belt Constructing.

The $62.50 item appears in the Trust Company's account against the Belt Company, Rec. 1-131, and is for a commission of one fourth of one per cent, charged by the Trust Company against the Belt for the renewal of a Belt Constructing note for $25,000.00 (Trust Company voucher 17959, Rec. 39-21623).

812 In this connection, the complainants call attention to the fact that in this paragraph, the Trust Company frequently credited the Belt Company for the first mortgage Connecting Company bonds purchased by it at the rate of $75.00 per bond, whereas, the subscription contracts of the Connecting bonds, a copy of which is set out in Vol. 13-5071, shows that the bonds were subscribed for at the rate of $80.00 per bond.

2. It is not possible to include within this report a clear and detailed statement as to all the transactions between the Trust Company and the Belt Company, in reference to commissions, trustees' fees, bonuses, interest, or in respect to the purchase or sale of bonds, that is, without extending the length of this report to several thousand pages; and, in view of the conclusions reached by the Master in respect to the absence of the dominating control by the Trust Company over the Belt and it- adjunct companies, as claimed by complainants in their bill, it is not deemed necessary to attempt to explain in full all the complicated transactions appearing in this voluminous record.

The idea which runs throughout the bill is that the securities of the Belt Company, and its constituent companies, were sold either through or to the Trust Company, and were bought either by the Trust Company direct, or sold by it to investors, on account of the Belt or its constituent companies, and that, by reason of the services performed by the Trust Company, these charges, in the nature of commissions, trustees' fees, bonuses, etc., were made by the Trust Company, and collected of the Belt Company or its adjunct or allied companies; the purposes of the bill apparently being to charge the Trust Company with the amount of all such commissions, fees, etc., or benefits received by it on account of the purchase or sale [*or*] the securities, upon the theory that the Trust Company was acting in a fiduciary relation to the Belt and the other companies, and that it controlled them to such extent, that all such transactions were of such character that, if not tainted by fraud, they should be strictly scrutinized, and opened up for all proper inquiry into their merits, regardless of the fact that the statute of limitations of this State has unquestionably run against practically each and all of the transactions complained of, unless the operation of such statute has been delayed or postponed by reason either of the alleged dominatory control of the Trust Company, or by reason of the fact that there existed such a fiduciary trust relation on the part of the Trust Company to the Belt and its adjunct companies, as should prevent

813 the Trust Company from asserting or maintaining the plea of the statute of limitations in bar of the transactions in controversy.

It appears on the face of the bill, that these trustees' fees, commissions, bonuses, etc., were received mostly in the year 1890 and

in 1893, and they all appear to have been received by the Trust Company on account of services rendered by it in respect to matters for which the charges are made. There may rightly be a difference of opinion as to whether such charges were reasonable at all times, and, entering into the determination of that question, the circumstances and conditions, financial and otherwise, of the parties involved and their enterprises, must necessarily have to be considered, for it is quite evident from the proofs in this cause, that the services rendered and discharged, from time to time, by the Trust Company, in connection with the disposition of the securities of the Belt and other companies, were not of the ordinary commission broker character, but, on the contrary, were in the nature of the active and persistent exploitation of the securities, which meant, in the case at bar, a more or less active concern in all of the business affairs of the different companies, whose securities were offered for sale, as has heretofore been more fully explained.

The question in respect to the trust relation, if any, between the Trust Company and the Belt and the other companies, will be hereafter more fully discussed, but, for the present, it may be said that such relation would be no more than an implied trust certainly not an express one, and, as against an implied trust the statute of limitations would run.

If the Master thought that there was any occasion for doing so, he would make a close examination of all the facts and circumstances connected with the services of the Trust Company in respect to the sale and disposition of the securities of the various companies involved in this accounting, and then state to the Court his conclusions. It has occurred to him, that after so many years of apparent acquiescence on the part of the Belt Company, and others interested, in respect to the charges made from time to time by the Trust Company in the transactions complained of, it will be exceedingly difficult, in the absence of actual fraud, to present and state facts which would justify the setting aside and avoiding all such transactions, for the purpose of having a re-accounting between the companies interested.

3. Interest.

814 In the 5th paragraph of the bill, the complainants allege that upon the incorporation of the Suburban, Consolidated, Union, Air Line and Connecting Companies, the Trust Company began the practice of loaning money to them, taking their promissory notes therefor and charging the loans to the Belt Company; that, as the moneys were advanced, from time to time, the charges were made to the Belt Company in open account, and the securities of these companies were either bought or sold by the Trust Company for them, and the proceeds credited to the acount of the Belt, and further, that interest was computed on daily balances, and if the balance was in favor of the Belt Company, an allowance was made of interest on the average daily balance for the current month, at the rate of 2% per annum but if the balance was in favor of the Trust Company, then interest would be charged at the rate of 7%. It was alleged that the amount of such interest was included in the

daily balances for the subsequent month, and also in the promissory notes, which were taken from time to time, and in that manner the interest exacted by the Trust Company was compounded upon daily balances. These items are in subdivisions (*a*) to (*k*), inclusive, in said paragraph 5, and are of the same general nature.

As already stated, in connection with commissions, trustees' fees, etc., the Master will not go into a detailed explanation of each item of interest. The testimony does show that the Trust Company charged the Belt Company 7% and sometimes 6%, interest on daily balances, and also on overdraft that the Belt owed to the Trust Company, but that when the Belt Company had a balance with the Trust Company, the latter was only allowed 2%, and, that at the first of each month, that balance went into open account.

It appears in the record that several of the bank presidents of Kansas City, among whom were Mr. J. F. Downing, and Dr. W. S. Woods, testified that the custom of the Trust Company in respect to the interest matter, was the usual custom prevailing in Kansas City, and that all the banks charged a high rate of interest on the overdrafts for the reason that they were undesirable, and the banks meant to discourage their customers in overdrawing.

It will be observed by referring to the items of interest that they are mostly in 1892 and 1893, though there are a few items occurring in 1896, 1897 and 1899, and totalling a large amount. At the conclusions of said paragraph 5, it will be seen that the complainants seek to fasten the liability upon the Trust Company for these interest items on the ground that it was the promoter of the com-
815 panies involved, dominated and controlled them, and occupied a fiduciary relation to them, and by reason of such things, the Trust Company did not have the right to charge these other companies any interest whatever upon daily balances, or otherwise, and hence, complainants ask that all such items contained in, or merged into, the items contained in the Trust Company's statement of account against the Belt Company, should be eliminated therefrom, with proper interest thereon.

For the reasons heretofore stated, in respect to the Trust Company's relations to the Belt Company, the Master is of the opinion that under the statements in the bill as to these interest items and the admitted facts in relation thereto, the complainants are not entitled to have eliminated from the Trust Company account the interest items in controversy.

VIII.

Paragraphs 6 to 29.

Building Department.

1. Complainants charge that the Trust Company, during the period beginning with the year 1892, and down to 1900, maintained what was called its building department, which consisted of a limited number of employees, whose duty it was to make contracts

for such building or construction work as the Trust Company might desire to have done to carry out its enterprises in connection with its auxiliary companies, including the Belt, Consolidated, Union, Air Line, Elevator and Amusement Companies, that all of the work done for said companies could and should have been done by the companies respectively, but that the Trust Company contrived the scheme of its building department, in order that work of that character might be done by the Trust Company, and large and exorbitant charges made therefor, from which the Trust Company might reap a large profit, by causing the Belt Company to pay not only the cost of such work, and material, but also large sums in addition thereto under the guise of superintendence; that the aforesaid plan was carried out to the extent that a large amount of work was done by the building department for the companies named, and the Trust Company caused the Belt Company not only to pay the cost thereof, but from 10% to 15% additional, under the guise of superintendence so charged by the Trust Company to the Belt, with the dates on which the charges were made, and the amount of each charge, is shown under the heading of "superintendence" on Exhibit 2, attached to the bill, and aggregates the sum of $40,456.32; that of said sum, 50% was clear profit to the Trust Company; that the Trust Company charged to the Belt Company the said sum of $40,-
816 456.32, and the same appears upon the pretended statement presented by the Trust Company, that by reason of the relation of the Trust Company to all said companies, it did not have the right in law to charge said companies any sum whatever for superintendence, in excess of the actual cost thereof, and did not have the right to profit out of such transactions; wherefore the complainants ask that all of such profits arising from such transactions be eliminated from the pretended statement, and that the Belt Company should be credited upon said account with the amounts so eliminated, including interest thereon.

The Trust Company, in paragraph 94 of its answer admits that one of the features of its business was to supervise or conduct building operations, and for such purposes it maintained a building department; but denies that it made exorbitant or unreasonable charges for the work done by it, and states that it maintained a large and expensive staff of employees for the purpose of carrying on its work, and that it made no charges for such work except such as were fair and reasonable. The Trust Company, beginning in 1892, maintained a building department down to the year 1900, the objects being to make contracts for the building and construction work which the Trust Company might desire to have done in carrying out its various enterprises. H. C. Lindsley, head of the construction department, stated that the business performed by the building department was general building and construction operations, mainly for the companies in which the Trust Company was interested, and also for the Trust Company itself; that the building also extended to railroad construction, such as the erection of buildings, depots, terminal work for railroads and all kinds of building construction; that the company's usual commission for such work consisted of 10% to

15% on the gross amount expended in the work, the items sometimes taking the form of part commission, part for superintendence and architect's services, and in addition to that a per cent charged upon the actual labor furnished. (Rec. 34-18023-'030; 18062-'067). There was some testimony by Architect Chamberlain to the effect that the charges made by the building company were unreasonable and exorbitant (Rec. 56-34136-34145).

After a review of the facts in relation to the object of the Trust Company in the establishment of a building department, and the character of the transactions conducted by that department, the Master is of the opinion that, while it is possible that some of the charges for the work done may have been higher than it was necessary to pay for the same work on the outside, yet the conduct of such
817 business was a matter for the judgment of the Trust Company in its dealings with the various companies in which it was interested, and, in the absence of fraud or domination in such dealings, there would seem to be no good reason why the accounts of the building department in respect to the transactions in controversy should not stand, and, hence, the finding will be against the elimination from the Trust Company's statement of the alleged profits of that company from the transactions in controversy.

Amusement Company.

2. Complainants charge that, in the year 1895, the Trust Company, under the pretense of increasing the earnings of the Air Line, caused the incorporation of the Amusement Company, and the establishment and exploitation of Fairmount Park, and, in so doing, the Trust Company caused to be expended by the Air Line, and by the Belt Company, large sums of money, and the acquisition of a large tract of land near the railroad of the Air Line, near Kansas City and Independence, and the construction of buildings thereon, and the adaptation of said grounds for the purposes of a public park; that the moneys so furnished by the Air Line, as aforesaid, were afterwards, by the direction of the Trust Company, charged to, and assumed by, the Belt Company, so that ultimately all the expenses in connection with the exploitation of Fairmount Park were charged to the Belt Company, and the various items making the aggregate thereof appear as debits to the Belt Company upon the pretended statement presented by the Trust Company; that the result of the organization and operation of Fairmount Park, was a net loss of $293,303.68, all of which the Belt Company was required by the Trust Company to stand; that the scheme of Fairmount Park was a financial failure, and the Trust Company knew, or should have known, that it would be such failure, and the conduct of the Trust Company, in causing the Belt Company to organize and carry on said enterprise, and to stand the loss arising therefrom, was and is inequitable, unjust and oppressive, and the Trust Company should be required to stand said loss itself, and the amount of such loss should be eliminated from the charges against the Belt Company, or, that if possible to identify the various items going to make up the defi-

ciency, then the amount of such loss, together with interest thereon, should be credited upon said pretended statement.

In paragraph 95 of its answer to paragraph 7 of the second ancillary bill, the defendant Trust Company denies that it caused the incorporation of the Amusement Company, and states that
818 said Amusement Company was caused to be organized by the Belt Company and the Air Line, for the purpose of creating passenger traffic, for those companies. It denies that it caused said companies to expend large sums of money, or any money, in the acquisition and improvement of Fairmount Park; but states that any money invested for that purpose was so invested by said companies for their own proper benefit and in the ordinary course of business; that the establishment and maintenance of said part resulted in creating extraordinary passenger traffic for the Belt Company and the Air Line and they received the benefit of such traffic. In June, 1895, (Rec. 16-9342-9344) Fairmount Amusement Company, with a capital stock of $2500.00, was incorporated for the purpose of taking over the operation of Fairmount Park. Thereafter the Amusement Company continued the operation of the park (Rec. 53-32735; Rec. 16-8327-8415).

In May, 1892, a lease was entered into between Cusenbary and the Air Line for fifty acres of land in Jackson County, Missouri, to be used for a private park *of* a health resort. After leasing the land the Air Line commenced making improvements on the same and charged the expenses to an account called "Cusenbary Park", which was afterwards changed to "Fairmount Park" (Rec. 16-8327-8329; and 8413-8415). It is charged by the complainants that the Trust Company caused the Air Line and Belt Company to expend large sums of money in the acquisition of a large tract of land near the railroad of the Air Line between Kansas City and Independence, and in the construction of buildings thereon, and the adaptation of such grounds for public park purposes; and further that the money so furnished by the Air Line was afterward, by the direction of the Trust Company, charged to and assumed by the Belt Company, so that the whole expense of the exploitation of the park was finally turned on the Belt Company the various items of which make the aggregate which appears as debits to the Belt Company, upon the Trust Company's statement. See Wilcox's testimony (Rec. 34-18066-'67; and 18207), wherein he states that the Air Line furnished the funds that went into the Amusement Company and the properties at Fairmount Park, and further that the moneys sunk in Fairmount Park were furnished by the Trust Company, when it was not earned by the Air Line, and was charged by the Trust Company to the Belt Company or Air Line, but, it all finally resulted in the Belt advancing the money to the Air Line and having a debit against it, and the Air Line then advancing it to the Fairmount Amusement Company in turn. The titles to the real estate known as Fair-
819 mount Park were originally taken in the name of the State Realty Company, and then later on transferred to the Central Improvement Company (Rec. 25-13308; Rec. 19-9626; Rec. 34-19040). There is considerable testimony in the record in respect to

the interest that Mr. Stilwell and the Trust Company took in the exploitation of development of Fairmount Park, but for reasons heretofore stated, in respect to the alleged domination of the Trust Company it is not deemed necessary to make further reference to such facts. (See Pickering's testimony, Rec. 35-18856-'860; Rec. 40-21980-'987; Rec. 55-33962-'984; and 34003-(125). As shown by Johnson's testimony (Rec. 16-8384-8405) it appears that the total loss and expenditures in connection with the Park Amusement Company amounted to $294,631.22 of which the Air Line and Belt provided $277,431.22; of this amount $179,496.58 was expended for improvements, of which $83,776.59 was labor and materials furnished by the Trust Company, upon which they secured from the railroads and Amusement Company $7,716.00, as a 10% commission to the building department. Of this grand total of loss and expenditures $113,014.07 represents the loss from operation from June 1892, to February 28, 1900 (Rec. 16-8400). The contention of the complainants is that the Trust Company knew, or should have known, that the Fairmount Park venture would be a failure, and, for that reason, that it ought to stand the loss arising therefrom, but no good reason is shown why such should be the case.

The finding of the master will be for defendant.

3. In paragraph 8 the items in controversy relate to a series of claims growing out of the incorporation of the Missouri Elevator and Terminal Company, hereinafter called the "Elevator Company". The allegations of the bill are, in effect, that the Trust Company caused the incorporation of the Elevator Company, and, after such incorporation, caused the Elevator Company to build elevators and to operate them and to incur certain obligations in respect to them, as stated in items (*a*), (*b*), (*c*), (*d*) and (*e*) appearing in paragraph 8.

The master does not deem it necessary to make reference to all of the facts appearing of record concerning these various items, as all of them are barred by the statute of limitations, and, as heretofore stated, it is not shown that the Trust Company dominated and controlled the Elevator Company and the Belt Company in the manner and to the extent claimed in this paragraph.

Without intending to make detailed or accurate reference to the record entries respecting those items, it may be stated, in a general way, that one of the chief sources of revenue of the
820 Belt Company was the switching charges it received from time to time for handling cars to and from the elevators referred to in this paragraph.

At the outset the Elevator Company was organized as an independent corporation and continued to be such. These elevators were, however, built, in the first instance, with moneys advanced by the Trust Company. Afterward the Elevator Company, by mortgaging its properties, secured certain amounts a part of which went toward reimbursement of the Trust Company, but there was a balance left still due to the Trust Company. It seems to have been the original intention that upon the completion of the elevators, the Elevator Company should deed its properties to the Belt

Company; but afterwards that arrangement was changed and, instead of deeding such properties to the Belt Company, the Belt Company acquired all of the outstanding stock of the Elevator Company and assumed all of its indebtedness, and the Belt Company then took charge of the elevators, rented them, ran its cars to and from them, and in that way received large revenues from the operation of the elevators.

It is not claimed that there was any fraudulent purpose on the part of the Trust Company in advancing money to the Elevator Company for the construction of its elevators, nor is it claimed that such money did not go into the actual construction of these elevators. The complaint in this paragraph is that the Trust Company caused the Belt Company to assume the Elevator Company's indebtedness, in other words, domination and control is involved here, as in most of the items contained in the bill.

The master sees no reason why the facts in relation to the items contained in paragraph 8 distinguish the elevator transaction from the others, in which it is alleged that the Trust Company dominated and controlled the Belt Company in the doing of the things complained of. The Belt Company was interested, in a business way, as above stated, in the operation of these elevators, and there was good reason why it assumed the indebtedness against the Elevator Company, and so far as concerns the Trust Company, the master is of the opinion that the alleged cause of action stated in this paragraph is without merit, and the finding will be for the defendant.

Connecting Company.

3-1/2. Complainants, in the 9th and 10th paragraph- of the bill, state that, in the year 1895, the Trust Company caused to be incorporated a railroad corporation, called the Kansas City & Northern Connecting Railroad Company, herein referred to as
821 the Connecting Company, for the purpose of constructing a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with the railroads at that point running easterly to Chicago, Illinois, and northwardly to Council Bluffs, Iowa; that, in the same year the Trust Company caused the Belt Company to enter into a contract with the Connecting Company, by the terms of which the Belt undertook to acquire the right of way, and to construct the railroad of the Connecting Company between the points mentioned, and, in consideration of which, the Connecting Company agreed to issue and deliver its stocks and bonds to the Belt Company; that in so constructing said railroad, and securing the right of way therefor, the Belt Company was caused to expend large sums of money for right of way, material and construction, and the stocks and bonds of the Connecting Company were wholly inadequate to reimburse the Belt for the money so expended, so that there resulted a large loss to the Belt Company, amounting to the sum of $116,644.53, and all of which said deficiency was by the Trust Company charged to the

Belt Company, and the items thereof appear upon the statement presented by the Trust Company, as charges against the Belt Company.

Complainants state that the action of the Trust Company in so requiring the Belt Company to enter into said contract, and construct said railroad, resulting as above stated, in said loss, was wrongful, oppressive and done solely for the benefit of the Trust Company, that it might profit from the handling of the securities of the Connecting Company, which under said contract would be received nominally by the Belt Company, but in reality by the Trust Company; that the Trust Company knew, or should have known, that the venture would result in a large loss to the Belt Company, which in equity should not be borne by it, but should be eliminated from said statement, together with interest thereon, or if the same cannot be identified, then that a credit therefor should be given on said statement.

(2) That, on January 1, 1897, July 1, 1897, January 1, 1898, and July 1, 1898, there fell due certain coupons upon the bonds of the Connecting Company outstanding in the hands of various holders, and which were the obligations of said Connecting Company, and not in any manner, the obligations, either direct or contingent, of the Belt Company.

(*a*) That when said coupons became due, at the dates mentioned, the Connecting Company was without funds to pay them, and the Trust Company, in order to bolster up and protect the Connecting Company's credit, and prevent a default in the payment
822 of its interest, did take up and pay said coupons in the amounts, and on the dates stated in the bill, and aggregating $56,025.67, the dates of said payments running from January 18, 1897, to July 28, 1898.

(*b*) That the Trust Company, by reason of its domination and control over the Belt Company, caused the Belt to pay from its funds the sum of $9125, on account of the interest upon certain bonds of the Connecting Company, falling due as aforesaid, and all said payments being in the month October, 1897, and to the persons and in the amounts mentioned in the bill, and none of which payments appear on the pretended statement furnished by the Trust Company.

(*c*) That all the foregoing payments were charged by the Trust Company to the Belt Company in the statement of account, except the item of $9125, in the amounts and at the dates above set forth, and there is also charged to the Belt Company, in said statement, interest upon said payment of $30,850.00, amounting to $167.95 and also the amount of $77.13, as commission or brokerage for paying said coupons; that the said charges made by the Trust Company against the Belt Company, and entered on said pretended statements, including said $9125, are unlawful, inequitable and were caused to be paid by the Belt Company, or made arbitrarily by the Trust Company, without reason or excuse, but for the pretended reason that the claim of the Trust Company, arising out

of its payment of said interest could not be collected from the Connecting Company, because of its financial inability to make said payments, and the Belt Company being in better financial condition, could be made to pay same by charging it to the account of the Belt; that said payments were unlawful and unjust, and as a result of the coercion and domination of the Trust Company, and not by reason of any liability on the part of the Belt Company, and hence complainants asks that it receive a credit for the amount thereof, with interest from its dates of payment, at the rate of 6% per annum.

(*d*) That, on or about July 31, 1898, the Belt Company was the owner of first mortgage bonds of the Connecting Company, and also of 314 coupons attached thereto, which were then due, and were the direct obligation of the Connecting Company, due and payable to the Belt Company, said bonds being at the time in the control of the Trust Company; that the Trust Company, on or about said date, wrongfully caused the coupons, amounting in value to the sum of $7850, to be taken from said bonds, and cancelled as having been paid, and denied and still denies
823 to the Belt Company the right to said coupons or the interest thereon; that said act of the Trust Company was wrongfully and inequitable, and operated to deprive the Belt Company of said $7850, and interest thereon, at 6%, and that the Trust Company should account to the Belt for said sum, which has been omitted from its said pretended statement.

(*e*) That in the statement presented by the Trust Company against the Belt, the following charges appear September 1, 1893, $700, February 28, 1894, $6800, March 1, 1894, $700, August 30, 1894, $6800, September 1, 1894, $700, February 26, 1895, $6800, March 1, 1895, $700, August 31, 1895, $6800, December 31, 1895, $700, February 27, 1896, $6800, March 2, 1896, $700, August 27, 1896, $6800, September 1, 1896, $700, February 26, 1897, $6800, February 27, 1897, $700, August 26, 1897, $6800, August 28, 1897, $700, February 26, 1898, $6450, March 1, 1898, $1050, August 29, 1898, $6450, August 31, 1898, $1050, March 1, 1899, $6450, March 1, 1899, $1050; it is alleged that all of said charges were made against the Belt Company on account of interest on the first mortgage bonds of the Air Line, which were alleged by the Trust Company to have been paid by it to the holders of the coupons evidencing the same, including the Trust Company; that the Belt Company had not assumed or become liable to pay the interest on said Air Line bonds and was not in any way liable therefor; that the action of the Trust Company in making said charges to the Belt Company was not warranted, and was solely by reason of its domination over the Belt Company, and hence that said charges should be eliminated from the statement of the Trust Company account.

In paragraph 97 of its answer, the Trust Company denied that it caused the incorporation of the Connecting Company, and states in effect that all the transactions had by the Belt Company in connection with the Connecting Company were voluntarily entered

into by the Belt Company at the instance of its stockholders, officers and directors, and that they were entered into for its sole benefit and profit, and that defendant should not be chargeable, either in law or equity, with any loss which resulted from such transactions. Defendant admitted that it paid certain interest coupons due on the bonds of the Connecting Company and charged the same to the Belt Company, but stated that it was done at the special instance and request and for the benefit of the Belt Company, and that at the time this was done the Belt Company had in its treasury large blocks of the securities, both stocks and bonds of the Connecting Company, which it had received in payment for constructing the railroad of that company, and that the Belt Com-
824 pany was at that time endeavoring to dispose of said securities through the defendant Trust Company; that it was to the interest of the Belt Company to obtain as large a price as possible for said securities and that it would have been disastrous to it for a default to have been allowed to occur in the payment of interest due on the bonds of the Connecting Company, and that for the purpose of preventing such default, and also preventing a depreciation of the value of the Connecting Company's securities, the Belt Company, for a short period, advanced, through the defendant, certain monies for the benefit of the Connecting Company and itself, for the payment of interest accruing on the Connecting Company bonds. Defendant denies that it caused the Belt Company to pay any such interest but states that it was done by the Belt Company for its own purposes, and that the defendant made no payments whatever on any interest on the Belt Bonds except at the request of the Belt Company; and further, that all charges made against the Belt Company by the defendant in this connection were made with its full knowledge, approval and consent.

Defendant further answering stated that the Connecting Company began operating on or about July 1, 1898, and that on July 31, 1898, certain interest became due on its first mortgage bonds which had been delivered to the Belt Company in payment for the latter's services in and about the construction of the Connecting Company railroad; that at the times the interest became due the Connecting Company had just begun to operate its road and was not at that time in financial condition to pay its fixed charges, and the Belt Company, being the holder and owner of a large amount of the Connecting Company bonds, by virtue of its construction contract and for the purpose of enhancing the value of such securities, requested the defendant, to whom said bonds had been delivered by the Belt Company for disposition, to cancel the interest coupons attached to the Connecting Company bonds becoming due on July 31, 1898; that pursuant to such request of the Belt Company this defendant did cancel said 314 coupons mentioned in the ancillary bill, and that it was done at the solicitation and with the full knowledge of the Belt Company, which should be estopped from now complaining thereof.

During the year 1895, the Connecting Company was incorporated

for the purpose of constructing a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with railroads at that point running to Chicago, Illinois, and to Council Bluffs, Iowa.

825 In the year 1896, the Belt Company entered into a contract with the Connecting Company by the terms of which the Belt undertook to acquire the right of way and to construct the railroad of the Connecting Company between the points above mentioned, in consideration of which the Connecting Company agreed to execute and deliver its bonds and stocks to the Belt Company.

On June 30, 1896, as shown by Belt Constructing the Northern Journal voucher (rec. 24, pages 12860 to 12953) the balance of the account of the Connecting Company of $14,045.38 was transferred from the Connecting Company to the Belt Company, and by the Trust Company charged against the Belt Constructing account. This Belt voucher appears at page 12953, the balance of the pages cited being taken up by receipts given to the Trust Company by various parties for moneys expended in behalf of the Connecting Company.

The Trust Company account with the Connecting Company, appearing in rec. 47, at page 28480 shows, under date July 22, 1896, a credit to the Construction Company of, "By all expenditures made by the Trust Company to 6-30-96 charged to K. C. Sub. Belt R. R. Co., $13,905.83" and "By all expenditures made by Trust Company from 6-30-96 to date charged to K. C. S. B. R. R. Co. 239.55, making a total charge to the Belt of $14,045.38", which agrees with Belt Constructing Journal voucher above cited.

By referring to pages 141 to 144 of Rec. 1, also rec. 47, pages 28468-28480, account of Trust Company with the Northern Connecting Company, it will be seen that the items that go to make up this $14,045.38 so charged by the Trust Company against the Belt Constructing, consists of costs or incorporation, engineering expenses, supplies, pay-rolls, telegrams, stationery, the costs of notice of stockholders' meetings, etc., of the Connecting Company paid by the Trust Company, and by the Trust Company charged to the Connecting Company; the various items commencing in May, 1895, and running to July, 1896, being the time for the transfer to the Belt Constructing. From page 145 of the account of the Trust Company against the Belt Constructing, the various expenditures made by the Trust Company were charged by them to the Belt Constructing the Northern Railroad.

The testimony of Neal S. Doran on this subject will be found in rec. 51, pages 31089 to 31091; and among other things he states that the railroad of the Connecting Company was built as a connecting link to the Gulf Railroad Company, and formed a connecting link between the Gulf and the Omaha & St. Louis

826 and the Omaha Kansas City & Eastern railroads. As shown by Johnson's testimony, (rec. 16, pages 8254 and 8255) the loss to the Belt Company in connection with the Connecting Company was $116,644.53, but it is difficult to point out in the record the items constituting such loss.

On January 1, 1897, July 1, 1897, January 1, 1898, and July 1, 1898, there fell due certain coupons upon bonds of the Connecting Company outstanding in the hands of various holders, including the Trust Company, which coupons were obligations of the Connecting Company and were not the obligations of the Belt Company. The payments made by the Trust Company from January 1, 1897, to July 28, 1898, and charged to the Belt line amount to $56,025.67 as stated in subdivision (*a*) of this paragraph, the items appearing on page 63 of the bill. The various entries in the record going to make up the nine transactions in controversy need not be here specifically mentioned or referred to except in a general way. When these coupons became due on the dates mentioned, the Connecting Company was without funds to pay them, and the Trust Company, in order to bolster up and protect the credit of the Connecting Company and prevent a default in the payment of the interest, took up and paid certain of these coupons and charged the same to the Belt Company. (See Rec. 1, pages 144, 148, 156, 157, Trust Company Journal voucher 9823; rec. 10 pages 4918, 4919, Trust Co. Journal Voucher 11456; rec. 10 pages 4980, 4981; Trust Co. Journal Voucher 11634; rec. 10 pages 4988, 4989, 5145, 5146, 5394, 5935).

It seems from the record entries that inasmuch as the railroad of the Connecting Company was not completed by the Belt Company until July 1, 1898, or after the interest on the first mortgage bonds of the Connecting Company matured on that date, it was arranged between the two companies so that an entry would be made to the effect that the face amount of the 1234 coupons held by investors and aggregating $30,850, should be paid, and that the other 314 coupons then in the possession of the Suburban Company Constructing and Northern road, should be cancelled by the Belt Company and turned over to the Connecting Company to be pasted in their coupon books; these two lots of coupons making 1548 outstanding at that time. It appears, from Journal Voucher 14922 in the record, this transaction was authorized by a letter of A. E. Stilwell, president of the Trust Company. The Wilcox letter, with Stilwell's answer to it, attached to Journal Voucher 14922 appears in Record 10 at page 5394. (See Wilcox testimony, record 34, pages 18069 to 18077). Mr. Wilcox in his testimony states that the Connecting Company was not in a position
827 to pay the interest on these bonds, and that the Trust Company owned a lot of the Connecting securities at that time (Rec. 34, page 18376 to 18377); that these payments of the Connecting Company interest occurring prior to July 1, 1898, were charged to the Belt Company on the theory that when the Connecting Company railroad was completed the Company would not be in physical condition to start in business to earn the amount of income that was expected when it first commenced operations, and that inasmuch as the Trust Company could not expect to be reimbursed from the Connecting Company for some time, these charges were made to the Belt Company, which was then in funds

Mr. Wilcox further stated that it was the policy of the Trust Company during the construction period, to have the company constructing the road to stand the interest charges, and that the Belt Company never opposed that policy. (Rec. 34, pp. 18093-18094). It is not thought necessary to refer to the record entries as to the interest payments made either by the Trust Company or the Belt Company in the subdivision of paragraph 10, as there seems to be no dispute as to the amounts, being paid at the times and by the parties mentioned in the bill, the only question being as to the liability of the Belt.

It will be observed that it is charged that the Trust Company, through its domination, caused the Belt Company to enter into a contract with the Connecting Company to build its line in consideration of its stocks, bonds, etc. The contract between the Belt and Connecting Companies was authorized by the stockholders and was expressly ratified by the Board of Directors and by the stockholders. It is also charged that the Trust Company knew, or should have known that the venture would result in large loss to the Belt Company and that the amount of such loss, so sustained by the Belt Company, should be charged up against the Trust Company; in other words, the effect of such a contention would be that the Belt Company would have a right to speculate upon the chance of making a loss or profit by the building of the road, and if a profit was made it would go to the Belt, but if a loss was incurred it should be charged to the Trust Company. It goes without saying that that would be an unreasonable kind of transaction for these companies to indulge in. In respect to the letter written by Stilwell to Wilcox containing a direction as to whether or not the amounts paid out by the Trust Company on account of these coupons should be charged to the Belt Company, or to the Connecting Company, it is of course well known that the Connecting Company was properly liable for the interest on these bonds, but at the same time the Belt Company had expended a vast sum of money in and about the construction of the railroad for the Connecting Company and was greatly
828 interested in the securities of the Connecting Company and in preserving the credit and standing of that company. Up to this time it seems that the Connecting Company had either not commenced to operate its road or had just commenced, when a large number of these interest payments were made direct by the Belt Company; at any rate the Connecting Company was not in financial condition to pay the interest on these bonds and the contingency arose which had to be met in the mutual interest of the Connecting Company and the Belt Company, and, to a certain extent, of the Trust Company which had been instrumental in selling the securities of both the Belt and Connecting Companies; hence, it was natural and right that Mr. Stilwell should have stepped into the breach and, through the Trust Company, assisted in helping both the Belt and the Connecting Company to adjust these interest coupon obligations.

Under the proofs, the Master is clearly of the opinion, and so finds, that there is no liability, on the part of the Trust Company

as to any of the matters complained about in paragraphs 9 and 10 of the bill.

4. In paragraph 11 of the bill it is charged in substance that on or about September 25, 1893, the Belt Company was the owner of 200 second mortgage bonds of the par value of $1,000 each, issued by the Air Line and secured upon its property, and, further, that the Belt Company on that date also owned 2500 shares of the par value of $100 each, issued by the Union Company; that on September 25, 1893, a written contract was made between the Belt and Trust Companies reciting that the Belt was the owner of said 200 second mortgage Air Line bonds, subject to the interest of the Trust Company as trustee in 30 bonds aggregating the principal sum of $30,000 and held in trust by the Trust Company by virtue of a mortgage given by the Air Line of date March 1, 1893; and further reciting that the Belt Company was desirous of selling and disposing of all its said bonds and said 2500 shares of Union Company stock for the purpose of raising money with which to properly extend, equip and maintain and operate its road and meet its obligations, and that the Trust Company had agreed to purchase said bonds and stock at the sum of $150,000, and the earned interest on the bonds, that is, at 75% of the face value of the principal of the bonds and the accrued interest, and to be paid for on or before eighteen months from the date of the contract. It is further alleged that the Trust Company gave the Belt Company credit for 130 of said bonds in the aggregate sum of $97,500, but that it failed to purchase and pay for the remaining 70 second mortgage bonds, as provided in the contract, as they were found to be worthless and could
829 not be sold upon the market. It is charged by the complainant that the Trust Company then devised a plan or scheme to re-sell and unload the remaining bonds upon the Belt Company, and in order to carry out such plan caused the Belt to enter into an agreement rescinding said contract of September 25, 1893, and releasing the Trust Company from its obligation to take the remaining 70 bonds; and in further consummation of such fraudulent purpose that the Trust Company caused entries to be made upon its books, and also upon the books of the Belt Company, charging the Belt as and for a return of said 130 bonds purchased by the Trust Company at $750 each, and aggregating $97,500. The claimants ask that they be allowed a credit upon the Trust Company account for said sum of $52,500, the contract price of the 70 bonds with interest, or in case the court should find that the contract was duly rescinded, then complainant asks for a credit of $62,500 on account of said 2500 shares of Union stock retained by the Trust Company. Complainant also claims that the action of the Trust Company in charging the Belt Company with the return of said 130 bonds in the sum of $97,500, was unlawful and inequitable, and that the item should be eliminated from the Trust Company account.

In paragraphs 99, 100 and 102 of its answer, the defendant states in substance that the payment of the second mortgage Air Line bonds in controversy had been guaranteed by the Belt Company before September 25, 1893, when the written contract was made be-

tween the Belt and the defendant whereby defendant purchased said bonds at the price of 75 cents on the dollar, or $750 for each bond; that in pursuance to the contract it received from the Belt 130 of said bonds and 2500 shares of Union Company stock; that the Belt Company, after the guaranteeing of said bonds and finding out that the earnings, present and prospective, of the Air Line were not sufficient to justify the Belt Company in negotiating said second mortgage bonds and thereby increasing the fixed charges of the Belt Company, which had guaranteed said bonds, it endeavored to find a way to retire said bonds and thereby rid itself of further liability; that thereupon the Belt failed to make further delivery to the defendant of the remaining 70 bonds and it was agreed between defendant and the Belt Company that defendant would return to the Belt all of the 130 bonds theretofore purchased by defendant of the Belt, which was done and the bonds returned to the treasury of the Air Line Company, in consideration of the Belt being relieved by the
830 Air Line of its guarantee thereon. Defendant further states that at the time the bonds were surrendered. under the circumstances mentioned, the Trust Company released the Belt Company upon condition that the Trust Company should retain said 2500 shares of the Union Stock, which defendant did. Defendant denies that said Air Line bonds were worthless on the market, but states that by reason of the written guaranty of the Belt Company which they bore, they were regarded as good obligations; and further, that the arrangement made by which the Air Line second mortgage bonds were returned to its treasury was at the solicitation and request of the Belt Company and for its interest and benefit. The contract of September 25, 1893, appears in Record 15 at pages 7990 to 7992.

It appears from the minutes of the Trust Company's executive committee that it was deemed advisable and for the best interest of the Company to sell to the Belt Railroad Company these second mortgage bonds for the sum of 75% of their face value. Without taking time to recite all the different entries upon the subject, it appears that the bonds were re-bought by the Belt from the Trust Company. It will be noted that the basis of this claim is that the Trust Company caused the Belt Company to do the things about which the complaints are made, in other words, it is another case of alleged denomination of the Belt by the Trust Company.

It occurs to the Master, from an examination of the record entries, that the facts may be reasonably stated, as follows:

That in 1893 the Trust Company bought said second mortgage Air Line bonds from the Belt Company, which had obtained them from the Air — Company in consideration of guaranteeing them, which it did, and thereby the Belt Company became legally liable for every dollar, principal and interest, of those second mortgage bonds. It is shown in the record that the property of the Air Line was incumbered by a prior mortgage of $300,000, the bonds for which were outstanding and the interest thereon had to be met. The Belt Company was the owner of the capital stock of the Air Line and in control of it and operating it, and by reason of its stock ownership was paying the interest on the bonded debt, and other

charges of operation. It was subsequently found out that, from a business standpoint, the Belt Company made a mistake in guaranteeing the second mortgage Air Line bonds, inasmuch as it added that much additional interest charge on the Belt Company, and on that account, by authority of its stockholders at a stockholders' meeting, the Belt Company asked for a cancellation of its arrangement with the Trust Company, which consented, and thereupon the Air Line bonds were surrendered and the obligations of the
831 Trust Company to the Belt Company, and of the Belt Company to the Air Line, were all released and discharged. This stockholders' meeting was held on or about July 7, 1896, the stockholders present representing 31751. Mr. Martin, president of the Belt Company, presented an annual report, which was set out in the minutes, and in which he refers to the condition of the company, its bonded debt, number of loaded and unloaded cars handled, equipment on hand, &c.; in his report he says "the above shows the fixed interest charge $167,500. We have in the treasury $700,000 Union Terminal bonds for such future use as may appear judicious. The Board of Directors deem it wise to concel the $200,000 Air Line bonds and have so ordered, thus reducing the fixed interest charge $10,000 per annum." This stockholders' meeting was largely attended, and the record of it does not disclose any dissent or objection to what was done. When said 200 second mortgage Air Line bonds were purchased, the 2500 shares of Union Company stock went with the purchase, but it seems when it was rescinded the trust company retained this stock, claiming that it was an element of profit in the deal and did not beling to the Belt Company.

There is nothing peculiar to the facts of this transaction which distinguished it from the others in this bill grounded upon the domination and control of the Trust Company, and, in view of the facts as the Master understands them from the pleadings and the record, he sees no reason why the prayer of the complainant should be granted.

5. In paragraph number 12 of the Bill it is recited that the Trust Company caused the Air Line to enter into a contract with it for the construction, equipment and completion of the Air Line's railroad, and that thereunder the Construction Company was to receive the stocks and bonds of the Air Line in certain amounts fixed in the contract; that the Construction Company entered upon the construction of the road, but before it was completed the Trust Company caused the Air Line and the Construction Company to go through the form of an agreement by the terms of which the Air Line was to accept the then partially completed railroad as and for full compliance with the contract, and to turn over to the Construction Company the securities provided in the contract to be turned over upon the completion of the road; and that it was further provided that the Air Line should assume all the liabilities of the Construction Company and succeed to and take over all of its assets, and that this plan was carried out and the uncompleted railroad was turned over to the Air Line and the securities were delivered to the Trust Com-

pany, and the Air Line assumed the liabilities and took over
832 the assets of the Construction Company.

It is also charged in subdivisions *a*, *b*, and *c* of this paragraph that by reason of this domination of the Trust Company the Belt Company suffered certain damages in the respects mentioned in said subdivisions, and complainants ask that the charges therein enumerated be eliminated from the Trust Company's statement, and the proper credits given therefor, with interest.

The cause of action stated in this paragraph is very much on the same footing as that of the Stilwell Terminal Construction Contract in relation to the building of the first division of the Belt Line, and the propositions of law applicable to that are also applicable to this.

The Master adheres to the opinion already stated, that the proofs in this cause do not show that the Trust Company exercised domination and control over either the Belt Company or the Air Line, and hence that the basis of the charges in this paragraph is not sustained. it also appears that the items themselves are barred by the statute of limitations. For these reasons it is not deemed necessary to make an extended statement from the record as to the facts under lying the items mentioned herein.

6. In the 13th paragraph it is alleged that the contract was entered into between the West Kansas City Land Company and the Consolidated Company, under the terms of which the Land Company agreed to sell to the Consolidated Company a strip of land 28 feet in width over and across certain land in Kansas City, Jackson County, Missouri, for a consideration of $10,000, of which amount $4,000 was to be paid upon the delivery of a warranty deed and the balance in three year thereafter; that while the contract was in the name of the Consolidated Company it was really for the benefit of the Belt Company, which paid the $4,000; that thereafter the Belt Company gave its note to the West Kansas City Land Company for $5,600, being the balance of the purchase price of the land, and the Trust Company guaranteed the payment of the note and interest to the Land Company, and took from the Belt Company the sum of $5600, in cash and retained the same as a special deposit to cover its liability on said note and agreed to pay interest thereon at the rate of 6% per annum; that afterwards the Belt Company was compelled by order of the Court to pay said note and interest amounting to $7910.32, and thereupon the Trust Company became liable
to refund to Complainants the said sum of $5600 deposited
833 with it, and interest thereon, but that the Trust Company failed and refused to do so. It is further stated that said $5600 appears on the Trust Company account as a charge against the Belt under date November 28, 1892, and that it should be expunged therefrom and credit given to the Belt Company for said $5600 and interest thereon at the rate of 6% per annum from November 28, 1892. This claim is supported by the proofs and should be allowed in favor of the complainants.

7. In paragraph 14, it is alleged that on or about November, 1899, a judgment in the sum of $5000 was rendered against the Belt Company in a suit of one Zumwalt to recover for personal injuries sus-

tained by him; that the Belt Company appealed to the Supreme Court of Missouri, first giving an appeal bond as required by law; that the Trust Company signed said appeal bond as surety, by request the Belt Company deposited with it $5000 to cover its liability as surety thereon; that said judgment was reversed without being remanded, and thereupon the liability of the Trust Company as such surety ceased, but notwithstanding that fact the Trust Company has refused to account for, or pay over to the complainants the said sum of $5000 with interest thereon; hence the complainants claim they are entitled to be credited in the account between the Belt and Trust Company with $5000 with interest thereon from November 29, 1899. The proof in this cause sustains this claim and it should be allowed in favor of the complainants.

8. In Paragraph 15 of the Bill it is charged that it is a habit of the Trust Company in the disposition of the stocks and bonds of the Belt Company and the other companies involved in this accounting, to make sales of such stocks and bonds as the Trust Company should decide upon, and when such sales had been made to then credit the Belt Company with a less amount, representing to the Belt that the sale so made by the Trust Company had been made at and for a much less price than the amount at which the sale has been actually made; that in other instances the Trust Company would have an opportunity to make an advantageous sale of the stocks and bonds and with that end in view would cause the Belt Company to go through the form of selling such stocks and bonds to the Trust Company, which would thereafter consumate the sale in contemplation; or that the Trust Company would cause the Belt to go through the form of selling stocks and bonds to the Trust Company at a price much less than their value and then shortly thereafter sell these same stocks and bonds at a much greater price; in other words that the Trust Company derived large profits from such
834 transactions, which were alleged to exceed the sum of $250,000. The attention of the Master has not been called, either in the briefs or by way of argument, to any facts tending to materially sustain the charges made in this paragraph. He recalls one instance in which Stilwell, then in London, instructed the Trust Company to buy some Belt shares at 18 cents, which he sold at 20 cents on the dollar. There was no commission charged on the transaction, and the profit to the Trust Company was perhaps $400 on the sale of $4000 of stock. The finding will be against the complainants on this paragraph.

9. In paragraphs 16, 17 and 18, it is charged in substance that, through the domination of the Trust Company, the Belt Company, though insolvent, was caused to declare three certain dividends to its stockholders in the sums respectively of $17,087.40 on November 1, 1893 $26,205.28 on May 1, 1894, and $71,250.00 on November 1897; that two of said dividends were declared in stock and one of them in money. It is difficult to understand upon what theory complainants seek to make the Trust Company liable on account of dividends alleged to have been paid to the stockholders of the Belt Company, among which the Trust Company happened to be one;

it is true that the Trust Company was a large holder in the stock of the Belt Company, and presumably interested in obtaining dividends on said stock, but at the same time the dividends were declared by the directors of the Belt Company, and the stockholders received the benefits of such dividends and retained them.

The finding of the Master will be against the complainants as to the charges in these paragraphs for the reasons; First, it is not shown that the Trust Company exercised domination and control over the directors of the Belt at the time that these dividends were ordered; and, Second: that under the admitted facts the complainants have no cause of action against the Trust Company.

10. In Paragraph 19, it is charged that after the incorporation of Union Company, the Trust Company caused it to execute bonds in the sum of [$2,000,000,000] and to secure the same upon its property then owned and thereafter to be acquired. That it was provided in said mortgage that the proceeds of all these bonds, except 150 reserved for interest paying purposes, should be used in the construction and equipment of the company's railroad; that after the railroad had been constructed, the Trust Company caused the Union Company to deliver to the Belt Company, and also caused
835 the Belt Company to deliver to the Trust Company, 1160 of said Union Company bonds of the par value of $1,160,000 and a cash value of $1,044,000; that although the Trust Company was the trustee in said mortgage and knew of the authorized purpose for which said bonds could be used, it wrongfully sold them to investors and used the proceeds thereof to credit to the account of the Belt Company, the debit side of which was greatly augmented by the conduct of the Trust Company in making to the Belt Company excessive and exorbitant charges for services, interest and commissions; that the said bonds so wrongfully put afloat by the Trust Company, drew interest at the rate of 5% per annum, and the Belt Company which had been theretofore required by the Trust Company to guarantee said bonds, was thereafter required and compelled by the Trust Company to pay interest in large amounts upon said bonds, in the amount of $432,000; that the conduct of the Trust Company was wrongful and in violation of its trust, and resulted in imposing upon the Belt Company the unnecessary burden of interest payments which appear as charges to the Belt Company in the Trust Company statement of account with it. The complainants ask that there be eliminated from the Trust Company statement all such charges of interest.

The dealings of the Trust Company with the Union Company and the relations generally between the Trust Company, Union Company, and Belt Company in respect to the Union Company mortgage securing its bonded indebtedness, and other matters arising thereout, are fully considered by the Master in that part of his report on the intervention of the Southern Company, entitled Subdivision XIII, "As to the claim of Intervenor for $773,246 for damages to the bondholders arising from misconduct of the Trust Company as co-trustee in the Union Company mortgage." The conclusions there reached by the Master are adverse to the contention of the com-

plainants, and the same finding is now made as to Paragraph 19.

11. In paragraph 20 of the bill, complainants state that, on or about April 28, 1892, the Trust Company sold to one Caroline A. Perkins, three Consolidated Company bonds for $2,550.00, which were the property of the Belt Company, but that the Trust Company had wrongfully refused to pay said proceeds to the Belt, or to account in any way for the bonds, and for that reason, the Belt Company is entitled to a credit of $2,550.00, as of the date April 28, 1892, with interest thereon.

The Trust Company has been unable to account for these bonds, or their proceeds, though it was understood that the transaction took place in 1892.

836 In view of the great number of transactions which have occurred between the Trust and Belt Companies, it is, perhaps, not surprising, that this item has not been satisfactorily explained by the Trust Company. The statute of limitations has been interposed, which will operate as a defense to the Trust Company, and bar a recovery of the claim.

12. In Paragraph 21, complainants state that, on or about December 12, 1895, the Trust Company charged against the Belt Company, the sum of $5,000.00, and credited to Arkansas lands; that the charge was fictitious and fraudulent, and that said sum was not then, or at any other time advanced by the Trust Company for the Belt, and that the Belt received no benefit or consideration therefrom, and hence, that the same ought to be eliminated from the Trust Company's statement of account, and the Belt credited, with interest thereon, from the time that the charge was made.

This $5,000.00 charge appears in the Trust Company's account with the Belt, under date of December 18, 1895, being for "advanced for right-of-way, Union Terminal R. R. $5,000.00," and is supported by Trust Company journal voucher 6945, appearing in Rec. 6-3041.

Wilcox, in his testimony (Rec. 34-18262-'63) states that this $5,000.00 charged to the Belt was credited on the Trust Company books to the account of the Arkansas R. R. lands, but does not know whether it was used for something that the Belt was interested in, that there is no credit shown on Willey's exhibit for the return of this amount, and that there were no Arkansas railroad lands along the line of the Union Terminal, or anywhere near it.

Martin, in his testimony (Rec. 55-33757 to 33771), states that he never heard of any Arkansas lands on the right-of-way of the Union Terminal, nor does he know of any expense to the amount of $5,000.00 that had any reference to Arkansas lands in connection with the right-of-way or with the Union Terminal. There seems to be rather an inference, from the testimony, that this $5,000.00 was connected, in some way, with the obtaining of an ordinance in respect to the extension of the Union Company's railroad to the Stock Yards, the Belt having contracted, under date of May 28, 1894, with the Union Company to build the extension for 150 Union Company bonds, as shown by Wilcox's letter, setting out the contract (Rec. 36-19230).

The complainants suggest that, in as much as this $5,000.00 was probably used for improper purposes with the Kansas City, Kansas council, for passing the franchise, that complainants are en-
837 titled to have it eliminated from the Trust Company account.

In the confused condition of the record, the finding of the Master will be against the contention of complainants on the merits, and also on the statute of limitations, which has been pleaded as a bar to the claim.

In items (*b*) and (*c*), of paragraph 21, complainants state that, in the Trust Company account, there are made certain charges and credits, which will appear by reference to the bill; that said charges represent payments made by the Trust Company to itself or others, on account of 450 Union Terminal coupons, due August 1, 1899, owned or claimed to be owned by the Trust Company; that the amounts of said coupons have heretofore been paid in cash to the Trust Company, so that the Trust Company has been paid twice in respect to said coupons, and that, consequently, the charges made in items (*b*) and (*c*) are unauthorized and invalid, and should be eliminated from the Trust Company statement of account.

In paragraph 109, the defendant, in its answer, states that the charges referred to in paragraph 21 of the bill, as having been made against the Belt Company, were on account of money advanced for that company by the Trust Company, and with its knowledge, consent and approval at the time of the advancement, and hence, that said charges are proper charges.

The statement in item (*b*) is simply that the charges and credits therein mentioned, appear on the Trust Company account. By reference to the record, it appears that these items of charges and credits, found in the Trust Company's account against the Belt (Rec. 1-135 to 137) are made in connection with the payment of 1527 Union Terminal coupons by the Trust Company, due August 1, 1899.

By reference to Willey's testimony and letter to Black, receiver of the Trust Company (Rec. 11-5860 to 5893), it will be seen that $38,175.00, of the charges set out in item (*b*) represents 1527 Union Company coupons due August 1, 1899. Ingels, in his testimony (Rec. 48-28742-'44), states that these charges and credits set out in item (*b*) do not appear upon the Belt books nor do the Belt books show any record of any money drawn, on De Goeijen, or any money received from him to be used in payment of Union Company coupons due August 1, 1899, nor is there anything on the books to show the receipt of the $40,000.00 mentioned. As further explanatory of this item, see letters of Wilcox to Howe and Doran, September 21, and September 30, 1899, appearing in Rec. 36-19121-'23 inclusive;
838 also Doran's letters to Willey, of January 10 and January 27, 1900, Rec. 53-33966 and 34055. Mr. Witzleben, foreign exchange clerk at the National Bank of Commerce, testified (Rec. 53-31780 to 31792) that these various drafts appear to have been the drafts of the Belt Company. According to Willey's letter to

Receiver Black, above cited, these various drafts took up 1527 of the 2,000 Union Company coupons that were due August 1, 1899, and required the expenditure of $38,175.00. The total amount of the credit for the draft of 100,000 florins, or $39,437.50, as shown by Wilcox's letter (Rec. 36-19121), were placed to the credit of the Trust Company at the [—] Commerce, for the purpose of paying Union Company coupons due August 1, 1899. The difference of $1,262.50, is not satisfactorily accounted for in the record.

If the Master properly understands the meaning of this transaction, it is that, on August 1, 1899, the Union Terminal interest became due on its bonded debt, and J. De Goeijen agreed to provide the funds to pay it. He authorized the Belt Company to draw upon him for $40,000.00. The Belt Company did draw on him for that amount, and the Trust Company indorsed the draft for the accommodation of the Belt. With the proceeds of the draft, these coupons were secured by the Trust Company to be held by it as collateral security to this indebtedness from the Belt Company to the Trust Company. When the draft, however, was presented to De Goeijen for payment, he paid it with the proceeds of another draft, the transaction taking somewhat the form of draft kiting, the draft in each instance. being drawn by the Belt Company, and when it became due, the Trust Company had to pay it, and hold the coupons as collateral. Mr. Witzleben, foreign exchange teller of the National Bank of Commerce, produced his books when he testified, which showed the entries, the drawer, payee, and the indorser, and that the drawer of each of the drafts was the Belt Company, and the Trust Company was merely the indorser. The Trust Company had to pay the draft, and charged it up to the account of the Belt Company.

In respect to the charges made by the Trust Company against the Belt Company in item (*c*) of paragraph 21, it appears that in the Trust Company's statement of account, certain items, aggregating $11,500.00 are charged therein against the Belt Company on account of past due Union Company coupons, and that these items were in July, 1900, paid by the reorganization Committee, as evidenced by a letter written by Mark Hubbert, treasurer of the Trust Company, directed to Mr. Asa S. Wing, vice-president, Philadelphia, in which Hubert acknowledge receipt of a check
839 for $11,250.00 in payment of Union Terminal coupons due August 1, 1899.

Mr. Willey (Rec. 55-33632 to 33677) states that, in reference to his letter to Judge Black, appearing in Rec. 11-5872 to 5883, that the equivalent of the $43,000.00 therein mentioned, represented money that the Trust Company used to take up 1527 Union Terminal coupons due August 1, 1899, which coupons the company then held; and also that, in July, 1900, Mark Hubbert, treasurer of the Trust Company, received from the reorganization Committee $11,250.00 in payment of 450 additional coupons (being other coupons than the 1527), these 450 coupons belonging to the Trust Company; and further that the letter of Mark Hubbert correctly recites the facts. This Hubbert letter appears in Rec. 55-33637, and is on the

letter-head of the Trust Company, dated, July 14, 1900, and from all of which it is seen that $11,250.00 of the $11,500.00, charged in the Trust Company account against the Belt Company, was paid to the Trust Company in cash by the reorganization Committee in July, 1900. The 1527 coupons covered by the $40,000.00 item set out in item (*b*) of paragraph 21, plus the 450 coupons paid by the reorganization Committee to the Trust Company, make up the total of 1977 out of 2000 Union Terminal coupons outstanding and due August 1, 1899. The Belt vouchers, appearing in Rec. 33-17964 to 17983, show the payment of Trust Company drafts to the amount of $650.00 on account of 2000 Union Terminal coupons due August 1, 1899, and this, with the 1527 and 450 coupons, makes a total of 2003 coupons, which is an error of 3 coupons. It is not shown by the record how tfiis error occurred.

Under this showing, the Master finds that the complainants are entitled to a credit upon the statement of account presented by the Trust Company for said $11,250.00, together with interest thereon at 6%, from July 14, 1900.

In item (*d*), of paragraph 21, it is stated that the Belt Company is charged in the Trust Company account with $770.77, being the costs of a certain replevin suit on account of steel rails. These cost items arose out of a certain replevin suit brought by the Trust Company against the Belt Company, to recover from the Belt certain rails formerly owned by it, and claimed by the Trust Company to have been transferred to them at a Belt directors' meeting of February 1, 1900 (Rec. 52-21429 to 21432). The Trust Company, in April, 1900, filed a replevin suit against the Belt Company to recover these rails, alleged to have been transferred by the Belt Company.

The $300.00 item is for premium paid on the Trust Company
840 bond given in this replevin suit, and complainants contend that it is not a proper charge to be made against the Belt. The other items going to make up the $770.77, are charges made in connection with the alleged disposition of the rails by the Trust Company. which complainants also contend are not proper charges to be made against them, and hence they ask that such charges be elminated from the statement of account presented by the Trust Company, together with interest at 6% from the date of the charging.

These rails were delivered by the Belt to the Trust Company as collateral security for its indebtedness, and it was the duty of the Trust Company to preserve the security and utilize it to the best advantage, so as to make the proceeds of the rails pay as much of the Belt indebtedness as possible. While it is true that these outlays of costs were not made at the special instance or request of the Belt Company, and were not authorized by it, yet the duty developed upon the Trust Company to utilize the rails to the best advantage in paying its claim against the Belt.

Entertaining some doubt as to whether this claim of $770.77 should be eliminated from the statement of account, the finding will be against the complainants.

13. In paragraph 22 of the bill, the complainants allege that

in the year 1892, the Trust Company caused the incorporation of the Fruit Auction Company, the incorporators being A. E. Stilwell, A. A. Mosher, E. L. Martin and W. S. Taylor; that the articles of incorporation recited that half of the capital stock, to-wit, $75,000.00, had been paid up in lawful money of the United States, when, in fact, no part of it had been paid up; that the Trust Company caused said Fruit Auction Company to engage in the business of selling fresh fruits in Kansas City, and after the business had been conducted for a few months, it went out of business, owing the Trust Company a large sum of money, that thereupon, in order to recoup its losses in that respect, the Trust Company appropriated to its own use 286 shares of stock of the Union Company, belonging to the Belt Company of the value of $6,292.00, and used the same to wipe out the debt owing to the Trust Company by the Fruit Auction Company. Complainants allege that the taking of said stock by appropriation under the circumstances, was wrongful, and was without consideration and hence, ask that a credit therefor, with interest, be given the Belt Company on the account of the Trust Company.

841 The defendant, in paragraph 22 of its answer denies that it caused the incorporation of the Fruit Auction Company, and states that such company was organized at the instance and request of the Belt Company, and for its benefit, and for the purpose of increasing the freight traffic on the line of the Belt railroad, and that, for such purpose, the Fruit Auction Company established a warehouse and trading room on the line of the Belt Company, at which commission merchants, and dealers in produce and fruit, conducted an exchange, and that shipments of fruit and produce were received at said exchange by means of the railroad of the Belt Company, and in that way the Belt Company derived a large revenue from the diversion of shipments of fruit and produce from other railroad lines to the Belt Line, and that, at the request of the Belt Company, the defendant advanced money to the Fruit Auction Company, and, to reimburse defendant for such advancements, for the benefit of the Belt Company, and not otherwise, the latter transferred to this defendant 286 shares of stock, but defendant denies that such stock was of the value of $6,290.00, and states that it had little, if any value, at that time.

In December, 1892, the Fruit Auction Company was organized with a capital stock of $75,000.00 (Rec. 34-18244-'47), the articles reciting that the stock had been in good faith subscribed, and more than one-half paid up in money, and was in the custody of the board of directors. The directors and incorporators of the Fruit Auction Company were officers and directors and members of the executive committee of the Trust Company (Rec. 11-5697). The Trust Company paid the incorporation expenses (Rec. 47-28731). As shown by Wilcox's testimony (Rec. 34-18247), no money was paid in on the capital stock of the Fruit Auction Company, and such moneys as it did receive, *was* advanced by the Trust Company and charged to it, exception such money as it might have made during the short time it was in business. The company held a daily

auction of fruit and produce at the warehouse building at 2nd and Main Streets, and for several months did an extensive business, but afterwards abandoned it (Rec. 34-18396). It became indebted to the Trust Company, and the matter was close up, charging it to the Belt Company, and taking from the Belt Company, Union Terminal stock for the amount of such indebtedness. This stock was after wards sold and the Trust Company got the benefit of the proceeds. As shown by Doran's letter (Rec. 55-33949), the Belt Company paid to the Fruit Auction Company a commission of 50c. per car for each car of fruit handled by the Fruit Auction Company. The balance of $6,292.00 due the Trust Company from
842 the Fruit Auction Company, largely represented by Fruit Auction Company notes to the Trust Company, was taken out of the Trust Company's expense account in February, 1894, by the Trust Company receiving from the Belt Company 286 shares of Union Terminal stock belonging to the Belt Company. Trust Company journal vouchers, appearing in Record 38-21169, shows that $5,000.00 of this $6,292.00 was evidenced by the notes of the Fruit Auction Company given to the Trust Company, from which it appears that the Trust Company took from the Belt Company 286 shares of Union Company stock, for the purpose of settling the Fruit Auction Company notes aggregating $5,000.00, and also settling any balance on open account due the Trust Company from the Fruit Auction Company.

It may be that the beginning of the Fruit Auction Company was brought about by Mr. Stilwell, or others connected with the Trust and Belt Companies, but unquestionably the object in inaugurating the fruit auction business was to create traffic for the Belt railroad, and in that sense the Fruit Auction Company was a Belt concern. Now, whether the Belt Company was unduly influenced to aid the Fruit Auction Company by reason of the profits which it may have supposed would result from carrying on the fruit auction business at a point near the line of its railroad, is a matter of no importance to this inquiry. It is now evident that those interested in behalf of the Belt and the Trust company, were mistaken in this fruit auction venture, as it did not turn out profitably. That fact, however, cannot be determinative of the question whether the loss following the venture should fall upon either or both the Belt and Trust Company. It seems that an arrangement was made between the managements of the two companies, by which the 286 shares were turned over to the Trust Company under the circumstances above stated.

The basis of the charge in this paragraph is that the Trust Company dominated the Belt Company in this transaction, and the decision of the Master upon that proposition will be the same as heretofore, and his finding will be against the claim of the complainants.

Loss St. J. & G. I. Stock.

14. In the 23rd paragraph of the bill it is alleged that in the account of the Trust Company against the Belt Company, under date

of September 13th, 1898, there is a charge against the Belt of $2,500.00 for moneys represented to be paid by the Trust Company in unlawful stock transactions in the stock of the St. Joseph and Grand Island Railroad Company, purchased as a speculation on margins, alleged to have been carried on account of the Belt
843 Company; and in the same account, under date of September 15th, 1898, there appears also a charge of $2,000.00, and, on the 9th day of December, 1898, another charge of $2,000.00 for a similar unlawful transaction in margins in stock of the same railroad company, alleged to have been for the account of the Belt Company; that said transactions were unlawful, beyond the corporate power of either the Trust Company or the Belt Company, and that it is inequitable and unfair that said transactions and the loss resulting therefrom in the sum of $5,989.50 should be charged against the said Belt Company; that said entries are incorrect and should be expunged from the Trust Company's account and credit allowed the Belt Company thereon for the amount of said sum and interest.

In paragraph 111 of defendant's answer, it is alleged that the charges against the Belt Company, carried in paragraph 23 of the bill, were made because the defendant Trust Company, on the dates therein mentioned, and at the request of the Belt Company, paid drafts aggregating the sum of $6,500.00, which should have been drawn on the Belt Company. The defendant further states that if the Belt Company lost any money in speculations, there is no reason, in law or in equity, why the defendant should pay such losses; that all of said charges were fully known, ratified and acquiesced in by the Belt Company, its officers and directors, and complainants are now estopped from questioning the same.

Without taking the time to refer to all of the book entries in regard to these stock speculations, it appears from the testimony of Wilcox, in speaking of these transactions, (Rec. 34-18405-406) that these charges in the Trust Company account, appearing at pages 122 and 124 of Record 1, were margins on 500 shares of the St. Joseph and Grand Island Railroad Company; that Stilwell and Maryin were active in handling the transactions, and that the stock was bought at that time because of the association of Martin and Stilwell with the officers of the St. Joseph and Grand Island (Rec. 34-18430-'431); that Martin and Stilwell were together in this deal and between them ordered the stock purchased, 500 shares being purchased on the Belt account and 500 shares on Stilwell's account (Rec. 34-18248-'250). Wilcox further states that the deal resulted in a loss and that he understands that all of the margins were wiped out; that this deal was had about the time that negotiations were pending looking to bringing to Grand Island Road into Kansas City over the Belt terminals.

For the total loss on these transactions, see Johnson's testimony, (Rec. 21-10821-'832) showing a total loss to the Belt Com-
844 pany of $5,989.50, and the complainants claim that they are entitled to have that amount eliminated from the Trust Company's account of the $6,500.00 charged therein on account

of the marginal stock transactions, together with credit thereon at six per cent interest.

It appears from the record that Mr. Martin was the President and active in control of the Belt Company, and that Mr. Stilwell was the President and active in control of the Trust Company, and that they were having certain negotiations with the management of the St. Joseph and Grand Island Railroad Company, looking to a business proposition by which that company would use the Belt terminals, and it is, perhaps, a fair presumption, from all the surroundings of this matter, that Stilwell and Martin mistakenly entered into the stock speculation deal, believing, as is usually the case, that they had a tip and a sure thing. Mr. Stilwell speculated on his own account, and it is contended that the transaction by Mr. Martin was on account of the Belt Company. A loss occurred and now the complainants seek to shift such loss on to the Trust Company. The record cannot, of course, disclose whether, in case, there had been a profit on the transaction to the Belt, that there would have been any complaint as to the transaction that Mr. Martin conducted for its interest. Be that as it may, regardless of the question of the alleged domination and control of the Trust Company over the Belt, the master is satisfied that under the facts in this case there is no sufficient proof to justify a finding of liability on the part of the Trust Company for the loss complained of; and, hence, the finding of the master will be in favor of the defendant Trust Company.

15. In paragraphs 24 and 25 of the bill, it is charged that the Trust Company did, on or about September, 1890, take, appropriate and convert to its own use $499,000.00 par value of the capital stock of the Belt Company, of the actual value at that time of $166,333.33, for which the Trust Company has failed to account in its statement of account against the Belt Company or, otherwise; and further that on or about the year 1892 the Trust Company took, appropriated and converted to its own use 2455 shares of the capital stock of the Union Company, of the par value of $245,000.00, and of the actual value of $49,100.00, for which the Trust Company has failed to account on its statement of account against the Belt Company; and for both of said sums of $166,333.33 and $49,100.00, with interest thereon from the dates mentioned, the complainants allege that they should be credited upon the Trust Company's statement of account against the Belt Company.

845 In paragraph 112 of the defendant's answer to the bill, defendant denies that it at any time appropriated or converted any of the stock of the Belt Company or the Union Company or any other company.

The item of 4,990 shares of Belt stock is of the same nature as that heretofore mentioned in item (*b*) of paragraph 1, and the item of 2,455 shares of Union stock is of the same nature as that heretofore mentioned in items (*h*) and (*i*) in paragraph 2 of this bill. The conclusion reached as to this class of items will answer the purpose of a separate finding by the Master in respect to the Belt and Union stocks in these paragraphs 24 and 25.

16. In paragraph 26 complainants state that the Trust Company caused to be constructed the railroad of the Air Line and used, for that purpose, the Construction Company, and caused the Air Line to enter into a contract with the Construction Company for the completion of the Air Line railroad; that under the terms of said contract the Construction Company was to receive $300,000.00 par value of the Air Line stock and $300,000.00 par value of the first mortgage Air Line bonds; that the Construction Company entered upon the construction of such railroad, but before it was fully completed, the Trust Company caused the Air Line and the Construction Company to go through the form of an agreement, by which the Air Line was to accept the then partially completed railroad, as for a full compliance with the contract, and was to turn over to the Construction Company the securities provided for in said contract, to be turned over upon the completion of the road, and that thereupon the railroad was turned over to the Air Line and the securities above mentioned, which had at all times remained in the custody of the Trust Company, were by it appropriated to its own use; that the actual cost to the Trust Company of the construction of the Air Line was $170,747.29, and that the Trust Company realized from the construction of said Air Line a profit of $129,252.71; and further, that by reason of the relation of the parties, it was unjust and inequitable that the Trust Company should retain said profits, or any of them; but, on the contrary, it should be required to account therefor to the Belt Company, and hence, complainants ask that they be allowed a credit for that amount, with interest, upon the Trust Company's statement of account against the Belt Company.

In paragraph 113 of the answer defendant Trust Company states, in substance, that it had already, in the former parts of its
846 answer, fully answered the charges made in said paragraph 26; that it denies that the Trust Company constructed the Air Line, but states that the road was constructed by the Construction Company; that when the Construction Company delivered the road to the Air Line in the year 1892, the Construction Company turned over to the Air Line all of the books of accounts, showing in detail all of the costs of the Air Line, and those books have ever since been in the possession of the Air Line and Belt Companies, and their receivers, and all of the circumstances surrounding the transactions of said Air Line and the costs thereof were fully known to the stockholders and directors of the Air Line and Belt Companies at the time that the railroad was accepted from the Construction Company, and hence, the complainants are now estopped from complaining of the result of such contract. Defendant denies that it made any profit on the construction contract, for it had nothing to do with it, except as a banking institution, selling the stocks and bonds received by the Construction Company in payment of its work, and for which stocks and bonds defendant has fully accounted many years ago.

The charges made in this paragraph 26 stand upon about the same footing as those in respect to paragraph 12 and in connection with the construction of the first division of the Belt. The conclu-

sion reached by the master [is] respect to the effect of the construction contracts under which the Air Line and the first Belt Division were built has already been stated and it is unnecessary [—] go over the same matter again. In the absence of the alleged domination and control by the Trust Company over either the Belt or Air Line corporations, the facts alleged in paragraph 26, even if true, would not constitute a cause of action against the Trust Company, and then again the statute of limitations, plead in bar by defendant, would be effective, even if any such cause of action ever existed.

The finding of the master will be against the contention of the complainants and in favor of the defendant Trust Company as to the matters contained in this paragraph 26.

17. In paragraph 27 the complainants state that, in connection with the contract between the Belt Company and the Connecting Company, and as a part of the obligation assumed by the Belt Company to procure the right of way for the railroad of the Connecting Company, the Belt Company was caused by the Trust Company to purchase and acquire certain lands along the line of said railroad, in addition to the right of way, and to take the title thereto in
847 a corporation which the Trust Company caused to be organized under the laws of Missouri, called the "Northern Townsite Company", hereinafter referred to as the "Townsite Company"; that the Trust Company caused the Belt Company to advance to the Townsite Company, and also to advance for the purchase of lands which were conveyed to the Townsite Company, the sum of $46,463.75, and that all the lands now held by the Townsite Company were purchased with money so caused to be furnished by the Belt Company; that the greater portion of said lands still stands in the name of the Townsite Company, but portions thereof have been sold and the proceeds are now held by Edward F. Swinney, receiver of the Townsite Company and likewise receiver of the Belt Company; that the Trust Company furnished to the Townsite Company the sum of $6,288.57.

The complainants seek to have the properties now standing in the name of the Townsite Company conveyed to them, as the property of the Belt Company, and also to have the moneys arising from the sale of such lands turned over to them, together with all other assets of the Townsite Company, or to have a credit upon the Trust Company's statement for the amount of moneys so furnished by the Belt, with interest thereon from the dates they were furnished. A claim is also made for a commission collected by the Trust Company, amounting to $1,085.00, as being an unlawful and improper charge, by reason of the relation of the companies to each other.

In paragraphs 114 and 115 of its answer, defendant, in effect, denies that it dominated or controlled the Townsite Company, or that it caused the Belt Company to have the title to any of its lands taken in the name of the Townsite Company, and defendant says that whatever was done in respect to those matters between the Belt and the Townsite Companies was wholly for the convenience and accommodation of the Belt Company, and not for the benefit of the Trust Company.

The Townsite Company was incorporated under the laws of Missouri (Rec. 16-8483), the incorporation expenses, amounting to $314.82, having been advanced by the Trust Company and charged to the Belt Constructing.

For a full discussion of the Townsite matter, see Johnson's testimony (Rec. 16-5417-8599); for the property purchased, title to which was taken by the Townsite Company, see Johnson's testimony (Rec. 16-8443).

The Townsite Company and its receivers, by virtue of the sale of a portion of the land purchased, had on hand June 10,
848 1905, the sum of $1,056.48. It is the contention of the complainants that upon the payment to the Trust Company of $6,720.07, advanced by the Trust Company to the Townsite Company, they are entitled to have the property now standing in the name of the Townsite Company conveyed to them, and also to have the moneys in the hands of the Townsite Company or its receivers, arising from the sale or rentals of land, together with any other assets of the Townsite Company, growing out of the moneys furnished by the Belt, transferred to them.

The complainants, in their intervening petition in this case, have set up specifically some claim as to the lands, the title to which was vested in the Townsite Company, and the finding of the master in that matter will answer for his finding under this paragraph. So far as concerns the commission of $1,085.00, paid to the Trust Company, the master sees nothing in the relations of the Trust Company and the Belt and Townsite Companies which should preclude the former from charging and receiving said commission.

18. In paragraph 28 complainants seek to have an item of $2,054.50, with interest from November 19, 1891, eliminated from the Trust Company's statement of account against the Belt Company, or that a credit therefor should be allowed the Belt Company for such amount and interest.

The facts relating to this matter are somewhat complicated and, inasmuch as the item itself is clearly covered by the statute of limitations, the master will not go into any further examination of it.

19. In paragraph 29 it is charged that the Trust Company, on or about July 1st, 1898, caused the Belt Company to lease from the Second Improvement Company certain real estate mentioned therein, at a rental of $100.00 per month, and on the same day caused the Belt Company to lease said lands, so leased from said Improvement Company, to the Wells Fargo Express Company, for $25.00 per month; that said land was not necessary for the right of way or for the operation of the Belt Company; but, nevertheless, the Trust Company so dominated and controlled the Belt Company as to cause it to make the lease. Wherefore, the complainants seek to have the Trust Company's account credited with $1,350.00, the alleged loss to the Belt Company on account of such lease.

Inasmuch as it is not shown that the Trust Company dominated and controlled the Belt Company to the extent and in the manner alleged, the finding of the master will be the same upon this
849 item as upon others of like nature, that is, adverse to the claim of the complainants.

Prayer of the Bill.

20. The prayer of the complainants' second ancillary bill is to the effect:

(*a*) That an accounting be taken of the various transactions and dealings between the Trust Company and the Belt Company, or by the Trust Company for the benefit of and as trustee and agent for the Belt Company, and, that in taking such accounting, all claims and demands alleged to be held by the Trust Company against the Belt where the Trust Company used the Belt as an instrumentality or agency for its own benefit, be charged against the Trust Company, and that it be held liable for all loss incurred or claimed to have been incurred by the Belt Company;

(*b*) That the notes given by the Belt Company to the Trust Company be decreed to have been executed in a fraudulent manner and for fraudulent purposes and without consideration, and, that the same may be directed by the court to be surrendered up and canceled, and, further that each and all of the stocks and bonds and other securities delivered to the Trust Company in the manner recited in the bill may be ordered surrendered and delivered up to the Belt Company, or reassigned to it, and

(*c*) That all of the properties purchased with the money of the Belt Company and belonging in equity to it, the title to which is held in any other companies, may be required by the court's decree to be conveyed to the Belt Company, or its receiver for it.

In the Matter of the Claims of the KANSAS CITY SOUTHERN RAILWAY COMPANY in its Amended Intervening Petition.

I.

General Statement.

On February 27, 1905, during the taking of testimony in this cause, and nearly four and a half years after the receiver of the Kansas City Suburban Belt Railroad Company had filed the Ancillary Bill of Complaint herein, the Kansas City Southern Railway Company filed its Intervening Petition, the general purpose and scope of which was to take away from the Guardian Trust Company the collateral securities held by it to secure the alleged indebtedness against the Belt Company, upon the theory that the
850 properties so held as security were subject to the lien of the mortgage executed by said Belt Company, by virtue of the "after acquired property" clause, and the "grant, bargain and sell" clause in said mortgage; and, by reason of which, the Kansas City Southern Railway Company, as the purchaser of the Belt properties at the foreclosure sale, became the owner of the equitable right or title in and to all properties covered by the mortgage, to the same extent as if they had been in existence and specifically named in it when executed; hence the intervenor asserts its claim to be the

equitable owner of all said collateral securities as against all parties to this suit.

The intervening petition was filed, pursuant to a stipulation, permitting the Kansas City Southern Railway Company to become a party to this action, either as joint complainant or by bill of intervention, as it might elect, and further providing that the "testimony heretofore or hereafter taken in this cause, so far as applicable, may be considered as evidence in support of the claim or bill of the Kansas City Southern Railway Company, and in support of the claim of the adversary parties." Rec. Vol. 57-35055.

Thereafter, another stipulation, appearing in Rec. Vol. 57-35058, was filed May 1, 1905, in which it was agreed that an Amended Intervening Petition of the Kansas City Southern Railway Company might be filed, setting up, in addition to the matters contained in the intervening petition then on file, the intervenor's claim against the Guardian Trust Company for certain alleged breaches of trust by it, under the mortgage made to it and the Provident Life & Trust Company, as trustees, by the Union Terminal Railroad Company.

For the purpose of more convenient references, the various companies involved or concerned in the amended intervening petition, hreinafter referred to as the intervening petition, are as follows:

1. Kansas City Southern Railway Company, herein referred to as the Southern Company.
2. The Kansas City Suburban Belt Railroad Company, herein referred to as the Suburban Company.
3. Consolidated Terminal Railroad Company, herein referred to as the Consolidated Company.
4. The Union Terminal Railroad Company, herein referred to as the Union Company.
5. Kansas City & Independence Air Line, herein referred to as the Air Line.

851 6. Kansas City Suburban Belt Railroad Company, herein referred to as the Belt Company.

7. Kansas City & Northern Connecting Railroad Company, herein referred to as the Connecting Company.
8. Kansas City, Pittsburg & Gulf Railroad Company, herein referred to as the Gulf Company.
9. Missouri, Kansas & Texas Trust Company, later by change of name called the Guardian Trust Company, herein referred to as the Trust Company.
10. Central Improvement Company, herein referred to as the Central Company.
11. Fairmount Amusement Company, herein referred to as the Amusement Company.
12. Northern Townsite Company, herein referred to as the Townsite Company.
13. Cambria Steel Company, herein referred to as the Cambria Company.
14. Missouri Elevator & Terminal Company, herein referred to as the Elevator Company.

15. The Provident Life and Trust Company, herein referred to as the Provident Company.

In the building of the railroads belonging to the Suburban Belt, and its allied railroad companies, a mortgage was first placed upon the properties of each road, respectively, and providing, generally speaking, that the mortgage lien should cover the railroad constructed, and to be constructed and properties described in such mortgage, then owned or controlled by such road, and also such properties as should thereafter be acquired by it. The object being to secure the money required to build the roads from the sale of the bonds secured by the mortgage, it was important, as a protection to future bondholders, that the proceeds of the bond sales should be used for and go into the building of the respective railroads, or in the purchase and acquirement of properties connected with the building or operation thereof, or otherwise for the betterment of the railroad company, so as to thereby enhance in value the security for its bonds. In other words, that the properties then owned or possessed, as well as those thereafter to be acquired, should alike come under the lien of the mortgage by virtue of the "after acquired property" clause thereof, as the purchasers of the bonds were bound to know the contents of the mortgage securing the same,
852 and had the right to rely thereupon, and to claim all the benefits to be legitmately obtained by reason of its provisions.

In so far as they may be involved in this case, it may be generally stated that the mortgages executed by the Gulf Company, Consolidated Company, Union Company, Air Line, and Connecting Company, and in fact all the allied railroad companies, contain substantially the same clauses as to "after acquired property", as those found in the Belt mortgage, and wherever the meaning or effect of any particular clause is a controverted issue in the case, a more specific reference will be made to that clause.

The statements contained in paragraphs 1, 2, 3, and 4, of the intervening petition, as to the organization, general purposes and bonded indebtedness of the Belt, Consolidated, Air Line, Union and Gulf Companies, are in the main admitted in the answer filed by the Trust Company, and, hence, I shall not make needless references to the record as to such uncontroverted matters.

The Suburban Company, a corporation organized and existing under the laws of Missouri, on or about May 1, 1890, executed and delivered its deed of trust or mortgage to the Missouri, Kansas & Texas Trust Company, (now by change of name called the Guardian Trust Company, one of the defendants herein) as trustee, and in which it is recited that it shall be a "first mortgage and paramount lien upon said railroad and upon all the property and rights of property of the railroad company of every name, nature and description then held or that might hereafter be acquired including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to said trustee, to secure an issue of the first mortgage bonds of said railroad company in the principal sum of One Million (1,000,000) Dollars, all

and singular the double track standard guage railroad of the company, (meaning thereby the Kansas City Suburban Belt Railroad Company), constructed and to be constructed from a point at the intersection of Second and Broadway Streets in Kansas City, in Jackson County, Missouri; thence in an easterly direction on and along said Second Street to its point of intersection with Harrison Street in said city; thence in a northeasterly direction to a point near Randolph Avenue in said city; thence east for a distance of about one and one-half miles; thence in a southeasterly and southerly direction to the southern limits of said city; thence in a general southwesterly direction to a point at or near the mouth of Brush Creek in said County of Jackson, being about twelve (12) miles of double track railroad, about ten (10) miles of which are within the corporate limits of Kansas City; also all the lands, tenements, easements and hereditaments acquired or appropriated or which shall be thereafter acquired or appropriated for the purpose of a right-of-way for said railroad, or for its tracks or switches; also all railroad tracks, railways, and rights-of-way, depot grounds, station grounds and other grounds, bridges, viaducts, culverts and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shop and other shops, water tanks, turn tables, superstructures, erections, fixtures, rolling stock, furniture, fuels, tools, implements, machinery and appliances and other facilities for maintaining and operating said railroad, as well such as are then owned or held by the company as also such as the company might thereafter construct or acquire for use in connection with its said railroad; also all the terminals, terminal rights, privileges, contracts, leases, connections and appliances which the company then owned and held and which it might thereafter own and hold for use in connection with its said railroad; also all of certain described lots, tracts and parcels of land situated in Kansas City, in the County of Jackson, State of Missouri, more specifically described in said mortgage or deed of trust; also all and singular the rents, tolls, income, issues and profits of the said railroad premises and property; and also all the estate, right, title and interest, legal and equitable and present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties and franchises of the company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof as well those thereafter to be acquired as those then held."

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The Consolidated Company, a Missouri corporation, on or about February 1, 1892, executed and delivered its deed of trust or mortgage to the Trust Company and the Provident Company, of Philadelphia, as trustees, to secure an issue of first mortgage bonds in the principal sum of $750,000.00, to be secured by a first mortgage upon its standard guage railroad and properties described therein, constructed and to be constructed from a point on the line of the Kansas City Suburban Belt Railroad, at or near the intersection of Grand Avenue and Second Street, in Kansas City, Missouri, in a westerly direction to a point on the State Line between the states of Missouri and Kansas, near the south bank of the Missouri River;

the provisions of which mortgage are substantially set forth in paragraph 2 of the intervening petition.

The Consolidated Company and the Suburban Company on or about July 25, 1892, entered into articles of consolidation
854 as authorized by, and in accordance with, the provisions of the Statutes of the State of Missouri, in such case made and provided, and the two companies thereby became consolidated, forming a new and separate corporation under the name of Kansas City Suburban Belt Railroad Company, herein referred to as the Belt Company, and thereby forming a continuous line of railroad, running in the same general direction.

The Air Line a Missouri corporation, on or about March 1, 1892, executed its deed of trust or mortgage to the Trust Company as trustee, to secure an issue of first mortgage bonds of the principal sum of $300,000.00, and to be secured by a first mortgage upon its standard *gua*ge railroad, running from a point on the line of the Belt railroad to the City of Independence, and also upon certain properties therewith connected; the provisions of which mortgage are set fo*u*rth in paragraph 2 of the amended intervening petition.

Default was made in the payments, required in and by said Belt, Consolidated and Air Line mortgages, and, on September 6, 1900, the proper proceedings in foreclosure were instituted, and had in the United States Circuit Court for the Western Division of the Western District of Missouri, the Trust Company being made a party to such proceedings, and all the above named foreclosure suits being consolidated, and, on November 6, 1901, a final decree of foreclosure and sale was entered in the consolidated suit. The properties there involved were thereupon sold, pursuant to said decree, to the Southern Company, which thereby became the purchaser of all the properties of said companies, included in or covered by their respective mortgages.

The Union Comapny, a railroad corporation organized and existing under the laws of the State of Kansas, and being about to construct and equip a line of railroad in Wyandotte County, Kansas, from the City of Argentine, so as to encircle the City of Kansas City, in said County of Wyandotte, and connect with the Kansas City Suburban Belt Railroad Company's railway at the State Line between Kansas and Missouri, on or near the south bank of the Missouri River, did, on or about February 1, 1893, execute and deliver its deed of trust for $2,000,000.00 to the Trust Company and the Provident Company, as trustees, the provisions of said mortgage being substantially set forth in paragraph 3 of the intervening petition. Default was made in the payments required by the terms of said mortgage, and, on September 6, 1900, such proper proceedings were instituted for the foreclosure thereof in the United States Circuit Court for the District of Kansas, that, upon November 6, 1901, a
decree of foreclosure and sale was entered therein, and the
855 properties embraced in said mortgage were decreed to be sold. A sale was made pursuant to the decree, and the Southern Company became the purchaser thereunder. The Gulf Company, a Missouri corporation, on or about April 1, 1893, exe-

cuted and delivered its deed of trust or mortgage to the Trust Company and the State Trust Company of New York, as trustee, to secure the issuance of its first mortgage bonds in the principal sum of $23,000,000.00, the provisions of said mortgage being substantially stated in paragraph 4 of the intervening petition. Default was made in the payments, required by said mortgage, and, on April 28, 1899, proce-dings were instituted in the United States Circuit Court for the Western Division of the Western District of Missouri, for the foreclosure of said mortgage, which resulted in the rendition, on February 5, 1900, of a decree of foreclosure and sale, and, pursuant to which, the railroad properties and franchises of the Gulf Company were thereafter, on March 19, 1900, sold to the intervenor.

The Guardian Trust Company denies that, in the foregoing mortgage, it is recited that the same shall be paramount liens upon all the properties and rights of said railroad companies, respectively, of every name, nature and description, then held or that might thereafter be acquired; and said Trust Company states that suits for the foreclosure of all said mortgages were begun and prosecuted, and decrees entered therein, and foreclosure sales made thereunder, pursuant to and in accordance with the plan and scheme, and under the circumstances, described in the answer (meaning thereby the Reorganization plan and agreement under which it is claimed that the so-called Stilwell system of railroads was foreclosed and purchased by the Southern Company).

In paragraph 5 of the intervening petition, the intervenor charges that the Trust Company, in the year 1887, conceived and entered upon the plan and purpose to cause to be constructed a number of railroads in and about Kansas City, Missouri, and Kansas City, Kansas, and that it was a part of said plan and purpose to cause said railroads to be built, constructed and operated by various corporations to be organized by the Trust Company, and to elect certain of the officers, agents and representatives of the Trust Company as officers and directors of the several railroad companies, so as at all times to absolutely dominate and control the corporate action of said railroad companies through their common directors and officers; that it was also a part of the Trust Company's plan and purpose to utilize and employ one or more of said railroad companies to act for the Trust Company in building and operating railroads, so as
856 to benefit the Trust Company in the issuance of the railroad stock and bonds, and gather to it all the profits and other advantages accruing therefrom, and leaving all the losses, burdens or other liabilities to be borne by the railroad company. It is charged by the intervenor that, in carrying out said plans and purposes, the Trust Company assumed the duty and position of trustee and agent in constructing and operating said railroads, and in managing and disposing of their stocks, bonds and other assets, and that the Trust Company was and is held to the liability of trustee for the use and benefit of all parties who might and did become interested or concerned in any of such transactions, wherefore, the intervenor, charged that the relation of the Trust Company to said railroads so used for its purposes, was that of a principal bound and charged

with the duty to indemnify and protect such railroad company, so employed and utilized in any particular transaction, against any and all losses, burdens and liability arising in the premises." The intervenor also charged that the Trust Company was, as between itself and the Provident Company, its co-trustee, the active trustee in charge and management of the trust created by the several mortgages or deeds of trust, and that as such trustee it owed an active duty at all times to care for and protect the interest of the bondholders secured by the mortgages, as well as to care for and protect the interest of the mortgagors themselves. The intervenor charges in substance that, in pursuance of the aforesaid plans and purposes, the Trust Company acquired the control of the Suburban Company in 1899, and caused it to issue stock and bonds, and to construct and operate its railroad, and that the Trust Company also caused the incorporation of the Consolidated Company, the Union Company, Air Line, and the Gulf Company, and the consolidation of the Suburban and Consolidated Companies into the Belt Comapny, and the issuance of their stocks and bonds, and the construction and operation of their railroads, respectively, and, also caused the Union Company to execute a lease of all property, rights and franchises to the Belt Company, and thereunder the Belt Company, to operate the Union line in connection with the Belt road until the foreclosures, and, also caused the Gulf Company to enter into contracts with the Belt Company for the use of the latter's terminals at Kansas City.

The intervenor further charges that the Trust Company, by virtue of its ownership and control of the capital stock of the Belt Air-Line and Union Companies, did at all times cause its officers and directors to be elected as the officers and directors of said lines, and, also, that it caused its officers and directors to be elected as officers and directors of the Gulf Comapny, and did thereby dominate and control [*and*] affairs and business of all said railroad companies, and caused them, and each of them, "to do and perform all such corporate acts and things as the Trust Company, from time to time, deemed to be beneficial to its own interests."

857

The Trust Company, in paragraph 5 of its answer, denies all the averments in paragraph 5 of the intervening petition and alleges that all said railroad companies were "managed and controlled by directors and officers, freely and voluntarily elected by the stockholders thereof in the usual and ordinary manner."

It is not deemed necessary to here [*made*] detailed reference to the remaining paragraphs of the intervening petition, in as much as the controverted items in each paragraph are hereinafter, under appropriate headings, separately examined and reported upon. In a general way, however, it may be stated that paragraphs 6, 7, 8, 9, 10, 11 and 12, relate to certain securities and properties, claimed to be held by the Trust Company as collateral to and for its alleged Belt indebtedness, that is.

Paragraph 6 is in respect to Central Company stock, or the lands claimed to be represented by such stock;

Paragraph 7 is as to certain steel rails and fastenings, or their value;

Paragraph 8 pertains to Union Company and Air Line stocks, or their values;

Paragraph 9 relates to Connecting Company stocks and bonds or their value;

Paragraph 10 has reference to a terminal contract claim of $133,000.00 against the Gulf Company, and assigned by Belt Company to the Trust Company;

Paragraph 11 concerns Townsite Company stock, or the conveyance of Townsite Company properties;

Paragraph 12 is in regard to the alleged misconduct of the Trust Company in obtaining the securities therein described on account of Belt indebtedness;

Paragraph 13 is as to alleged breach of trust of the Trust Company as trustee, in connection with Union Company affairs, and, wherein is claimed the sum of $773,246.00 and interest.

Paragraph 14 is concerning the question of the Cambria claims being subordinated to those of the intervenor.

858 The Trust Company denies any liability whatever to the intervenor on account of any of the claims set out in the intervening petition, for the following, among other, reasons, briefly stated:

1. That the properties claimed by the intervenors are not now and were never subject to the mortgage liens, as contended by intervenor's counsel.

2. That if the intervenor's claims were ever good, they were barred by the statute of limitations, when presented in this cause, and are now so barred.

3. That the intervenor has been guilty of such laches in the presentation and prosecution of its alleged claims as to preclude or estop it from asserting and prosecuting the same in this cause.

4. That the intervenor, either by consolidation with the Belt, statutory or de facto, or by assumption, express or implied, under the provisions of the Reorganization Plan, (by which the Gulf, Belt and other allied railroads were acquired by the Southern Company—) or otherwise, has become liable to the Trust Company for the Belt indebtedness to it, and for that reason is not entitled to the properties pledged to the Trust Company in trust, until it pays to the Trust Company the debt secured by these collaterals.

II.

Authorities on After Acquired Property.

In order to economize the time and lessen the labor of the court in the consideration of the questions for determination in the intervening petition, the Master has made somewhat extended references to the adjudications, applicable to the legal propositions, submitted by counsel.

It will be readily understood from the pleadings, that the principal issue is in respect to what properties, if any, of those in dispute are within the "after-acquired property" clause of the Belt mortgage, and, in consideration thereof, the cases herein enumerated

will be, perhaps of some service to the Court. Following these authorities, an investigation of each disputed item of property has been made, and a conclusion reached as to whether, under the law and facts of each transaction, the intervenor has any legal or equitable claim to the property, and, if so, the nature of such claim.

In Central Trust Co. v. Kneeland, 138 U. S., 414, Mr. Justice Brewer said:

859 "The first mortgage had the "after-acquired property" clause in it. It is settled that such a clause is valid, and that thereby the mortgage covers not only property then owned by the railroad company, but becomes a lien upon all property subsequently acquired by it which comes within the description in the mortgage. Pennock v. Coe, 64 U. S., 23 How., 117 (16:436); Dunham v. Cincinnato, P. & C. R. Co., 68 U. S., 1 Wall., 254 (17:584); Galveston H. & H. R. Co. v. Cowdry, 78 U. S., 11 Wall., 459 (20:199); Thompson v. Whitewater Valley R. Co.; 132 U. S., 68 (33:256). And this is true, not only as to property to which it acquires the legal title, but also as to that to which it acquired only a full equitable title. Toledo, D. & B. R. Co. v. Hamilton, 134 U. S., 296 (33:905)."

Again:

"So far as the property standing in the name of Ballou is concerned, he was the financial agent of the mortgagor, the Toledo, Delphos & Burlington Railroad Company, and while he took title to some properties in his own name, the purchase was made with moneys of the mortgagor. Hence while he held the legal title, the full equitable title was in the railroad company, and that property became, therefore, in equity, subject to the lien of the first mortgage * * * All that part whose title was taken in the name of Ballou was paid for by the funds of the Toledo, Delphos & Burlington Railroad Company, and therefore it had the full equitable title, and he had only the naked legal title in trust for its benefit * * * So, whatever may have been the secret thought and scheme of the parties controlling the management of these railroad companies, we are of the opinion that the various properties included in the right of way and terminal facilities became, in fact, subjected to the lien of the two mortgages of January and June, 1880, executed by the Toledo, Delphos and Burlington Railroad Company."

In Wade v. Chicago, etc., R. Co. 149 U. S., 327, the court say at page 341:

"The after-acquired clause" in the mortgage of the Chicago Springfield and St. Louis Railroad Company, under the decisions of this court, covers all acquisitions made to the property either by the Construction Company or others acquiring rights, under it. * * * In this latter case (Central Trust Co. v. Kneeland, supra) it was held that the "after-acquired property" clause of a mortgage will cover not only the legal acquisitions, but all equitable rights and interests subsequently acquired by or for the mortgagor."

860 In Toledo, etc. R. Co. v. Hamilton, 134 U. S., 296, the Court say at page 305:

"In the case at bar, as appears from the testimony and the decree, only the naked legal title remained in Ballou; the full equitable title was in the railroad company—and in that company before the contracts were entered into. The railroad company had the same title when it made the contracts that it had when the work was done and the decree rendered. Hamilton's contracts were with the railroad company, and of course gave a lien upon the lands only to the extent of the title that the railroad company had. The mortgage being one with words of general description, conveyed land held by a full equitable, as well as that held by a legal title."

In Augusta etc. R. Co. v. Kittel, 52 Fed. Rep., 63, it appears that the State of Florida granted to the Railroad Company certain lands, which amounted to quite an extensive tract: To secure a certain indebtedness of the Railroad Company, a mortgage was executed in favor of Kittel. In considering the effect of the mortgage, the Circuit Court of Appeals for the Fifth Circuit say:

"In our opinion, if the company had not a legal title to the lands mortgaged it had a full equitable title. The language of the mortgages, in the granting part, is full and complete, conveying any and all interest of the railroad company in the land, and passed whatever title the railroad company had. It was sufficient to mortgage land held by a full equitable title, as well as that held by a legal title."

In Pere Marquette Railroad Co. v. Graham, 99 N. W. Rep. 408 (Mich.) the court hold:

"A mortgage by a railroad company, covering its present and after acquired property, described the property as the company's railroad, located and to be constructed, and all lands and depot grounds, purchased or to be purchased, and all property acquired under the authority of its franchises now in possession or thereafter to be acquired, and including all the appurtenances and appendages of the railroad and the property of the company. Held, that, as against a stranger, the mortgage included an after acquired city lot adjacent to the company's main line, and adapted to use in its business, and hence the deed on foreclosure of the mortgage, describing the property in substantially the language of the mortgage, conveyed the lot."

Again:

861 "That the purpose of this broad language was to include all the after-acquired property which the railroad company should fit to acquire, having any relation to the business of the corporation, is, we think, perfectly manifest. That this property, being adjacent to the main line of the company, was adapted to use in its business, is, we think, also manifest."

In Columbia Finance & Trust Co. v. Kentucky etc. Railway Co., 60 Fed. Rep. 794, it is held:

"A railroad mortgage covering, among other things, "all the corporate rights, privileges, franchises, and immunities, and all things in action, contracts, claims, and demands of the said party of the first part, whether now owned or hereafter acquired in connection or relating to said railroad," is sufficient to include a subsequently ac-

quired lease of a belt railway whereby the company acquired access to a city at one of its terminals."

In Brady v. Johnson, 26 Atl. Rep., 49, the court say:

"For it is now well settled that a mortgage with the after acquired property clause in it embraces and creates a charge upon all property subsequently acquired by the mortgagor, which comes within the description of the mortgage; and this is not only as to property to which the mortgagor acquires the legal title, but also as to that to which it acquired only an equitable title." Trust Co. v. Kneeland, 138 U. S., 414, 419; Railroad Co. v. Hamilton, 134 U. S., 296.

In Knevels v. Florida etc. Railroad Co., 66 Fed. Rep. 224, 23 U. S. App., 549, the disposition of courts in construing the after acquired "property clause in a railroad mortgage, is illustrated, where it is held:

"The general term "railroad," as ordinarily used, includes many kinds of property, both real and personal, and cannot with any degree of propriety be confined to the track or the land simply necessary to lay the track upon. It is not necessary to consider whether the land can pass as appurtenant to the land, for it is unquestionable that land may pass as appurtenant to a railroad. It is claimed that nothing can be appurtenant to the railroad unless it is necessary for its operation. Here the term "necessary" may be used with several significations and limitations, and we do not consider that its most restricted and confined use should be accepted in this connection. It can at no time be claimed that a strip of land
862 one hundred feet wide, or two hundred feet wide, as is frequently granted by charter, is absolutely necessary for the laying of a track and the operation of a railroad, and yet it is considered that it is reasonably necessary and appurtenant to the railroad, and it all passes with it.

A careful examination of the numerous authorities cited satisfies us that any piece of land that may be considered reasonably necessary for the present operations of the road, or for the contemplated and prospective extensions or improvements, and that is held for that purpose, may within the scope of the decisions be held to appertain to a railroad."

Again:

"These lots were partly paid for with funds thus procured. Even in the absence of a positive lien a court of equity might well hold them subject to an equitable lien in favor of the holder of the bonds whose money could be traced to them."

In McGourkey v. The Toledo & Ohio Central Railway Co., 146 U. S. 536, the syllabus is as follows:

"The future acquired property clause of a railway mortgage attaches only to such property as the company owns, or may thereafter acquire, subject to any liens under which it comes into the possession of the company.

If, however, the property though nominally leased by the railway company, was acquired under an arrangement which amounted in law to a purchase by it, the mortgagee of the company, or a purchaser at the foreclosure sale, may insist that the railway thereby ac-

quired the title to the property, and that it had become subject to the lien of the mortgage.

Any arrangement by which directors of a corporation become interested adversely to such corporation in contracts with it, or organize or take stock in companies or associations for the purpose of entering into contracts with the corporation, or become parties to any undertaking to secure to themselves a share in the profits of any transactions to which the corporation is also a party, is voidable at the election of the corporation or by the party whose rights were sacrificed."

In Galveston Railway Co. v. Cowdry, 11 Wall. (U. S.), 459, it is held:

"A railroad mortgage as against the company and its privies although given before the road was built, attaches itself thereto, as fast as it is built, and to all property covered by its terms, as
863 fast as it comes into existence as property of the company."

In Omaha etc. Railway Co. v. Wabash etc. Railway Co., 108 Mo., 298, the court say:

"From the foregoing statement, it will be seen the important question here is whether the mortgage from the St. Louis, Kansas City and Northern Railway Company to the United States Trust Co. dated the fifteenth of February, 1879, covered this after-acquired real estate. That mortgage contains an after-acquired property clause; and it must be taken as well settled law that such a clause is valid as to subsequently acquired property, real or personal. Pennock v. Coe, 23 How., 117; Dunham, v. Railroad, 1 Wall., 254; Thompson v. Kneeland, 138 U. S., 414. The case last cited shows that this is true as to property to which the company acquires the equitable title as well as to that to which it acquires the legal title.

The real question, therefore, is whether this property is fairly embraced within the terms of the mortgage. The mortgage covers the entire line of road between the designated points "as said railroad now is or may be hereafter, constructed, maintained, operated, or acquired, together with all the privileges, rights, franchises, real estate, right of way, depots, depot-grounds, side-tracks, water tanks, engines, cars, and other appurtenances thereto belonging." The question to be determined does not depend upon the technical meaning of the word "appurtenances" as seems to be argued by counsel for defendants. The mortgage in clear terms includes "after-acquired real estate," and these words cannot be confined to such real estate as may be used for right of way, depot grounds, side-tracks, and tanks. They do not, of course, mean, or include, real property not used in connection with the road, but they do mean any real estate acquired for use in the operation of the railroad proper. Now, it is to be remembered that Stanberry was the end of the division, and there was no hotel or boarding house at that place. Under these circumstances the property was purchased and the hotel erected for these purposes; namely, first, for an eating house; second, to accommodate the employes of the company, and, third, to accommodate passengers and other persons. Had this hotel been erected on the right of way or depot grounds though such grounds

were acquired after the date of the mortgage, it seems to us there can be no doubt but it would become subject to the mortgage. The circumstances that is separated from the passenger depot
864 and right of way by a street, is immaterial, the property being convenient and suitable for the designated purposes. As has been said the property was purchased and the building erected, not as an independent speculation, but as an incident and aid in operating the railroad. Surely the company could, as a legitimate part of its operations, provide an eating house, and could provide accommodations for its employes, there being no hotel or boarding house at the place. Grounds obtained and a structure erected for such purposes would be part of the property of the company owned and used in the operation of the road. The addition of the ordinary hotel feature, does not make it an independent outside enterprise. In our opinion this property is part and parcel of the railroad property, and is covered by the mortgage. This is the conclusion reached by the Circuit Court of the United States for the Southern District of Iowa, for that court ordered the moneys arising from the insurance on the building paid over to the receiver, who represented the first mortgage creditors. 32 Fed. Rep. 480.

The chief question in this and like cases is, whether the parties to the mortgage intended that the after acquired property, the subject of the litigation, should be subject to the lien of the mortgage. 1 Jones on Mortgages (4 Ed.) Sec. 153. That the parties intended all such property as this should come under and subject to the mortgage is, we think, clear and beyond doubt; for the mortgage professes to convey every part and parcel of the line of railroad and all real estate then or thereafter acquired and thereto belonging.

The defendants press upon our attention Humphreys v. McKissock, Receiver, 140 U. S., 304. That controversy arose out of the mortgage now in question. There the mortgagor, by its new name of the Wabash, St. Louis, and Pacific Railway Company, and other railroad companies, subscribed for stock in the Union Elevator Company at Council Bluffs; and the question was whether the mortgage now in question covered that stock or any interest in the elevator property. It seems the trial court held that it did, but the Supreme Court of the United States reversed the judgment. In doing so it was held: First that the elevator company and railroad company were separate corporations, that the railroad company was simply a stockholder in the elevator company and had no interest in the property of that corporation which it could transfer or mortgage; second, that the stock held by the railroad company in the elevator company was not an "appurtenance" to the railroad property, and, hence, was not covered by the mortgage to the United States Trust Company. That case is wholly unlike the one now on
865 hand, as must be apparent from this statement. The present controversy does not turn upon any proposition of law involved in that case, and that case is therefore inapplicable to the one in hand.

As we hold the mortgage attached to the property now in question,

the other questions discussed in the briefs become immaterial and out of the case. The judgment is therefore affirmed."

In United States Trust Co. of New York v. Wabash etc. Ry. Co., 32 Fed., 480, the syllabus is as follows:

"The St. Louis, Kansas City & Northern Railway Company executed a mortgage to the United States Trust Company, covering the line from Pattonsburg, Missouri, to Council Bluffs, Iowa, "as said road is or may be hereafter constructed, maintained, operated, or acquired, together with all privileges, rights, franchises, real estate, right of way, depots, depot-grounds, side-tracks, water-tanks, engines, cars, and other appurtenances thereto belonging." Subsequently the line to Council Bluffs became part of the Wabash System being known as the "Omaha Division." After the consolidation the Wabash Company purchased a lot in Stanberry, Missouri, and built a hotel thereon to afford accommodation for their employes and passengers. The title to the lot was taken in the name of a trustee, in order that the company might sell the hotel if proper arrangements could be made, and to prevent the mortgage from becoming a lien on the property. The trustee in the mortgage had no knowledge of this arrangement. The receivers of the Wabash System, who had been previously appointed, insured all the property in their hands including the hotel, for the benefit of all parties interested therein. The hotel was leased and kept for the benefit not only of the employes and passengers of the Wabash System, but of all persons desiring to stop thereat, until it was entirely destroyed by fire. After the fire, a receiver of the Omaha division was appointed and the receivers of the Wabash system turned over to him said division, and the property appurtenant thereto. Held, that the hotel was to be deemed appurtenant to the railway, and that the insurance thereon was payable to the receiver of the Omaha division for the benefit of the mortgagees holding under the mortgage, and not to the receivers of the Wabash system, representing the general creditors of the Wabash, St. Louis and Pacific Railroad Company."

In Harris v. Youngstown Bridge Co., 90 Fed. Rep., 322, the court say:

"It is well settled, since the decision of the Supreme Court of the United States in Pennock v. Coe, 23 How., 117, that one may
866 execute a mortgage, valid at least in equity, upon property not in existence or not owned by him, the lien of which will immediately attach to the property when it shall come into existence, or become the property of the mortgagor, and this whether the title of the mortgagor is legal or equitable. The rule has been applied both to real and to personal property. Dunham v. Railway Co., 1 Wall., 254, 266; Railroad Co. v. Coudrey, 11 Wall., 459, 481; U. S. v. New Orleans R. R., 12 Wall, 362; Dillon v. Barnard, 21 Wall., 430, 440; Fosdick v. Schall, 99 U. S., 235, 251; Myer v. Car Co., 102 U. S., 1; Porter v. Steel Co., 122 U. S., 267, 283; 7 Sup. Ct., 1206; Thompson v. Railroad Co., 132 U. S., 68, 74, 10 Sup. Ct., 29; Railroad Co. v. Hamilton, 134 U. S., 414, 423, 11 Sup. Ct., 357; McGourkey v. Railway Co., 146 U. S., 536, 567, 13 Sup. Ct., 170;

Wade v. Railroad Co., 149 U. S. 327, 341, 13 Sup. Ct., 892; Irrigation Co. v. Garland, 164 U. S., 1, 17 Sup. Ct., 7."

In Contracting & Building Co. of Kentucky, v. Continental Trust Co. of N. Y., 108 Fed. Rep., 1, the court say:

"It is too obvious for discussion that the arrangement under which the railroad company acquired the ten locomotives in question was no ordinary letting of property for a fixed rental, and that no such thing was really contemplated, and that the retention of title was intended as a mere mode of securing the payment of the purchase price. The real character of such transactions has been often the subject of judicial construction, and their rank in relation to the claim of creditors, considered with reference to the registry laws of the states within which the property is situated. Hervey v. Locomotive Works, 93 U. S., 664, 23 L. Ed., 1003; Heryford v. Davis, 102 U. S., 235, 26 L. Ed., 160; McGourkey v. Railroad Co., 146 U. S., 536, 13 Sup. Ct., 170, 36 L. Ed., 1079. The real transaction was a bargain and sale, the title being retained as security for the purchase money. Being property susceptible of separate ownership, and separate liens, it passed under the after acquired property clause of the existing mortgage, subject to the lien of the vendor; the existing mortgages not being purchasers for value in respect of such after-acquired property. Harris v. Bridge Co., 33 C. C. A., 69, 90 Fed., 322; U. S. v. New Orleans R. R., 12 Wall., 362, 20 L. Ed. 434; Myer v. Car Co., 102 U. S., 1, 26 L. Ed., 59; Fosdick v. Car Co., 99 U. S., 256, 25 L. Ed., 339; Kneeland v. Trust Co., 136 U. S., 89, 95, 10 Sup. Ct., 950, 34 L. Ed., 379. The lien thus acquired by the mortgagees could not be displaced by any subsequent agreement to which they were not parties. Evans v. Kister, 35 C. C. A., 28, 92 Fed., 828. It follows that the assignment of the so-called "lease contract" was unavailing, as against the antecedent mortgage lien."

867 In New England Water Works Co. v. Farmers' Loan & Trust Co., 136 Fed., 521, the second syllabus is as follows:

"A water company owning a plant and a franchise for supplying water to the inhabitants of a city executed a mortgage to secure an issue of bonds largely in excess of its then indebtedness, a part of which were to be retained by the trustees, and issued only when required for the extension of the plant. The mortgage covered the company's property and franchises, and all extensions and additions thereto, and all after-acquired property. The reserved bonds were issued on the sworn certificate of the officers that extensions were to be made, and a new pumping station, necessary to obtain a supply of pure water and to fulfill the company's contract obligations to the city, was built, and mains extended therefrom and connected with those of the company. Such station and mains were nominally constructed and owned by a second company controlled by the same stockholders, but the station was equipped with the engine from the old station, and they had no purpose or function except to supply water to the pipes of the original company. Held, that they constituted the extensions and additions contemplated and provided for by the mortgage, and came within its lien, as after-acquired property, without regard to

whether or not they were actually built with the proceeds of the bonds sold for the purpose."

Again the court says:

"Here, then, in a sentence, is the whole case: A mortgage on a necessarily expanding water works system—looking forward, as well as to the present, and contemplating that the new property, as fast as created, shall be drawn under the mortgage; a requirement that new property by created, constituting, in connection with the old property removed, the mouth and throat of the whole enterprise, and, finally, the actual creation of such new property, having no function other than to act as mouth and throat for the old. Can any one doubt that under such circumstances the new property, whatever may be the legal form given to it, is equitable but after-acquired property, within the meaning of the mortgage? Does not such a case, on its physical aspects alone, constitute a case of after-acquired property?

Thus viewed, we need not concern ourselves with the question whether the new station was actually built out of the bonds issued under the prior mortgages or not. It is enough that the mortgage bond issue contemplated just such extension."

868 III.

Properties Pledged to the Trust Company as Security for the Belt Indebtedness; and as to the Title, Legal or Equitable, of the Southern Company in or to Such Securities.

From the intervening petition it is disclosed that the Southern Company's claim is founded upon the following two propositions:

First. That the appointment of the Trust Company as trustee in the Belt mortgage, and its acceptance of such trusteeship, created such a fiduciary relation between it, the Belt Company and the Belt bondholders as to place the Trust Company under a disability to accept or receive in pledge any of the Belt property as security for the Belt indebtedness to the Trust Company, and, further, that the Southern Company, as the purchaser at the Belt foreclosure sale, has succeeded to all the rights and liens of the Belt Company and its bondholders as to all properties included in or covered by the Belt mortgage, and for that reason, it is entitled to recover said properties in kind from the Trust Company, or their value, if they have been sold by the Trust Company.

Second. That, without regard to the existence of any such fiduciary relation between the Belt Company, its bondholders and the Trust Company, as would preclude the Trust Company's receiving the Belt properties in pledge, it appears from the provisions of the Belt mortgage that said properties were covered by the so-called after-acquired property clause thereof, and subject to the lien thereof; and hence it follows that in so receiving said property in pledge, the Trust Company diverted and took from the bondholders a part of their mortgage security, and, further, that this mortgage lien upon the pledged property was acquired by the Southern at the Belt fore-

closure sale, and, by reason thereof, the intervenor is entitled to enforce such lien against the Trust Company.

The Trust Company replies, in substance, to these propositions as follows:

First, that the Belt Company pledged the properties in controversy to the Trust Company long before any default had been made in the payment of the interest on the Belt Bonds, and that, until the Belt defaulted in its obligations under the mortgage, the Trust Company was merely a "dry or naked trustee" with no active duties to
869 perform, and, further, that its trusteeship imposed no such fiduciary relations as would prevent its extending credit to the Belt Company, and receiving security therefor, provided, of course, the property pledged was not included within the Belt mortgage.

Second, that the pledged properties were not of such nature as to come within the lien of the Belt mortgage.

Third, that more than five years before the filing of the intervening petition, the properties in dispute had been pledged to the Trust Company, and, for that reason, the intervenor's claim is barred by the statute of limitations.

Fourth, that there has been such laches in the prosecution of its claim that the intervenor is estopped to assert it in this cause.

Fifth, that the money loaned from time to time, by the Trust Company to the Belt Company, was used by it in the improvement construction and equipment of its road, in the payment of interest, and for its betterment generally, and such money having fed the security of the bondholders and thereby advantageous to them, that they and the Southern Company are both estopped to assert title to the properties pledged as security to and for such loans.

History of Transactions in Which Belt Securities Were Pledged.

1. In connection with the consideration of the duties and responsibilities of the trusteeship of the Trust Company, and its alleged disability in respect to receiving the disputed collateral securities from the Belt Company, it is essential that there should be a concise statement of the facts as to the history of the transactions, in which the securities in question were pledged by the Belt Company to the Trust Company, and the circumstances of such transactions, so as to better understand the claims of the parties interested in the controversy over the pledged properties.

An exhibit prepared by witness Willey, appearing in Vol 1, at page 206 of the Record, sets forth in some detail the history of the Belt notes given to or held by the Trust Company, showing the dates and amounts of the original notes, and the collateral security pledged therefor, and which are as follows:

870	Date original note.	Amount.	Collateral security pledged.
No. 1.	Sep. 23rd, 1898.	$25,000.00	50 first mortgage 5 per cent bonds K. C. & N. C. R. R. Co. Nos. 1129-78 with coupons of Jan. 1, 1900, and all subsequent coupons attached. 50 Second Mortgage 5 per cent bonds K. C. & N. C. R. R. Co. Nos. 1176-90, with coupons of Jan. 1, 1900, and all subsequent coupons attached.
No. 2.	March 31, 1899.	50,000.00	2500 shares Union Terminal stock.
No. 3.	July 2nd, 1899.	50,000.00	2500 shares Union Terminal stock.
No. 4.	March 31, 1899.	50,000.00	2500 shares Union Terminal stock.
No. 5.	March 31, 1899.	50,000.00	2500 shares Union Terminal stock.
No. 6.	March 31, 1899.	50,000.00	2500 shares Union Terminal stock.
No. 7.	March 31, 1899.	50,000.00	2500 shares Union Terminal stock.
No. 8.	July 26, 1899.	203,900.00	4997 shares Union Terminal stock. 4994 shares Air Line stock. 67 97/100 second mortgage 5 per cent bonds K. C. & N. C. R. R. Co., $1000 each. 25 shs. stock Fairmount Amusement Co. $100.00 each. 439 shs. stock Northern Townsite Co. $100.00 each. 1120 shs. stock Central Improvement Co. $100.00 each. 425 shs. stock Missouri Elevator & Terminal Co. $100.00 each.
No. 9.	Jan. 10, 1899.	50,000.00	125 first mortgage 5 per cent Northern Connecting bonds.
No. 10.	May 18, 1899.	15,000.00	42 first mortgage 5 per cent Northern Connecting bonds.
No. 11.	June 9, 1899,	20,000.00	60 first mortgage 5 per cent Northern Connecting bonds.
No. 12.	Nov. 27, 1899.	24,500.00	63 first mortgage 5 per cent Northern Connecting bonds.

No. 13. June	29, 1899.	25,000.00	Secured by same collateral as Note No. 8 given above and 13,920 shares Northern R. R. Stock.
No. 14. July	19, 1899.	10,520.13	23 first mortgage 5 per cent Northern Connecting bonds.
No. 15. Sept.	21, 1899.	23,056.48	Secured by same collateral as Note No. 8, given above.
No. 16. Jan.	20, 1899.	13,600.00	34 first mortgage 5 per cent Northern Connecting bonds.

The foregoing tabulation shows the dates and amounts of the original notes, out of which arose, by renewals and readjustments, the notes now held by the Trust Company, and copies of which will be found in Vol. 11, p. 5807 et seq. of the Record. These notes are in the usual form of collateral notes, and contain the following provision: (Record 5812).

"And it is further agreed that the securities hereby pledged together with any that may be pledged thereafter, shall be applicable in like manner to secure the payment of any past or of any future obligations of the undersigned held by the holders of this obligation, and all such securities in their hands shall stand as one gen-
871 eral outstanding collateral security for the whole of said obligations, so that the deficiency in any one shall be made good from the collaterals for the rest."

The officers of the Belt Company were authorized to pledge said properties to and with the Trust Company, as appears, particularly, in the minutes of the meetings of March 31, 1899 (Vol. 52, Rec. 31420), July 20, 1899 (Vol. 52, p. 31425), and Feb. 1, 1900 (Vol. 52, p. 31429 to 31432). From the foregoing records it appears that all the properties in dispute were pledged by the Belt to the Trust Company on or prior to July 20, 1899, with the exception of an item of 600 tons, more or less, of steel rails and fastenings, and, also, of an open account of approximately $133,000.00, due the Belt Company from the Gulf Company, and assigned to the Trust Company, and which last two items were pledged on February 1, 1900 (Vol. 52, p. 31429-31432). Hence it follows that all the properties in dispute were pledged to the Trust Company long prior to the default, on June 1, 1900, by the Belt Company in the payment of interest upon its mortgage bonds, and, on account of which, the bills for foreclosure of the mortgages were, on September 6, 1900, filed against the Belt Company and its constituent companies, by the Provident Company as sole trustee, the Trust Company having theretofore been removed as trustee by the Southern Company, which then held and controlled all the Belt bonds, and such right of removal being expressly given in the Belt mortgage.

Trust Company's Knowledge of Gulf Company's Insolvency.

2. Counsel for the Southern Company contend, however, that the circumstances under which the Trust Company obtained its collat-

eral securities for the Belt indebtedness were such, in connection with its trusteeship, as to debar its holding the same as against the Southern Company. The facts specially relied upon in support of such contention, are in respect to the knowledge of the officers of the Trust Company of the insolvency of the Gulf Company, the probable foreclosure and sale of its properties, and the disastrous effect thereof upon the Belt Company, on account of the intimate relationship then existing between the managements, operations and interests of the two companies.

It is not disputed that the Gulf Company was insolvent on April 1, 1899, having on that day defaulted in the payment of its semi-annual interest then due, and by reason of which its railroad and properties were placed in the hands of receivers appointed by the Circuit Court of Jackson County, Missouri, and that subsequently on April 28, 1899, upon bill filed by the Trust Company, receivers were appointed in the United States Circuit Court for the Western
872 Division of the Western District of Missouri, and the suit theretofore pending in the State court was then dismissed.

It may be taken as proven, by the proofs in the record, that the Trust Company, through its managing officers knew, prior to April 1, 1899, that the Gulf Company would default in its interest, that receivers would be appointed for it that the then proposed reorganization plan would most probably be adopted, and that the appointment of the Gulf receivers would likely mean that the Trust Company would not thereafter be as potential in the affairs of the Belt Company as it had formerly been. "Wilcox's testimony, Rec. Vol. 34, 18108, 18111; Nolthenius, Vol. 49, 30248; E. L. Martin, Vol. 55, p. 33800, Vol. 21, 13312, Vol. 11, 5704). Wilcox, Nolthenius and Martin were directors of the Trust Company. Martin was also 2nd Vice-president of the Trust Company and was one of the receivers appointed by the Jackson County Circuit Court, Robert Gillham and J. McD. Trimble being the other two joint receivers. (Vol. 21-13312.)

Wilcox states that, *on* or about the time of the Gulf receivership it was the plan of the Trust Company to get possession of all the personal property of the Belt Company, and to eliminate from its books long and questionable or slow accounts, and that, in accordance with instructions from Stilwell, he got from the Belt Company all its available securities, and, he further states that the assignment and transfer of personal property by the Belt Company to the Trust Company, as shown by the Belt minutes of July 20, and September 30, 1899, and February 1, 1900, was a part of the Trust Company's plan to get whatever the Belt Company had in the way of securities in order to secure the Trust Company's claim against the Belt, and that this action was taken in view of the probable loss of the controlling influence of the Trust Company in Belt Company matters, by reason of the reorganization plan going through, and the Belt Company and its allied companies passing beyond the alleged control of the Trust Company. (Vol. 34-18108-18111).

E. L. Martin stated that, at the Belt directors' meeting of February 1, 1900, everything was taken from the Belt Company that it

could spare, and tarnsferred to the Trust Company, that is, everything that would not interfere with the Belt Company's operations, except some accounts amounting to $50,000.00, which, if taken, would have left the Belt Company without current funds for the operation of its road, and would have crippled it. He also stated that Chadbourne, Vice-President of the Trust Company, demanded that the Belt Company secure its large indebtedness to the Trust
873 Company, that the officers of the Belt considered the debts just and thought it was best to give the securities to protect the Trust Company from loss. Mr. Martin further stated that the indebtedness to the Trust Company at that time was something like $500,000.00 the greater part of which having been incurred on account of the contract, entered into by the Belt for the construction of the Connecting railroad, and that the total debts of the Belt Company were approximately $900,000.00, but that he did not recollect of any securities having been turned over to the other Belt creditors, at that time. (Vol. 53, p. 32816; Vol. 55, p. 33676-33682).

Counsel for the Southern Company have called special attention to the proceedings of the Belt directors' meetings of March 31, 1899, July 20, 1899, September 30, 1899, and February 1st, 1900, for the purpose of showing that the officers of the Trust Company knew of the condition of Belt affairs, and, also, that Stilwell influenced the actions of the Belt Directors.

On March 31, 1899, the day preceding the appointment of the Gulf receivers, Martin and Stilwell being present at a meeting of the Belt directors, (Rec. 52-31420 to 31422) the Belt Company gave to the Trust Company $360,000.00 in promissory notes, secured by 10,500 shares of the capital stock of the Union Terminal Company; and on July 20, 1899, as shown by minutes of Belt directors' meeting (Rec. 52-31425 to 31427) the Trust Company secured from the Belt Company as collateral to the alleged Belt indebtedness to it, the following securities:

4998 shares Union Terminal stock;
4993 shares Air Line stock;
1120 shares Central Improvement Comapny stock;
439 shares Northern Townsite Company stock;
425 shares Missouri Elevator & Terminal Company stock;
25 shares Fairmount Amusement Company stock;
13,290 shares Connecting Company stock;
67.9 second mortgage bonds Connecting Company;
Also the right of the Belt Company to receive,
1815 additional shares of the Connecting Company stock,
207.5 additional second mortgage bonds of the Connecting Company.

On September 30, 1899, as shown by the minutes of the Belt directors' meeting, appearing in Rec. 52-31427, to 31429 the Belt Company sold to the Trust Company all of the stock of the Connecting Company then owned by the Belt, at $1 3/7 per share, to apply upon the alleged Belt indebtedness to the Trust Company.

874 On February 1, 1900, as shown by the Belt directors' minutes, Rec. 52-31429 to 31432, the Belt Company again turned

over to the Trust Company all of the above mentioned securities, to secure the Belt indebtedness to it, and, as additional security, transferred to the Trust Company, as hereinbefore stated, by bill of sale, 600 tons, more or less, of sixty pound steel rails, then owned by the Belt Company, and stored in its yards in East Kansas City, and, also, transferred and assigned to the Trust Company the Belt account for $133,058.00 against the Gulf Company.

In respect to the question of the effect of the acts of the Board of Directors and officers of the Belt Company, in transferring the Belt securities and personal property to the Trust Company, as shown by the foregoing minutes of Belt directors' meetings, it is not disputed that all the officers and directors of the Belt Company during the year 1899 and up until March, 1900, were officers, directors or employees of the Trust Company, excepting A. F. Nathan, who was a Belt director, and A. L. Howe, director and assistant treasurer of the Belt Company, and Neal S. Doran, who, was a Belt Director.

In his report, in respect to the charges made against the Trust Company in the second Amended and Supplemental Ancillary Bill of Complaint, the Master has made an elaborate examination of the facts and law relied upon by the receiver of the Belt Company, and, also, incidentally by the Southern Company, (which is in effect the successor of the Belt), to show that the Trust Company, for its own selfish purposes, dominated and controlled the corporate acts of the Belt Company, to such extent that such acts became and were so unjust and inequitable that they should be absolutely avoided, or, if not set aside, then that they should be inquired into for the purpose of determining what would be right and just in each transaction in controversy. The conclusions there reached and stated on the question of the alleged domination and control of the Belt Company by the Trust Company, and the legal effect thereof in this cause will be and are applicable to the like issues raised and submitted by the Southern Company in its intervening petition. For the reasons heretofore stated, and for the purposes of this intervention, the finding of the Master will be and is against the "domination and control" theory of the intervenor, and in favor of the legality of the acts of the Belt directory in the different matters complained about in the petition, so far as they may be affected by the domination question, and that too, regardless of the dual officers of the Belt and Trust Companies, the commingling of corporate interests, and the
875 manifest powerful influence of Stilwell, which unquestionably permeated and in some measure, at least, directed, even if it did not control, the Belt Company and all the allied or auxiliary companies, which had been financed by the Trust Company; in other words, that, as to the transactions about which the intervenor complains, the findings of the Master are based on the voluntary atcion of the Belt directory along legitimate lines, in respect to such transactions, leaving open for determination the question of the legal right of the directory otherwise to pledge the Belt securities for the Belt indebtedness to the Trust Company, under the circumstances shown in the record.

As to its Trusteeship Disabling the Trust Company from Accepting Belt Securities in Pledge.

3. The intervenor contends, in substance, that, independently of every other question in this cause, the Trust Company as trustee in the Belt mortgage given to secure the bonds, to be used in the construction and equipment of the Belt railroad, undertook to perform the trust reposed in it and thereby became trustee for all the bondholders, and, that by reason of such trustee relation to the properties in controversy, it is estopped to hold any of the properties pledged as security for its own indebtedness; that, in its trustee capacity, the Trust Company assumed an obligation to care for and protect the interests and rights of every bond holder. and that its duties arose from the express terms of the mortgage and such implications therefrom, as the law itself creates; that, while acting as such trustee, and sustaining such trust relation to said properties and to the bondholders, the law will not permit the Trust Company to take or receive any of the Belt assets or properties and appropriate them as security for its own indebtedness; that the courts are so jealous, in guarding the interests of the beneficiaries, that they will not permit a trustee to accept an equivocal position, for otherwise the interest of the trustee and the beneficiary might conflict, and it would be offering a temtation to human weakness to put it in the power of the trustee to decide which of the two duties it will perform; and, further, that such disability of the trustee would exist whether the properties turned over were included in the mortgage or otherwise. Counsel in support of intervenor's contention, have cited the case of King v. Remington, 29 N. W. Rep. 352, decided by the Supreme Court of Minnesota. In that case, King, owner of a large quantity of real estate, was largely indebted, beyond his ability to pay, without sacrificing his property. His wife also owned considerable real estate, and, on June 15, 1875, the two conveyed the greater part of their real estate to Remington by deeds absolute in terms.
876 At the same time, King and Remington executed an agreement in writing, acknowledging the conveyance to have been made as security for advances to King, made and to be made by Remington, and containing provisions in respect to the future advances of money and credit, which Remington covenanted to make, and, from which the purpose of the transaction appears to have been to enable King, by means of the advances so to be made, to pay off his debt, and to save so much of his property as might remain after disposing of enough to reimburse Remington for all advances made and to be made, including interest and expenses. The contract gave to Remington peculiar powers with respect to the holding and disposition of the lands conveyed.

It was held that "this created such a relation of trust and confidence between the parties as disabled Remington to purchase under judgments or mortgages or bankruptcy proceedings, and held against King, and for his own benefit, property of King, whether included in the deeds executed as security or not."

That is to say, that Remington, having accepted his deed to cer-

tain specific property to be held by him as security for advances made and to be made to King, thereby assumed such trust relations to King and his property as to disable him from becoming a purchaser at any sale, execution sale or bankruptcy sale, of any property belonging to King, even though it was not the property included in the trust arrangement. As a reason for such ruling the court say:

"Of the main questions in the case, the first that occurs is, what was the character of the relations between the Kings and Remington created by the conveyance and contract of June 15, 1875? The appellants insist that those instruments created merely a mortgage with power to enforce the security by private sales of the lands, and that the relations between the parties was only that of mortgagors and mortgagee, with no other rights, duties, and disabilities than pertain to that relation. The respondents argue that they created a trust, and between the parties the relation of trustee and cestui que trust, they did vest a valid power in trust. As Remington's only right to the lands then conveyed was as security for his advances made and to be made, it would be immaterial whether the transaction was a mere mortgage, or a mortgage with a trust, or with a power in trust added, were it not for the acquiring by Remington of outstanding titles through execution and mortgage and bankruptcy sales, and the claim by appellents of the right to hold
877 them adversely to plaintiff; for, whether the transaction be as claimed by plaintiffs or defendant, there is, unless it had been cut off by the titles thus acquired, a right to call Remington to account for sales made. And this is, in substance, an action for accounting, and not one to enforce the performance of any supposed trust, or to test the validity of any act done under a supposed power in trust. But it is important to consider the character of the transaction far enough to ascertain whether it created such a relation between the parties as, according to the rules of equity jurisprudence, disable Remington to acquire and hold, against the Kings title to the property.

The rule which disables one occupying a confidential or fiduciary relation, in respect to property the subject of a sale, from purchasing for his own benefit, and regarding him as trustee if he do purchase, is absolute, and looks to no other facts than the relation and the purchaser. No fraud in fact need be shown by the cestui que trust, and no excuse will be heard from the trustees. The fact established, and the result inevitably follows. The rule is entirely independent of the fact whether any fraud has intervened. It is to avoid the necessity of such inquiry that the rule takes so general a form. The general interests of society require it to be so, as no court is equal to the examination and ascertainment of the truth in much the greater number of cases. The rule stands on the moral obligation to refrain from placing one's self in relations which will ordinarily excite a conflict between self-interest and integrity. It seeks to remove the temptation that might arise out of such a relation to serve one's self interest at the expense of one's integrity and duty to another, by making it impossible to profit by yielding to the

temptation. Nor is the application of the rule confined to a particular class of persons; as guardians, solicitors, attorneys, etc. It applies universally, to all who come within its principles; which principle is that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use. The duty in relation to the property need not be a legal one, such as the law will enforce a performance of. If it be a moral duty, growing out of confidence and trust reposed by one and accepted by another, in business relations and transactions, it is enough."

As further illustrations of the application of this principle, counsel referred to the following cases:

878 In Ex parte James, 8 Ves. 337, and in Ex Parte Bennett, 10 Ves. 381, it was applied to a solicitor for a commission in bankruptcy in respect to a sale by the commission; In Poillon v. Martin, 1 Sandf. Ch. 589, to the clerk of an attorney conducting a sale of the property, in Duncomb v. New York, H. & N. R. Co., 84 N. Y. 190, to a director of a corporation purchasing its bonds; in Case v. Carroll, 35 N. Y. 385, to an attorney, who had been consulted by an owner of land, on which there was a mortgage then being foreclosed by suit, in respect how to obtain and use the mortgage to perfect her title. The attorney, having brought suit to foreclose the mortgage, conducted it to a foreclosure, and bid in the property, and the rule was held to apply; in Gardner v. Ogden, 22 N. Y. 327, to the clerk of a broker to sell real estate who had access to the correspondence between his principal and the vendor; in Ex parte Hughes, 6 Ves. 617, to a creditor of a bonkrupt, he having been consulted as to the mode of sale by the assignee; in Fulton v. Whitney, 86 N. Y. 548, to the trustee of a fund created by will, purchasing at the foreclosure of a mortgage on real estate of the deceased (not part of the trust fund), as the deficiency on the foreclosure would be chargeable as a debt against the estate, and so might diminish the trust fund; in Oliver v. Court, 8 Price, 127, trustees to sell lands for payment of debts employed a land surveyor and auctioneer. He was assisted by his son, a land surveyor and auctioneer. The son acted as auctioneer at an attempt to sell the lands at auction, which failed for want of bidders, and he afterwards bought at private sale. It was held that the rule applied to him.

It is insisted by intervenor's counsel that in none of these cases was there any legal trust, or legal enforceable duty in respect to the property, the subject of the sale, the person in each case occupying a position, because of which more or less confidence and trust were reposed in him in respect to the property, or by means of which he may have acquired information, or possessed some advantage in relation to it, not common to others; and, further, that it is against good conscience that one, occupying such a position, should make a profit to himself by use of the information or advantage which the confidence reposed in him gives him, to the prejudice, perhaps of the person reposing such trust and confidence in him.

It is strongly urged that that doctrine is especially applicable to the Trust Company, not only by virtue of its trusteeship, but, also, because of its intimate knowledge of Belt affairs, and the close and friendly relations existing between the Belt and Trust Companies, and their respective managements.

879 The Master is unable to approve the Intervenor's contention in respect to the duties, responsibilities and obligations of the Trust Company, as applicable to the proofs in this cause, however correct the principles enunciated may be as to other trust relationships. It is true that the inter-relations of the Belt and Trust Companies were exceedingly intimate and of such character as not only to warrant, but, perhaps, to exact the most scrutinizing investigation of any questionable transactions between them, at the instance of any interested party; but, it is also true that the Trust Company, as the financial support of the Belt Company, advanced to it thousands of dollars, which were used for the betterment of Belt affairs, and it would seem that every consideration of good faith and common fairness would entitle the Trust Company to be secured for all its advancements, and to be reimbursed from the securities, provided, of course, that no paramount principle of law was violated in so doing. For the reasons, hereinafter stated, the Master is of the opinion that the Trust Compny was under no such duty to the Belt bondholders as would prohibit it from taking collateral security to secure an indebtedness to it from the Belt Company, nor was there any express covenant in the mortgage creating such duty, nor was there any such duty by implication of law.

In Article III, of the Belt mortgage (Rec. Vol. 48-28932), it is provided that until default is made by the Belt Company, it should be suffered and permitted to possess, operate and enjoy the mortgaged property, and, further, that, in case of default in the payment of any of the obligations secured by it, the trustee should have the right to enter into possession and operate the mortgaged property and sell the same, and, upon such sale, to apply the proceeds in payment of the debt secured. The mortgage also contained the following further provision:

"And the trustee may be removed by a majority in interest of the holders of all said bonds hereby secured, in writing, under their hands and seals, or by a vote of a meeting duly held as herein provided."

It seems to be reasonably clear, from a careful reading of the mortgage provisions, that no active duties were by the mortgage required of or cast upon the trustees until a default had occurred, nor is there any covenant in the mortgage from which, by implication, any such active duties would devolve upon the trustee before such default. The Trust Company was not even authorized to collect interest on the bonds, the same being payable at the office of the Union Trust Company, in Philadelphia, Pa.

880 The authorities justify the contention of counsel for the Trust Company to the effect that until default the duties of a trustee in a railroad mortgage are merely nominal, and that there is no such fiduciary relationship between the trustee and the bond-

holders as will prevent the trustee from receiving in pledge, to secure its own indebtedness from the mortgagor, any property not included within the lien of the mortgage.

Commonwealth v. R. R. 122 Pa. State, 306.
Sturges v. Knapp, 31 Vt. 1.
Perry on Trusts, Sec. 749.
National Water Works Co. v. Kansas City, 78 Fed. at p. 433, per Brewer, Judge.
Gasquet v. Fidelity Trust Co., 75 Fed. 343.

In Commonwealth v. R. R. 122 Pa. State, 306, the court said:

"Until default is made in the payment of the bonds or the interest falling due upon them, the trustee has no active duties to perform, but is simply the repository of the title to the property mortgaged, in trust for the whole creditor class secured thereby. The actual possession of the franchises and the property remains in the railroad company, to enable it to discharge its duties to the public and earn an income from which to pay its liabilities. But when a default occurs, the duties of the trustee become active and important. He represents all the bondholders, and is under obligations to protect them so far as the property in his hands in trust for them will enable him to do so. If he neglects or refuses to move, any bondholder may proceed by bill, filed on behalf of himself and the other members of the class of creditors to which he belongs, to compel a sale of the mortgaged premises, a removal of the trustee, or such other relief as may be appropriate."

In National Water Works Company v. Kansas City, supra, Judge Brewer said:

"There are in existence certain trust companies, who are in the business of acting as trustees in mortgages, especially railroad mortgages. They are often trustees in successive mortgages from the same grantor, or from different corporations, having a common interest and control. Any question as to the extent of the notice which these trustees take of the transactions of their mortgagors, and the effect of such notice upon parties purchasing bonds from them, is of vast importance. * * * It must be borne in mind that the trustee was selected and the terms of the trust prescribed by
881 the mortgagor alone, and that, until after the bonds were negotiated, it was acting only as the latter's agent. It is true that, after the purchase of the bonds, the bondholders look to the trustee for the discharge of certain duties, but only such duties as it was promised to perform; and, to the extent that those duties inure to their benefit, they may properly hold it liable for any default therein. If, by the terms of a mortgage, neither the principal nor the interest is payable at the office of the trustee, or through its agency, the bondholders, after purchase, deal directly with the mortgagor, and generally only in case of default do they invoke action on the part of the trustee."

In the case of Gould v. R. R. 52 Fed. 680, Judge Caldwell said:

"The corporation is under the same obligation to pay a bona fide

debt due to one of its directors and stockholders that it is to pay a debt to a stranger, and security given for a debt due to a director and stockholder, is as valid as a security given to any other creditor."

In that case, it appears that four directors of the railroad company and in control of its affairs, caused the company to execute a deed of trust in their favor to secure certain individual advances made by them to the company. Thereupon, certain of the stockholders sought to have the deed of trust set aside on the ground that these directors stood in a fiduciary relation to the railroad company, and hence could not lawfully receive from it its property in pledge as security for their individual advances. The substance of Judge Caldwell's opinion is that if the indebtedness owing the directors was contracted in good faith, they had the right to take security therefor, though the corporation was insolvent at the time, and even though the effect of the transaction might be to give them priority over other creditors in the payment of their claims.

In respect to the retention by the corporation of the money which the directors had loaned to it, the court said:

"The attack upon the validity of the trust deed must fail upon another ground. Treating the directors as trustees, is not open to the company or any of its creditors to avoid the security given in pursuance of the direction of the stockholders, as well as the directors, so long as the company retains the money which was loaned in good faith, and actually appropriated to legitimate corporate uses.

The payment of the debt [th*is*] contracted is an essential pre-
882 requisite to the avoidance of the deed of trust given to secure its payment. And, in the language of the Court of Appeals of New York, "this is true whether the pledge be taken for a present or precedent debt. In either case the equity to be regarded equally exists."

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As to the Properties Pledged by the Belt with the Trust Company Being within the Lien of the Belt Mortgage.

4. The Belt mortgage, in its entirety, will be found in Rec. Vol. 48-28932, and the parts thereof descriptive of the properties intended to be covered by its provisions have already been stated herein. Article III of said mortgage is as follows:

"Until default shall be made by the company in the payment of the principal or interest of the said bonds hereby secured, or some one or more of them, or in the performance or observance of any of the covenants, stipulations or agreements herein required to be by it kept, performed or fulfilled, the company, its successor or successors, lessee or lessees, or assigns, shall be suffered and permitted to possess, operate and enjoy the said railroad, premises, property, appurtenances, rights, privileges, immunities and franchises heretofore mentioned, and to take and apply to its or their own use the tolls, incomes, revenues, rents, issues and profits thereof, and to dispose of the same in any manner not inconsistent with these presents or which shall not impair its ability, fully and promptly, to comply

with, perform and fulfill all the stipulations covenants and agreements herein contained by it to be complied with, performed or fulfilled."

The properties pledged by the Belt to the Trust Company as security for the Belt indebtedness, are as follows:

19,927 shares of stock of Union Terminal R. R.
4,994 shares of stock of Air Line.
99 first mortgage Northern Connecting bonds.
315 First mortgage Northern Connecting bonds.
15 second mortgage Northern Connecting bonds.
67.9 second mortgage Northern Connecting bonds.
13,920 shares of stock of Northern Connecting.
1,120 shares of stock of Central Improvement Company.
25 shares of stock of Fairmount Amusement Company.
439 shares of stock of Northern Townsite Company.
425 shares of stock of Mo. Elevator & T. Company.

An open account against Gulf Company for accrued switching charges in amount about $133,000.00, assigned by Belt Company to Trust Company.

In addition to these securities, the Belt Company, by its bill of sale of February 1, 1900, delivered to the Trust Company
883 600 tons, more or less, of steel rails and fastenings, which were subsequently sold by the Trust Company, and appiled in part payment on the Belt indebtedness.

The foregoing list of pledged properties is compiled from promissory notes, given by the Belt to the Trust Company, containing a description of the collaterals, and which notes will be found in Rec. Vol. 2-5807 to 5827.

In support of the proposition that the "after acquired property" clause of the Belt mortgage covers the stocks and bonds of the Air Line, Union and Connecting Companies, the intervenor relies upon Section 1061, R. S. Mo. 1899, which in general terms provides for acquiring stocks and bonds of other companies as follows:

"Any railroad company, heretofore organized, or which may be hereafter organized, under the laws of this state, may extend its line of railroad beyond this state into or through any other state or territory, and may acquire any line of railroad, within or without this state, which shall form a continuous line with the road operated by such company by direct connection, or over any other line or lines constructed or to be constructed, and which such company shall have the right by contract or otherwise, when completed, to use or operate, and may acquire and may hold the obligations and stocks of other companies owning or operating any such lines of road."

The claim of counsel for intervenor, in respect to the applicability of this section to the question of the stocks and bonds of said railroad companies being covered by the terms of the Belt mortgage, may be summarized as in the following manner.

It is charged that this section gives to a railroad company the power to acquire the stocks and bonds of another railroad company when the two railroads form a connecting and continuous

line, and hence that, the power existed at the outset, on the part of the Suburban Company, if it had so desired, to have itself constructed the Air Line and the Consolidated railroads; that the Suburban Company had the corporate power to do so, and, if it had in fact constructed the lines of the Air Line, Consolidated and Union Companies, that then the physical properties of these roads would have come under the after acquired property clause of the Belt mortgage, the lien of which would have extended to and bound all the properties of these railroads, respectively; that, instead of actually constructing these railroads, the Suburban
884 Company took over all stock of the Union Terminal and Air Line, and thereafter operated both roads by virtue of its large stockholdings therein; that, in as much as the Belt Company was authorized by law to build these lines, or to acquire them by purchase, neither of which it did, but, it is claimed, on the contrary, arrived at the same object by purchasing the stocks of these companies and holding them, which, under the Missouri statutes, the Belt had the right to do, as the roads formed a connecting, continuous line, it follows that those stocks now stand in the place of the properties belonging to such railroad companies, and that a court of equity will look through and beyond the shares of stock, and fasten the lien of the mortgages upon the physical properties of those companies, whose stocks were so held by the Belt Company; and, ynally, that the language of the Suburban Belt mortgage is broad enough to include the railroads and properties of the Belt, and that, whether the railroads are owned by having the title thereto actually conveyed to the Suburban Belt or by virtue of the holding of its stock ownership in the other companies, would make no difference; in other words, that a court of equity will look beyond mere forms and get at the substance and that, for example, if the Belt Company owned all the capital stock of the Air Line, then in contemplation of law it would be the owner of the Air Line, so far as a court of equity is concerned.

The case of the New England Water Works Co. v. Farmers Loan & Trust Co., 136 Fed. Rep. 521, has been cited as showing that, where a second company is formed for the express purpose of doing certain things, which were part of the functions of the first or original company, then a court of equity will look beyond the corporate form of the second company, and fasten upon the property acquired by it the lien of the after acquired property clause of the mortgage of the original company. In the same way, it is contended that the lien of the Suburban Belt mortgage properly attaches to and fastens itself upon the stock of the other companies held by the Belt, and, further, that it was the intention of the parties, at the time the mortgage was made, to include other railroads, whether owned by the Suburban Belt by the conveyance to it of their physical properties, or by the ownership of their stock, or bonds, or both; and the fact that the Belt Company, because of its ownership of the stocks of the Air Line and Union Terminal, took upon itself the operation of these roads,

without any leases, or other authority, except its stock control, is referred to as sustaining intervenor's contention that these roads were considered as parts of the Belt System, and that by the construction thereby placed upon the transactions by the parties themselves, the Air Line and Union Companies were not re-
885 garded as distinct or separate companies, except for the purpose of issuing their securities, and that, after that was done, all distinction was apparently lost, and the Air Line and Terminal roads became practically parts of the Belt System; and, by way of suggestion, as tending in the same direction, reference was made to the original charter of the Suburban Company to show that it contemplated a railroad that should encircle the City of Kansas City, Missouri, and Kansas City, Kansas, and hence it is claimed that the incorporation of all these other companies was intended to carry out the original purpose for which the Belt was organized, and, also, that the construction of the Union Terminal road in Kansas was a part of the same general plan.

It is insisted that the same line of argument applies to the stock and bonds of the Connecting Company, whose railroad was really constructed through the instrumentality of the Belt Company, which was required to take its stocks and bonds in payment for the construction of the road, and that these stocks and bonds became charged with the lien of the after acquired property clause, since the statute gave the railroad company the right to own stocks and bonds of other companies, as above stated.

It is not otherwise contended by counsel for the Southern Company that the Belt mortgage in terms creates a lien on the stocks and bonds of these other companies, at least until such time as the Belt Company defaulted in the payment of its obligations, and possession had been taken by the trustee or other legal representative of the bondholders.

As to the railroads of the Union Company, Air Line and Belt Company being connecting railroads, and forming a continuous line of railroad with the Belt Company, see Wilcox's testimony (Rec. 34-18368), wherein he states that the Air Line, Union Company and Belt Company were connecting and formed a continuous line of railroad, and that, as early as 1896, the Belt had acquired the stock of the Air Line and Union Company through exchange, and at that time the old Suburban Company had consolidated with the Consolidated Company, and thereafter forming the Belt Company.

The foregoing reasons, given by the intervenor in favor of the proposition that the Belt's mortgage lien attached to and covered the stocks and bonds of the other railroad companies mentioned, are, in the judgment of the Master, unsound in law. It is undisputed that each of the railroad corporations, whose stocks and bonds are in controversy, was a distinct and separate legal entity, organized for the specific purpose of building its own railroad between
886 two certain points, and connecting, either directly with the Belt, as in the cases of the Air Line and Consolidated, or indirectly through another road that did so connect with the Belt, as in the case of the Union Terminal in Kansas, which connected with the

Consolidated and which latter in turn connected with the Belt, the whole forming what was known as the Belt System. In order to construct and build these railroads, it became necessary for each company to place a mortgage upon its own franchises, proposed railroad and properties, to secure the bond issue, which had to be floated, and, from the proceeds of the bonds sold, the funds were obtained with which to build the projected railroad. The money for that purpose did not come from the Suburban Company or the Belt Company, however much interested, as a business measure, they were, or might have been in the successful construction and building of the several allied railroad lines, which were to become such important feeders or adjuncts of the main Belt road; on the contrary, the needful funds for building each road came from the sale of the corporate securities of the particular company, organized to build such road. The mere fact that the Belt Company acquired some of the stocks and bonds of the allied companies for a consideration, whether of money or services, in connection with the building of one or more of these roads, and, possibly, in pursuance of a plan of its own, in respect to building up the Belt system, as an entirety, by means of these separate railroad corporations, does not, in the least, militate against the proposition that they were, in a corporate sense, entirely free and independent of the Belt, and owned their respective properties, without any equitable claim thereon or therein, by the Belt. It is true that the Belt Company had the statutory right to buy and own the stocks and bonds of other connecting lines just as it might do as to other personal property, but that right of itself in no way affects favorably the broad proposition of the intervenor that, through the ownership of said stocks and bonds, the physical properties of these roads became subject to the Belt mortgage lien, that is, presumably, the equity in such properties, as the prior mortgage executed by each road, as above stated, was admittedly the first lien thereon.

In conclusion, this is not a case, then, where the Belt had used its own money in building another road whereby, under some circumstances, it might possibly acquire an equitable lien on or right to the railroad property it had helped to bring into existence but, on the contrary, these allied roads were built from their own resources, and the fact that the Belt Company might have built them, in the exercise of its statutory right, does not change
887 the real situation here involved and presented for determination.

The Trust Company denies that any part of the stocks and bonds in controversy were covered by the terms of the Belt mortgage, or that they were in any way appurtenant or necessary to the operation of the Belt railroad, and then alleges that they were all acquired after the consolidation between the Suburban and Consolidated Companies, forming the Belt Company, which acquired the railroads of the Consolidated and Suburban, subject to the mortgages placed by those companies on their properties prior to the consoli-

dation, and, on account of which it is claimed that the intervenor acquired no right, title or interest to said stocks, or any part thereof, by means of the foreclosure proceedings.

This same statement as to the effect of said consolidation applies to all the stocks, bonds, securities or properties pledged to the Trust Company all of which are claimed to have been acquired by the Belt Company after the consolidation; and it is to be inferred that the Trust Company means to assert that the after-acquired property clause of the Suburban Company mortgage (herein otherwise referred to as the Belt mortgage) applies only to the properties acquired by the old Suburban Company, which went out of existence by the consolidation in 1892, and not to properties acquired by the new company, called the Belt Company, after the year 1892.

Now, is that proposition tenable, in view of the Articles of Consolidation, and of Section 1059 (R. S. Mo. 1899), which latter imposes upon the Consolidated Company all of the contracts and liabilities of the constituent companies. This section is as follows:

"Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities and subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation."

In the Articles of Consolidation between the Consolidated Terminal Railway Company and the Kansas City Suburban Belt Railroad Company, articles 1, 2, 8, and 9, are as follows:

888 Article I. "The said Consolidated Terminal Railway Company of Kansas City and The Kansas City Suburban Belt Railroad Company do hereby severally and mutually agree with each other to consolidate and to form a permanent union of their interests, rights and management, and do hereby unite and consolidate their respective companies, properties and franchises into one consolidated company which shall succeed to, possess and enjoy all the property, franchises, powers, rights, privileges and immunities, which belong or belonged to the said constituent companies hereby consolidated, or to either of them, and which shall have the power to sue and be sued in all courts of competent jurisdiction, and shall have and enjoy all the benefits, immunities, grants, rights, powers and franchises conferred upon incorporated railroad companies by the laws of the State of Missouri."

Article II. "The name of the new company formed by this consolidation shall be "Kansas City Suburban Belt Railroad Company."

Article VIII. "The two constituent companies the parties hereto, do by these presents assign, transfer, set over and convey unto the Kansas City Suburban Belt Railroad Company, the new con-

solidated Company, hereby formed, subject to all liens now on the same, all the rights, privileges, powers and franchises of each of the constituent companies and all the property real, personal and mixed, and all choses in action, accounts, claims, and demands, of whatever nature owing or belonging to either of said constituent companies, and all rights of way, leases, leasehold interests, depots, station houses, turntables, tanks, terminal yards and terminal facilities, tracks, roadbeds, rail, iron, rolling stock, tools and implements, including all the property of every name, nature and description belonging to either of the constituent companies with all the rights, privileges and appurtenances thereunto appertaining; to have [*to*] to hold unto and to be owned and controlled by the said Kansas City Suburban Belt Railroad Company, the consolidated company hereby formed, and its successors and assigns, as fully and completely to all intents and purposes as either or both of the constituent companies can now own, hold, use, enjoy and control the same;

And the said constituent companies hereby covenant and agree with the said new company, and with its successors and assigns, that they and each of them will, upon the demand or request of the new company, its successors or assigns, duly execute and deliver any and all such further assurances, assignments, transfers and deeds of conveyance to the said described property, or any part
889 thereof, as may be deemed necessary to vest in said new company, its successors and assigns, a good and sufficient title thereto, subject to all liens which may exist against any of said property at the time this consolidation shall be consummated, including a mortgage or deed of trust, dated February 1st, 1892, given by the said Consolidated Terminal Railway Company to the Missouri, Kansas and Texas Trust Company and The Provident Life and Trust Company of Phialdelphia, as Trustee, to secure its issue of seven hundred and fifty thousand (750,000) Dollars of bonds, all of which liens the new company hereby formed shall assume and pay."

Article IX. "The consolidated company hereby formed shall assume, pay, satisfy and discharge all and every the debts, duties and obligations of each of the constituent companies and said consolidated Company shall assume, perform, fulfill and satisfy all of the obligations and contracts of each of the constituent companies of whatever kind or nature."

It appears that, independently of said statutory provision there is an express assumption by the Belt Company of all of the debts, duties and obligations and contracts of each of the constituent companies; and, furthermore, there was an adjudication of this liability question in certain foreclosure suits in this court to which The Trust Company was a party. The foreclosure bills were against the new consolidated company, and the decree rendered therein recited that the Suburban Company consolidated with the Consolidated Company in 1892 and by the terms of which consolidation the new company assumed and agreed to pay all the obligations and

liabilities of the constituent companies, which became merged in the Belt Company.

In the opinion of the Master, however, the legal effect of said consolidation is immaterial in this cause, in so far as it might affect the merits of the claim of the intervenor, in respect to the alleged Belt mortgage lien on the securities and properties pledged by the Belt to the Trust Company, in view of the conclusion reached by the Master that, in law, no such lien existed, and, hence, the intervenor, as the purchaser at the foreclosure sale, could not be subrogated to any such lien.

IV.

As to Shares of Stock of the Union Company and Air Line Pledged as Security to the Trust Company.

There were 19997 shares of Union Company stock and 4994 shares of Air Line stock pledged as collateral security for the Belt indebtedness to the Trust Company, and these constituted, outside of a few shares held to qualify the directors of the Union
890 Company and the Air Line Company, respectively, all of the outstanding capital stock of these companies, and which had been acquired by the Belt Company by exchanging its own stock for the Union Company and Air Line stocks. (Rec. Vol. 34-18368).

As will be more fully hereinafter shown, the Philadelphia Committee, a Committee of bondholders interested in the Belt and Gulf Companies and allied railroad companies, associated themselves together for the purpose of reorganizing the railroads belonging to said companies, and working out some plan, by which the Committee should bring within its control the capital stock of the Air Line and the Union Company, which had been theretofore pledged by the Belt Company to secure its indebtedness to the Trust Company. Thereupon, this Committee selected one of its members, Max Pam, to enter into negotiations with the Trust Company for a surrender by it of the Air Line and Union Company stocks, and, as a result of these negotiations, the Committee of bondholders purchased these stocks for the sum of $35,000.00, which was paid to the Trust Company, and applied by it upon the Belt indebtedness. These facts will be disclosed by the minutes of the proceedings of the Reorganization Committee, found in Vol. 41, pp. 22208, 22226, 22233, 22255, 22256, and 22304.

At a meeting of the Committee of June 6, 1900, the following resolution was adopted:

"It was resolved that the Mercantile Trust Company be authorized to pay the sum of $35,000.00 upon delivery to it, for account of this committee, of 20,000 shares of the Union Terminal Railway Company's and 5,000 shares of the Kansas City and Independence Air Line Company's stock, less the outstanding shares, for qualifying directors of the company." (Rec. Vol. 41, p. 22304.)

The Trust Company contends that, in as much as the bondholders

Committee, which was succeeded by the Southern Company, recognized the Trust Company's title to the stocks in question, the Southern Company, which had been incorporated in June, 1900, when this transaction took place, is not now in a position to attack such title. The Southern Company had then acquired, through the Committee, substantially all of the bonds of the Belt Company, and, in all respects the Southern Company received the benefits of the reorganized plans of the Philadelphia Committee, and stands relatively in the same position to the transaction, conducted by that Committee, as it would have stood, provided it, the Southern Company, had personally conducted such transactions. These Air Line and Union Company stocks were acquired by the Committee
891 for the Southern in order that the latter might be able to include such stock in its general mortgage as further security to the new security holders or bondholders thereunder. It would seem to be clear, then, that the Southern Company, having received the benefits of the Committee's purchase of this stock, has ratified the Committee's acts, and cannot be now heard to repudiate the transaction and claim any advantages adverse to it, for it cannot be contended that even if, as an original matter, the Trust Company was guilty of fraud in taking the Air Line and Union Company stock in pledge, yet the bondholders' Committee had the right to waive any alleged breach of duty, and which they unquestionably did when they purchased the stock from the Trust Company, thereby recognizing that it had a title to sell to them.

For the foregoing reason, it is wholly immaterial whether said stocks came within the lien of the Belt mortgage or not, for, in the opinion of the Master, the intervenor, under the circumstances above stated, has neither a legal nor equitable right to the $35,000.00 received by the Trust Company for said Union and Air Line stocks; and the finding as to that issue is in favor of the Trust Company and against the Southern Company.

V.

Bonds and Stocks of Connecting Company, Alleged to Have Been Converted by the Trust Company.

These bonds and stocks of the Connecting Company, which were pledged by the Belt to the Trust Company, are as follows:

99 first mortgage bonds.
315 first mortgage bonds.
15 second mortgage bonds.
67.9 second mortgage bonds.
13920 shares of stock.

In the 9th paragraph of the intervening petition, it is charged that, in the year 1896, the Trust Company caused the incorporation of the Connecting Company, for the purpose of constructing a railroad from Kansas City to Pattonsburg, Missouri, in order to connect with railroads at that point, running eastwardly to Quincy,

Illinois, and northwardly to Council Bluffs, Iowa; that the Trust Company caused the Connecting Company to issue its capital stock, and to execute its bonds, secured by mortgage upon all its properties, and, also, caused the Connecting Company and the Belt Company to enter into a contract, under which the Belt Company undertook to acquire the right-of-way and to construct the
892 railroad for said Connecting Company, and, under which the Connecting Company agreed to give the Belt Company its bonds and stocks.

The Trust Company admits that such a contract was made between the Belt and Connecting Companies, but it states that the contract was made freely, and of their own accord, and without any interference on the part of the Trust Company; that the railroad of the Connecting Company formed a direct connection with the Belt Company, the two making a continuous line of railroad, and, that, in pursuance of said contract, it is admitted by the Trust Company that the Belt Company began the construction of a railroad for the Connecting Company, and the acquisition of its right-of-way, and receiving, as consideration for so doing, a large amount of the first mortgage bonds and all the capital stock of the Connecting Company, and that the Belt Company held such stock and bonds, on and prior to July 20, 1899.

The intervenor also charged that, at various dates, the Trust Company took and converted to its own use the following Connecting Company stocks and bonds, then owned by the Belt Company;

1130 first mortgage bonds of the value of.....	$845,415.00
16 second mortgage bonds of the value of.....	7,200.00
and 6250 shares of stock, of the value of.....	35,500.00

The intervenor further charges that on or about July 20, 1899, the Trust Company took from the Belt Company 414 first mortgage bonds, and 3920 shares of stock of the Connecting Company, being the property of the Belt Company, and claimed to hold the same as collateral security for an alleged indebtedness from the Belt Company to it; that all of said bonds and stocks came under the after acquired property clause of the Belt mortgage, and were charged with an equitable lien to secure the Belt bonds, and, that the Trust Company at all times knew such to be the fact; that, by the foreclosure proceedings and sale to the intervenor, above referred to, the equitable title to said stocks and bonds, or the proceeds thereof, when they had been sold by the Trust Company, vested in the intervenor, which is now the equitable owner thereof; that, on or about September 30, 1899, the Trust Company claims to have sold said 3920 shares of Connecting Company stock for $19,885.71.

The Trust Company denies that said bonds or stocks, or any of them, came under the after acquired property clause of the Belt mortgage, or that they, or any of them, were charged with an

equitable lien to secure the bonds of the Belt Company, or
893 that, by reason of the foreclosure proceedings and sale thereunder, the equitable title to said stocks and bonds, or the proceeds thereof, vested in equity in the intervenor; but, on the contrary, the Trust Company states that said mortgage did not by its terms cover said bonds and stocks, or any part thereof, that they were not necessary or appurtenant to the operation of the railroad, and were all acquired after the consolidation between the Suburban Company and Consolidated Company into the Belt Company, and, that said intervenor acquired no right, title or interest of any kind whatsoever in said stocks and bonds by means of said foreclosure proceedings.

The Trust Company admits that, on or about September 30, 1899, it sold 13920 (not 3920) shares of Connecting Company stock, which it had theretofore held as collateral security for the sum of $19,885.71, being the full and fair value thereof, but alleges that, prior to said sale, it had accepted said stock as part payment of its indebtedness at the same price, for which it afterwards sold the same.

The intervenor further charges that the Trust Company sold all of said first mortgage bonds, and received, as the proceeds thereof, the sum of $995,415.00, and to which the intervenor claims it is entitled, in equity and good conscience, for the reason that the proceeds of all said stocks and bonds so disposed of, stand in equity for the securities themselves.

The claim of the intervenor, when analyzed, is to the effect that 414 first mortgage bonds and 82.9 second mortgage bonds and 3920 shares of stocks of the Connecting Company, were pledged by the Belt Company to the Trust Company as collateral security for the Belt indebtedness to it; and, also, that the Trust Company otherwise took and converted to its own use 1130 of said first mortgage bonds, including those pledged as above stated, and all being of the alleged value of $845,415.00, and 6250 shares of Connecting Company stock of the alleged value of $37,500.00.

First, as to the pledged stock and bonds of the Connecting Company, 315 first mortgage bonds were taken as collateral to a Belt note for $109,500.00, dated February 8, 1900. (Rec. 11-5816) and were sold by the Trust Company, on October 23, 1900, at 35 cents on the dollar, to the National Bank of Commerce of Kansas City, Missouri, and the proceeds, amounting to $110,250.00, were applied on the Belt debt. (Rec. Vol. 11-5805, and Vol. 15-8231);

894 23 first mortgage bonds were given to the Trust Company as collateral security to a Belt note for $23,056.41, dated September 21, 1899, (Rec. Vol. 14, p. 7806-7815);

50 First mortgage bonds, as collateral to Belt [*nore*] for $25,000, dated January 25, 1900, (Rec. Vol. 11, p. 5807 and Vol. 14, pp. 7806 to 7815);

26 first mortgage bonls, as collateral to Belt note for $10,400.00, dated February 9, 1900, (Rec. Vol. 11-5827).

The 99 first mortgage bonds, together with 381 coupons, were sold, on November 1, 1901, under an order made by Judge Thayer in the Bierce case, dated October 30, 1901, and pending in this court for

$40,001.25, and which sum, under said order, was, by the receiver of the Guardian Trust Company, appointed in that case, placed in a separate fund to await the outcome of this litigation, (Rec. Vol. 2-5795, and Vol. 15-8231), as both the Cambria and Southern Companies as well as the Trust Company, claim this money.

The 13920 (not 3920, as stated in intervening petition) shares of Connecting Company stock were by the Trust Company sold to John Lambert, one of the associates of John W. Gates, at $1.42-6/7 per share, or $19,885.71, and the proceeds credited upon the Belt debt. This sale to Lambert was made on September 30, 1899, and long before any default was made by the Belt Company in the payment of interest on its bonds. (Rec. Vol. 2-5809; Vol. 15-7840-7844), and at a time when, under the terms of the mortgage, the Belt Company was authorized to own, possess, use and enjoy its property and the income thereof.

The second mortgage bonds are now on hand, but are utterly worthless by reason of the foreclosure of the first mortgage on the railroad of the Connecting Company.

It is not controverted that such foreclosure under the first mortgage, was made, and that, after applying the proceeds of the foreclosure sale on account of the bonded indebtedness, there was left unpaid a large deficiency on the first mortgage bonds in addition to all the second mortgage bonds.

The history of the incorporation of the Connecting Company and the construction of its road by the Belt Company, unmistakably shows that it could not have been intended that the bonds, issued by the Connecting Company, and acquired by the Belt Company, were to be within the lien of the after-acquired property clause of the Belt mortgage.

It appears from the record that the Connecting Company made a construction contract with the Belt Company, dated June
895 30, 1896 (Rec. Vol. 15, pp. 8174 to 8191), whereby the latter loaned its money and credit to the former in exchange for the securities, bonds and stocks of the Connecting Company, which were to be in the way of compensation to the Belt for the building, construction and equipping of the Connecting road, and, in view of the transaction as conducted between these companies and the Trust Company in the disposition of these securities, it necessarily follows that it could not have been contemplated between the Belt and Connecting Companies that these securities of the latter Company should be held and retained in the Belt treasury as part of the mortgage security of the Belt bondholders. On the contrary, it was clearly the intention of all parties concerned that the Belt should raise money on these securities, in order to provide the necessary funds for the construction of the Connecting road, for, otherwise, as shown by the record, and about which there is no controversy, the Belt Company had no other means of raising the funds required to build the railroad of the Connecting Company, which was approximately 90 miles in length.

In fact, one of the main complaints, made by the intervenor against the Trust Company, is based upon the alleged domination

and control of the Belt by the Trust Company, by reason of which the intervenor claims that the Trust Company financially involved the Belt Company in the building of the Connecting Company's railroad alleged to be an unprofitable venture on the part of the Belt Company.

It is shown in the record that, as the work of building this road progressed, these securities were turned over to the Belt Company from time to time, and, in lieu thereof the Belt Company, operating largely through the Trust Company, furnished the funds with which to carry on the construction work. The Connecting Company was a distinct and independent organization from the Belt Company, and, during the construction period especially, was managed and operated by its own officers, though afterwards, by reason of Belt ownership of all its capital stock, it became largely a Belt institution. There can be no doubt that, perhaps the principal motive actuating the Belt Company, in entering into the construction contract with the Connecting Company, was that the latter Company would become a tenant line of the Belt, under the terminal contract for its switching, thereby increasing the earnings and revenues of the Belt Company, and, in addition, it is reasonable to suppose that the Belt Company intended, and in fact expected, to make some profits out of the construction of the Connecting railroad. It was intended then, as a business transaction, mutually beneficial to each
896 of the contracting companies.

Second, as to the unpledged stocks and bonds of the Connecting Company, disposed of by the Trust Company:

The Connecting Company stocks and bonds, obtained by the Belt Company, were turned over to the Trust Company and sold and disposed of by it. (Wilcox's testimony, Rec. Vol. 34, pp. 18068-69, 18367-69, and '70).

In Johnson's statement, (Rec. Vol. 15, pp. 8225-8226) there is shown the disposition of 1306 first mortgage bonds of the Connecting Company, all of which were either disposed of to the Trust Company, or by it to others, except 176 bonds, which were disposed of by others than the Trust Company, and thereby leaving 1130 first mortgage bonds, including those pledged to it, which were either acquired by the Trust Company or disposed of by it, for an aggregate sum of $845,415.00.

Sixteen second mortgage bonds of Connecting Company, belonging to the Belt, were acquired by the Trust Company, pledgee, for $7200.00. (Johnson's statement, Rec. Vol. 15-8227), and 6250 shares of Connecting Company stock were acquired by the Trust Company at the price of $37,500.00 (Rec. Vol. 31, pp. 16679-16680, and Johnson's statement, Rec. Vol. 15-8224).

No useful purpose would be subserved by here showing the particulars of the various transactions had by the Belt and Trust Companies in respect to the disposition of said Connecting Company securities, as it appears, from the statements in the record as to the disposition thereof, that the Trust Company has fully accounted for the proceeds of all sales of said bonds and stocks, made to it directly or through it to others.

Briefly stated, the reasons heretofore given and conclusions reached, to the effect that the Union and Air Line securities are not within the lien of the Belt mortgage, are equally applicable to the stocks and bonds of the Connecting Company.

The Master is of the opinion that the intervenor's contention, in respect to the Connecting Company securities, is not sustained by the proofs, and the law of the case, and, his finding is adverse to intervenor's claim.

VI.

Account of Belt Company against Gulf Company for About $133,000.00, *and Assigned by Belt to Trust Company as Collateral Security for Belt Indebtedness.*

897 This account is now the subject of an intervening petition, filed by the Trust Company in the Gulf foreclosure case in this court, and the intervention is still pending there, awaiting the determination of the issue in this case, and nothing whatever has yet been realized on the open account.

In paragraph 10, of the intervening petition, it is charged that the Trust Company caused the Belt Company to enter into a terminal contract with the Gulf Company, by the terms of which the Belt gave to the Gulf an entrance into Kansas City, and certain valuable terminal rights and facilities, and that the Gulf undertook and agreed to pay the Belt certain sums of money as rental for such rights and privileges, both parties entering upon the performance of the contract, and continuing to so perform, until April 1, 1899, when receivers were appointed for the Gulf Company, at which time, it is alleged that the Gulf was indebted to the Belt, on account of said contract, to an amount in excess of $133,000.00. It is charged by the intervenor that, by virtue of the after acquired property clause in the Belt mortgage, said terminal contract became charged in equity with the mortgage lien to secure the Belt bonds, and, that the rents, issues and profits at that time due the Belt Company under said contract also became charged in equity with such mortgage lien, and, further, that, by reason of said foreclosure proceedings and the sale thereunder to the intervenor, the latter acquired "all equitable right and title to said contract and to the rentals due thereon, as the Trust Company, at all times well knew."

It is, also, charged that the Belt Company, on or about February 1, 1900, undertook to transfer and assign said account to the Trust Company, as collateral security to secure an alleged indebtedness to the Trust Company from the Belt, and that the Trust Company now claims to be the assignee of said account.

The Trust Company admits that the parties operated under said contract until April 1, 1899, when receivers for the Gulf Company were appointed, and that there was then due from the Gulf to the Belt, under said contract, the sum of about $133,000.00, and that, on or about February 1, 1900, the Belt Company transferred and assigned to the Trust Company, its said account against the Gulf

Company as collateral security for and to the Belt indebtedness to the Trust Company.

The Trust Company, however, denies that it caused the Belt Company to enter into said terminal contract with the Gulf Company, or that, under the after acquired property clause in the Belt mortgage, the said contract became charged in equity with a mort-
898 gage lien to secure the Belt bonds, or, that the rents, issues and profits, accruing under said contract, became charged in equity with such mortgage lien, or that, by virtue of the foreclosure proceedings and sale thereunder to the intervenor, the latter acquired any equitable title or right to said contracts, and the rentals, issues, and profits due thereon. The Trust Company, on the contrary, contends that said contract, its rentals and profits, are not covered by the terms of said Belt mortgage, and are in no way appurtenant to the operation of the Belt railroad; and, further, that, in as much as said contract was made and the rentals and earnings accrued thereunder, after the consolidation hereinbefore mentioned between the Suburban Company and Consolidated Company into the Belt Company, the said rentals and earnings are not within the after acquired clause of the Belt mortgage. The effect of this consolidation has already been considered by the Master, and, the conclusion there reached will suffice for the purpose of this intervention, wherever the same contention is made in Trust Company's answer.

There is a slight discrepancy in the record as to the amount owing by the Gulf Company on said terminal contract. From the testimony of witness Ingals, the total claim appears to be $132,805.48, which is taken as correct for the purpose of this intervention. As for the items comprising that amount, see Ingals' testimony, and exhibit, in Rec. Vol. 48, pp. 28823 to 28850.)

In Rec. Vol. 52-31429, will be found a record of a meeting of the Board of Directors of the Belt Company, held in February 1, 1900, at which there was adopted a resolution, reciting the Belt indebtedness to the Trust Company, and directing the Belt officers to execute an assignment to the Trust Company of the account, held by the Belt against the Gulf Company, aggregating the sum of $133,058.04, and which represented past due charges for switching services and terminal facilities furnished by the Belt to the Gulf as provided in a written contract between them. The furnishing of these terminal facilities and switching services constituted an important source of income and revenue to the Belt Company, and, the intervenor claims that such account is included within the lien of the Belt mortgage. This account is strictly for the revenue or earnings of the Belt Company, accruing from its daily operations and without which it could not be expected to continue its legitimate or ordinary business affairs, or, in other words, exercise its proper corporate functions. It is well settled that the income or earnings of such a railroad company are not included within its mortgage, and further, that neither the bondholders, nor the trustee in
899 the mortgage, are entitled to the income or earnings which accrued and had been disposed of, prior to the time possession is taken by the trustee or receiver. In this case, the receivers

were not appointed, nor was possession taken until September 6, 1900, which was some seven or eight months after the assignment of the claim to the Trust Company.

Jones, in his work on Corporate Bonds and Mortgages, Section 80, says:

"The earnings of a railroad, which is allowed to remain in the possession of the mortgagor, are not subject to the lien of the mortgage, although in terms the mortgage covers the tolls of the road, if at the same time the mortgage implies that the mortgagor is to hold possession and receive the earnings of the road until the mortgagee takes possession."

Counsel for the Trust Company also cite the following authorities:

Gilman v. Railroad, 91 U. S., 603, 617;
R. R. v. Cowdry, 11 Wallace, U. S. 459;
American Bridge Co. v. Heidelbach, 94 U. S., 798;
Dow v. R. R. 124, U. S., 652;
N. Y. Security Co. v. Gas Company, 159 N. Y., 137;
See also 45 L. R. A., 132.

It has been held that the money, which is in the hands of the treasurer of a railroad company, at the time when possession is taken of its properties and assets under a mortgage covering such properties and earnings, belongs to the railroad corporation itself, and not to the trustee in the mortgage, that is, in case the mortgage provides that until default the company may retain possession; and if, in such case, the trustee should take possession of the money, it will be subject to garnishment, at the suit of general creditors of the company, because of the fact that it is not subject to the lien of the mortgage, and hence, legally belongs to the corporation, and not to the trustee or bondholders.

Jones on Corporate Bonds and Mortgages, Sec. 86.
Schmidt v. Railroad, 112, Ky. 717.

Counsel for the Southern Company contend that this claim for switching charges was included within the Belt mortgage, because of the fact that the mortgage conveyed "all the terminals, terminal rights, privileges, contracts, leases * * * which the company now owns and holds, and which it may hereafter own and hold for use in connection with its said railroad," the point of the contention being that the word "contracts", as used in that con-
900 nection, must be deemed to mean terminal contracts, and, that therefore, in as much as these switching charges arose out of a terminal contract between the Gulf and Belt Companies, it follows that this open account was subject to the mortgage.

From an examination of the authorities cited, the conclusion has been reached that even in cases where the mortgage expressly covered income tolls and earnings, yet, if it further provided that the mortgagee was to remain in possession until default, then the bondholders and the trustee in the mortgage are not entitled to the earnings or income of the road, earned prior to the taking of possession, and cer-

tainly not to such as had theretofore been disposed of to bona fide creditors; and it follows that all such earnings and income belong to the general creditors of the corporation, and not to the mortgagee.

In the judgment of the Master, this claim for switching charges falls strictly within the earnings and income of the Belt, and for that reason is not, under the facts of this case, within the terms of the Belt mortgage; and, for the reasons above mentioned, the finding of the Master, as to this item, is against the claim of the Southern Company.

VII.

Steel Rails and Fastenings Pledged by the Belt Company to the Trust Company.

As to the alleged appropriation by the Trust Company, on February 1, 1900, of 600 tons of steel rails, and 20 tons of fastenings, belonging to the Belt Company, the Southern Company, in paragraph 7 of its intervening petition, charges that, on February 1, 1900, and prior thereto, the Belt Company was the owner and in possession of, approximately, 600 tons, more or less, of steel rails, and 20 tons of fastenings for use in connection therewith, and that, by virtue of the after acquired property clause in the Belt mortgage, the steel rails and fastenings became charged with a lien to secure the payment of the Belt bonds, secured by the Belt mortgage, and that, upon the foreclosure of the Belt mortgage, and the sale had thereunder, the equitable title to said rails and fastenings passed to and vested in the intervenor, who became the equitable owner thereof.

The intervenor denies that the Trust Company has any right or claim to the rails and fastenings, and asks that it be required to account therefor at the rate of $35.00 per ton.

901 In paragraph 7 of its answer, the Trust Company denies that said rails and fastenings were covered by, or became charged with, the lien of the Belt mortgage, by reason of the after acquired property clause, or that the intervenor became the equitable owner of said properties, upon the foreclosure of said mortgage and the sale thereunder.

The Trust Company also alleged that there were less than 360 tons of said rails and fastenings and that they were purchased after the consolidation of the Suburban and Consolidated Companies, thereby forming the new company, called the Belt Company, and long after the execution of the Belt mortgage; that said rails and fastenings were not appurtenant to the operation of the Belt railroad, and are held by the Trust Company as collateral security to the Belt indebtedness to it; that said rails and fastenings were sold for about $11,000.00, and that the net proceeds of the sale has been credited by the Trust Company on its indebtedness against the Belt Company; and, further, that notwithstanding the Belt Company had theretofore given said rails and fastenings to the Trust Company as collateral security for its indebtedness against the Belt Company the latter afterwards refused to deliver the same to the Trust Company,

and, thereupon, it was compelled to bring a replevin suit for such rails and fastenings, in the Circuit Court of Jackson County, Missouri, and which suit was subsequently determined in favor of the Trust Company, and, by reason of which, it is claimed by the Trust Company that the judgment rendered therein is res adjudicata and cannot be here inquired into.

The Trust Company acquired these rails and fastenings by reason of the proceedings at the Belt Directors' meeting of February 1, 1900, (Rec. 52, pp. 31429 to 31432), and, in this connection, see Martin's testimony, as to what occurred at that directors' meeting of February 1, 1900, and the reasons given for the Trust Company's taking additional collateral security, and, also, Wilcox's testimony as to the rails being taken as collateral security by the Trust Company on that date, and as a part of what he understood was the general plan of the Trust Company to get all the collateral it could from the Belt, in view of the probable loss of control of the Belt Company. (Rec. 53-32816, and Rec. 34-18294).

E. L. Martin further stated that these rails had been brought from the Cambria Company, and were, on February 1, 1900, available for any purpose in connection with the Belt Company (Rec. 55-33760 to 33761), and, Neal S. Doran, stated that it was his recollection that the rails were down in the East Bottoms yards, (Rec. 51-31215).

902 The statement of account between the Trust Company and the Belt Company (Rec. 1-137) shows the sale of 16-1712/2000 tons of fastenings at $33.00 per ton, and also the sale of iron rails at $33.00 per ton, the net proceeds being $11,133.06, which were credited upon the Trust Company's open account against the Belt Company. There is a dispute as to the number of tons of rails acquired by the Trust Company, the intervenor [—] that there were 600 tons and the Trust Company claiming that there was only 343-1940/2040 tons, but the Master finds that the amount in the hands of the Trust Company, as proceeds of said rails and fastenings, is $11,133.06.

It appears, on page 167, of the testimony taken by counsel for the Cambria Steel Company, before the Special Master, upon the application for a temporary injunction in this cause, and filed with the Clerk of this Court on November 27, 1900, and which by agreement of counsel is made part of the record of this cause, that witness Johnson identified a letter from the Belt Purchasing Agent, reading as follows:

"The rails are intended for use in constructing new yards for the Kansas City and Northern Connecting; also these splice bars are intended for use in connection with the rails recently received for the new yards of the Kansas City & N. C. R. R. at Kansas City."

It is not disputed that in April, 1900, the so-called Stilwell management retired from the management of the Belt Company, and thereupon Stuart R. Knott became the manager thereof, and that, on September 6, 1900, said Knott and E. F. Swinney were appointed receivers of the Belt Company, that the Trust Company demanded possession of said rails and fastenings, and, upon being re-

fused, brought an action in replevin against the Belt Company in the State Circuit Court; that, on October 9, 1900, the Belt filed its answer in the replevin suit, and on January 25, 1904, judgment was rendered in favor of the Trust Company for the possession of said properties, and damages for the detention thereof. (Rec. 53-36690).

It appears from the record that, during the pendency of that suit, the said Knott was the president of the Belt and Southern Companies, and was also one of the receivers of the Belt Company, and, for such reasons, it is contended by the Trust Company, that it cannot reasonably be claimed that the Southern Company, as well as the Belt receiver, did not have actual notice of the pendency of the replevin suit, even though neither the Southern Company nor the Belt receiver were made parties to said suit.

903 The Trust Company, having so obtained possession of the rails and fastenings in question, sold the same on September 26, 1900, and credited the net proceeds of $11,133.06, upon the open account due the Trust Company from the Belt Company. (Rec. 1-137).

Counsel for the Southern Company insist that, inasmuch as the replevin suit was not brought against it, the judgment rendered therein does not in any wise affect its rights to the rails and fastenings in controversy.

Counsel for the Trust Company, however, contend that the judgment in the replevin suit is res adjudicata and is conclusive on the Southern; and, also, that the replevin suit did not abate the appointment of receivers for the Belt, and, further that, in view of the official connection of Receiver Knott with the Southern and Belt Companies, as above stated, the Southern after its long waiting, ought not now be permitted to dispute the title of the Trust Company to the rails in controversy.

The Master does not deem it necessary to express an opinion as to the "res-adjudicata" proposition involved, for, independently of the legal effect of the judgment in the replevin suit, that is, whether it is binding on the intervenor, or otherwise, the main question for determination is whether the rails and fastenings in question were part of the mortgaged property, and covered by the after acquired property clause of the Belt mortgage.

After a careful examination of the provisions of the Belt mortgage, and the authorities on the subject, the Master has reached the conclusion that it does not purport to convey after acquired rails, or other materials, which are not part of the roadbed. The mortgage mentions specifically, many kinds of properties, which are intended to be included within its provisions, whether then owned or thereafter to be acquired, as, for example, water tanks, fuel, tools, implements, machinery, etc., but nowhere does it mention or specify materials. The necessities of railroads frequently require them to dispose of their old surplus materials, and acquire new or different materials for their purposes, and, for that reason, the omission of the word "material" was doubtless intentional, and for the very purpose of not interfering with the usual and customary right of rail-

roads in disposing of their surplus materials, such as ties, rails, etc. Jones, in his work on Corporate Bonds and Mortgages, Sec. 104, says:

"A mortgage conveying a railroad, with its superstructure, track and all other appurtenances, made or to be made, and also
904 the railroad furniture, including engines, tenders, cars of every description, tools, materials, machinery, and every other kind of personal property which shall be used for operating said railroad, does not purport to grant property thereafter to be acquired by the company, except so far as it becomes appurtenant to the road, or is used in it. Chairs intended for fastening down the rails afterwards acquired, which were never used in its construction, but were lying upon the ground in heaps, are not appurtenant to the road or used in operating it, within the terms of the mortgage, and consequently are not covered by it. There is no language in the instruments which purports to convey materials, to be after acquired for the construction or repair of the road," citing cases.

The cases of "Farmers Loan & Tr. Co., v. Bank, 11 Wis. 207, and 15 Wis. 424," and "Dinsmore v. R. R. 12 Wis. 649", are to the same effect.

In the case at bar, it appears that the materials in dispute were intended for use on the Connecting Company road, rather than the Belt road.

The conclusion of the Master is that the intervenor's claim as to said rails and fastenings, cannot be maintained, and, hence, that the Trust Company should not be held to account to the intervenor for said properties, or their proceeds.

VIII.

Central Improvement Company Properties and Stock.

One of the most valuable collateral securities, turned over to the Trust Company by the Belt Company, is 1120 shares of stock of the Central Improvement Company, herein called Central Company, and, the claim of the Southern Company, as the purchaser at the Belt foreclosure sale, by reason of the after acquired property clause of the Belt mortgage, is found in the sixth paragraph of the intervening petition, in which the intervenor states, in substance, that the Trust Company caused the Central Company to be incorporated in 1895, with its directors and officers made up from those of the Trust Company, and its purposes being to hold the title to such real estate as might be needed for rights of way, or other uses in connection with the operation of the different railroads, alleged to be dominated and controlled by the Trust Company, the title in some instances being taken by the Central Company to enable it to give back a first deed of trust on the property purchased, to secure the unpaid balance of the purchase price, and so as not to be subject to the lien of the general mortgage given by such road upon its own properties.

905 In pursuance of this plan, large amounts of money were contributed by the Gulf, Belt and Air Line Companies, respectively, for the purchase of such rights of way and terminal properties as were necessary for the use and operation of their respective railroads, the titles thereto being, for convenience merely, placed in the Central Company, and, the money to pay for such properties being furnished by the partcular company, for whose benefit the purchase was made, and either paid directly to the vendor of the property, or to the Central Company, which issued its capital stock to the Company furnishing the money to the extent, approximately, of the amount so furnished.

In this way there were issued by the Central Company 1407 shares, and of which, 817 shares were to the Belt Company, 334 shares to the Union Company, 22 shares to the Air Line and 234 shares to the Gulf Company, said companies having furnished, from time to time, for the purposes above stated, the following amounts: Belt Company, $129,571.50, Air Line, $16,104.41, and Gulf Company, $23,673.89, making the total sum of $169,349.60, and being the only money furnished to the Central Company, which did not have any assets, other than the properties bought by it for said companies respectively.

Intervenor charges that, by reason of the premises, the Central Company is, and was, at all said times, a mere trustee, holding the legal title to the various properties, in trust, for the railways, for whose use and benefit said lands were bought, and that immediately upon the vesting of the legal title in the Central Company, the particular railroad interested in any such purchase, because the equitable owner, and entitled to the conveyance of the property purchased; and, also, that all the properties so purchased were necessary for the use and operation of the railroads purchasing them, and came within the after acquired property clause of the general mortgage placed upon said railroads, respectively, "so that the equitable liens of said mortgages attached to and became a charge upon the said properties, in favor of the bondholders of said companies, respectively; that the proceeds of some of said properties, sold by the receiver of the Central Company, under the orders of this Court, are now in the receiver's possession.

Intervenor further charges that, by reason of the foreclosure proceedings, and sales thereunder, it acquired the equitable title to all of said properties, so held by the Central Company, and became and is [not] entitled to the conveyance thereof, and to the proceeds of all sales thereof made by the receiver of the Central Company under the order of this Court, and now held by such receiver. The prayer of the petition is as follows:

906 "Wherefore, your petitioner prays:

a. For a judgment order and decree of this court requiring the Central Improvement Company and its receiver to convey to your intervenor all the real estate or other property standing in its name and to turn over to your intervenor all the moneys held [by] the Central Improvement Company, or its receiver, or owing to it, or them or arising from the sale of the proceeds of said property,

and for such other relief as may be equitable and just." (Int. Pet. 28).

The Trust Company, in its answer, denied all the material averments of the intervening petition, excepting the organization of the Central Company, and, then alleged, in substance, that its officers and directors were freely elected by its stockholders and had no personal interest in procuring any benefit or advantage, for respondent, at the expense of the Central Company, and did not procure any such advantage; that the Central Company was organized, by the procurement of the Belt and Gulf Companies, for the purpose of securing and acquiring the title for various tracts of land in and about Kansas City, the money for the purchase of which lands was to be furnished and paid by the Gulf, Belt and Air Line Companies, respectively, and for which payments, the capital stock of the Central Company was issued, from time to time, to each company, according to the amount of the payments; that the interest of the company, so advancing the money, is represented by the Central stock, and, in that way, the three companies, through their stock representation, became the beneficial owners of the properties of the Central Company, subject to any liens thereon; and the Trust Company further alleged that no part of the Central Company properties was covered by any of the general mortgage liens, which were foreclosed in the foreclosure proceedings of the Belt and constituent companies, nor were any of said properties appurtenant or necessary to the operation of the foreclosed railroads, nor did the intervenor acquire title to any of said properties by reason of said foreclosures.

1. The Central Company was organized March 21, 1895, with a capital stock of $50,000.00, afterwards increased to $200,000.00, and its corporate purposes, as expressed in its Articles of Association, were to buy, own, rent, hold and improve real estate [to] the states of Missouri, Kansas and other states; to sell, rent, lease, mortgage, and otherwise dispose of the same for pecuniary profits or gain (Rec. Vol. 18-9160).

It is not controverted that the evidence in the record (Vol. 53 31895 to 32375), discloses that, from time to time, the Gulf
907 Belt, Air Line, and Union Terminal railroads, deemed it expedient or necessary to arrange for the purchase or control of more real estate than was then absolutely required for their respective rights-of-way purposes. In some instances, lands were bought or leased for the purpose of erecting, either for the railroads or for some vendee, industrial plants along the lines of the railroads, with a view to increasing their traffic. In other cases, tracts of vacant property were acquired for the use of terminal yards for switching, in view both of present and future necessities; and, again, as in the case of Fairmount Park, large tracts of land were bought or leased for use as amusement parks, and for the purpose of building up the business of the Air Line and Suburban Belt roads. In still other cases, such lands were bought for the purpose, in part, of providing the necessary right-of-way for the road making such purchase, and, in as much as the entire tract through which the right-of-way was projected could be purchased for about the same price that the

right-of-way would cost, the whole tract would be brought, and the surplus held for future use.

Before the organization of the Central Company, another corporation, called the State Realty Company, mainly managed by officers of the Trust Company, had been organized and used as an instrumentality for taking the title to such land as was acquired by foreclosure by the M. K. & T. Real Estate Trust Company, which preceded the Trust Company, and the State Realty Company also took and held the titles to such lands as the various railroads mentioned desired to control, and later on, as these properties increased in number, it was seen that there was a necessity for divorcing and separating from the business of the State Realty Company the business of the various railroad companies, and, to accomplish such purpose, the Central Improvement Company was organized. It is also shown in the record, and not controverted, that one of the chief underlying purposes of so vesting in the Central Company the title of the real estate investments of the different railroads, of the nature above indicated, was that it was intended thereby to prevent said properties from being subject to the lien of the railroad mortgages, which had been executed by said railroads and covering after acquired properties, and in that way, the object was to enable the Central Company, as the corporation holding such titles, to make such disposition of said lands as might be desired, from time to time.

The Belt Company was strictly a switching road, and, in order to enable it to build up its business, it was deemed necessary for it to develop and enlarge its own traffic arrangements by encour-
908 aging industries to locate along its lines, and, with that end in view, real estate was acquired adjoining the Belt right-of-way with the view of erecting elevators and other plants thereon, so as to make business for the road. The same object was attempted to be attained by the Air Line, when it acquired the Fairmount Park tract for the purpose of increasing its passenger traffic over it and the Belt road.

When the Central Company was organized, the lands held by the State Realty Company were quitclaimed to it, and the railroad companies, holding stock in the State Realty Company, surrendered the same, and took in lieu thereof the stock of the Central Company, which made a full and complete settlement with the Realty Company, (Vol. 53-32353) and from that time forth the function, theretofore performed by the Realty Company, in the respect mentioned as to such railroad purchases, was taken up and performed by the Central Company. The Realty Company billed these properties, so conveyed to the Central Company, at their actual cost, that is to say, at their original purchase price, with all taxes and other fixed charges thereon, and thereupon, the Central Company charged the amounts thus fixed against each property to the various railroads, along whose route the lands thus acquired laid, and against those charges the Central Company credited itself with its own capital stock, which it issued out of its treasury to the railroad companies, respectively.

From time to time, the Central Company made other purchases and the cost of such lands were in each instance charged to the par-

ticular railroad purchasing the same, the custom of conducting the business being to make a requisition upon such road for the necessary funds to pay for the land purchased, and the railroad company would respond by issuing to the Central Company its voucher, covering the cost of the land and the expenses incident to the purchase, such as attorneys fees, recording fees, abstract, etc.; and, all such advances made by any railroad company, on account of land purchased, were credited to it by the Central Company, and, for the exact amount of which the stock of the Central Company was issued to such railroad company (Vol. 53-31120). This business was conducted in an accurate and systematic way, and certificates were always issued, calling for even hundreds of dollars, par value, and, in case the amount advanced by any railroad company to the Central Company, was more or less than an even hundred dollars, then the Central Company would issue its capital stock for an even amount and either issue its voucher for the remainder in excess of one hundred dollars, or it would issue to the railroad company up to
909 the next one hundred dollars, and then collect from it the difference between the amount of stock so issued and the actual amount paid in by the company on the purchase in question. As to taxes, insurance and other fixed charges, paid at the time of the acquisition of the lands, they were charged direct to the railroad company interested in each particular purchase, and stock issued therefor, but as to taxes, insurance and other fixed charges accruing after the title was taken by the Central Company, the evidence is somewhat confusing, though, in many instances, these amounts were paid out of the funds in the Central Company treasury, and charged to profit and loss, as is claimed by respondent.

The financial resources of the Central Company were derived from the amounts received from the Gulf, Belt and Air Line Companies on account of land purchases by these roads, and for which the Central Company stock was issued, as herein stated, and, also, from the rents and sales of buildings on the properties purchased by it with the funds supplied by said companies. The Trust Company, however, contends that the income from rents and sales of properties went into the common treasury of the Central Company, and was disbursed by it for general purposes, and applied to the payment of expenses of all the real estate, without any discrimination, and, in proof of such contention, relies on the testimony of expert accountant Francis A. Wright, which tends strongly to such conclusion. Another source of income was about $16,000.00, which was realized by the Central Company on its note executed on December 18, 1896, to the Pennsylvania Fire Insurance Company, and secured by mortgage on real estate purchase No. 6, which said Wright states is the only purchase listed as Gulf property on the Central Company ledger (Rec. Vol. 54-33063-'067), and, which mortgage upon its maturity, was purchased by the Southern Company, and is now owned and held by it and stands unreleased on the record. (Rec. Vol. 53-32360). The Trust Company insists that the holding of this mortgage by intervenor is wholly inconsistent with its claim that the Central Company should be treated

as a mere form or nullity, while the intervenor suggests that, in as much as said notes were indorsed by the Gulf Company (Rec. Vol. 18-9537 to 9566), such fact is indicative of the existence of a greater interest in the Gulf at that time in said real estate purchase No. 6, than that of a mere stockholder, who does not ordinarily feel called upon to make himself personally responsible for such large corporate liability; in other words, that, instead of being against it, the
910 $16,000.00 mortgage transaction tends strongly to support the intervenor's theory that the Central Company was a mere trustee, holding the title for the Gulf Company, which was simply taking care of its own property in that transaction, as it should have done, in view of the alleged trust relation existing between it and the Central Company.

It appears from the testimony of expert accountant Johnson (Vol. 21-10713 to 10718) that the total amount advanced by the Belt, Gulf and Air Line Companies, direct to the vendors of the properties purchased and conveyed to the Central Company, or to the Central Company itself, on account thereof, is as follows:

Belt Company	$129,571.50
Air Line	16,104.41
Gulf Company	23,673.89
Making a total of.....	$169,349.60

To this should be added the sum of $18,502.90, paid by the Southern Company in order to protect real estate purchase No. 6, and thereby making a total amount paid by all of said companies, including the Southern, of $187,852.50, and all of which came from said railroad companies, or from rentals received from the properties purchased, or from sales of buildings upon said properties.

It also appears from said Johnson's statement that the Belt item of $129,571.30, included $10,327.00, paid by the Kansas City Terminal Construction Company on account of the Belt railroad; and further, that the total payments made by the Belt, Gulf and Air Line Companies direct to parties, from whom the properties were bought, or to their agents, were $46,961.68, by the Belt Company, $6,204.41 by the Air Line Company, and $19,002.90 by the Gulf Company, making a total of $72,168.99, so paid direct to the vendors of the properties purchased; and further, that the amount, advanced by these same companies, as shown by Central Company's cash book, is $115.683.51, which, added to said $72,168.99, totals $187,852.50, the full amount paid by said companies, as above stated; and it further appears by said Johnson's statement that the actual cost of all said properties was $173,863.67, and, that the difference of $13,988.83 (in excess of actual cost) was used in paying the expenses of the Central Company, and taxes, excepting about $228.00, turned over to the receiver of the Central Company, but since then, several tracts of land have been sold and the proceeds thereof used by the receiver of the Central Company in paying taxes

and other fixed charges, including his fees, as will be hereinafter shown.

911 The Air Line ceased making advancements to the Central Company, after December 23, 1897, and, thereafter, the payments, on account of Air Line properties, were made by the Belt Company (Vol. 21-10719); and the Belt Company, also, responded for the Union Company (Vol. 55-33030).

For funds, supplied by the Belt, Air Line and Gulf Companies, in connection with real estate purchases, the Central Company issued to them its stock, from time to time, until finally their holdings of Central stock aggregated as follows:

Belt Company, 817 shares; Gulf Company, 234 shares; Union Company, 334 shares; Air Line, 22 shares; making a total of 1407 shares. Ten shares were also issued to A. E. Stilwell, but it does not appear that the Central Company received any consideration therefor. The Trust Company, as trustee, holds 58 shares of Central stock, and in which it disclaims any interest. It also holds and claims 1120 shares of Central stock, pledged to it as collateral security by the Belt Company, in connection with other like securities, as has hereinbefore been fully stated, in respect to the pledging thereof for the Belt indebtedness to the Trust Company (Rec. Vol. 18-9215-9262).

Nature and Conduct of Central Company's Business.

2. For the purpose of giving the Court a clearer idea of the objects intended to be accomplished by the conveyance of properties to the Central Company, it is thought best to call special attention to the statements of the persons at that time directly concerned in the acquisition of the properties claimed by the intervenor; and then, also, refer to certain communications between the Central, Trust and Belt Companies, in respect to the manner of conducting the business of buying and paying for lands acquired by the Central Company.

The statements of Frank B. Wilcox, E. L. Martin and J. H. Pickering, concerning Central Company matters, are given because of their special familiarity with the relations existing between the Central, Belt and Trust Companies.

Frank B. Wilcox, a former officer of the Trust Company, stated in substance that, in furtherance of the general policy of the Trust Company, in respect to developing the natural resources, locating townsites and creating business enterprises in connection with the Belt and Gulf systems, various companies were organized, and controlled mainly by the same men who were officers of the Trust Company, and, among these companies, were the Central Company, the State Realty Company, and the Second Street Improvement Company, all of which followed out the general policy of

912 the Trust Company in their organization, and were regarded as subsidiary companies, the Central Company, and the Second Street Improvement Company, being engaged in pur-

chasing lots and lands for railway purposes, and for business purposes, adjacent to said railroads. (Rec. 34-17999-18001).

The books of the Central Company were kept in the office of the Trust Company, and the clerical work was done by the Trust Company clerks. (Rec. 34-18010-18011).

The reason for the organization of the Central Company was to provide the means, in the form of a corporation, by which properties could be acquired for the railway corporations, in which the Trust Company was interested, and to thereby enable them to acquire lands for rights-of-way or other purposes in connection with the railway uses, and for which the stock of the Central Company, representing the investment would be issued, it being intended that through this process the after acquirement clause of the mortgage, securing the railroad companies' bonds might be overcome, and these properties not pass directly under the mortgages already created, but leave the properties clear of those mortgages. (Rec. 34-18038-18039).

E. L. Martin testified, in part, that the Central Company was organized for the purpose of taking title to lands lying along the road of the Suburban Belt. In some instances, the Belt road had to buy more land that was then actually needed for its own railroad uses, and, in order to reserve that part, which was not so needed for railroad purposes, it became necessary to place it in the name of some other person or corporation than that owning the railroad, so that such reserved portion would not be held under or subject to the general railroad mortgage, and the Central Improvement Company was organized to hold the title to such properties. (Rec. pp. 32829-32830).

In some cases, part of the lands purchased was for the future use of the railroad; and other lands were bought because frequently the whole tract could be purchased on better terms than to force the railroad right-of-way through it, thereby leaving the remainder of such land to be sold to some industry at a profit, and, without being incumbered with the railroad mortgage, which might have prevented a sale, if such property had been conveyed direct to the railroad company, and an opportunity had arisen to sell the same.

If it had not been for the railroad mortgage the land would have been conveyed to the railroads. (Rec. 53-32831).

913 The Central Company was incorporated for the purpose of taking titles to properties, running along and adjoining the railroads, and, of buying rights-of-way for them. One of the purposes of handling these transactions through the Central Company, was to prevent the properties, purchased for right-of-way and switch purposes, from coming under the after-acquired clause of the railroad mortgage, and, so that the portion not needed for right-of-way could be disposed of, and, the sale thereof not be hindered by reason of the railroad mortgages. The lands, the titles to which were taken in the name of the Central Company, were situated in and about Kansas City, and along the Belt, Union Terminal, Consolidated Terminal, and Air Line and Gulf; and, in cases where more land was bought than was actually needed for the then present requirements of the right-of-way, it was the intention to hold it,

if desired, to use for additional terminal facilities, or for such other future uses, as might be necessitated by the growth of the railroad. The properties were acquired by and conveyed to the Central Company with moneys, furnished and provided by the Belt, Air Line and Gulf, and, upon his (Martin's) recommendation, as an officer of all said railroads, including the Union Terminal. At the time he recommended these purchases of property by the Central Improvement Company, it was his opinion that they were required by, or useful to, the particular railroad company which he represented in each purchase. It was his recollection that no properties were purchased with the Belt money, except upon his recommendation as President of the Belt. The right-of-way was secured expressly for the railroad, and the balance of the purchase was for such disposition as might be needed for the future requirements of the road. (Rec. 55, pp. 33655-33661).

The 1120 shares of Central Company stock represented and covered real estate purchased for the use of the Suburban Belt Railroad Company, part of which is clear, and part of which has mortgages upon it for part of the original purchase price. (Rec. 55, pp. 33699-33700).

The Trust Company had nothing to do with the Central Company and the Second Street Improvement Company, further than to organize them, and find subscribers to their stock. (Rec. 55-33761).

James H. Pickering, in part, testified that he became General Superintendent of the Belt in 1892, continuing as such until March, 1899, (Rec. 35, pp. 18581-2), and that, after he became connected with the Belt Company, he was instrumental in urging the acquire-

914 ment of certain lands for yards, side tracks and rights-of-way, in connection with the Union Terminal, the Belt and the Consolidated Terminal railroads, the terminal facilities, including ample switching yards and side tracks, being absolutely necessary to railroads like the Belt and its allied lines. Railroad companies, after having projected their lines, frequently find that the values of properties along it which are desired for terminal facilities and switching yards, have become greatly increased. (Rec. 35, pp. 18689-18690).

The usual width of a right of way is one hundred feet, though the least economical right of way for roads, such as the Belt and its allied lines, fifty feet. (Rec. 35, pp. 18705-6).

The Union Terminal, Consolidated Terminal, Belt and Air Line are all single track roads, except the Belt, which is a double track, and spurs and sidings and switch yards are especially important for single track railroads. In order to have switches for passing tracks, there must be additional grounds than the mere right of way; and switches play an important part on roads like the Union Terminal and Consolidated Terminal, and add greatly to the economy in handling cars and are essentially necessary.

It is absolutely necessary that proper side tracks and terminal yards should be furnished in order to handle the business of any railroad, and particularly the Belt lines. Railroads acquiring properly for yards and such as that always buy for future requirements.

They always purchase more ground than they absolutely need at the time the purchase is made. That is the invariable custom of all new roads. That is the policy pursued, and it is a good business policy. (Rec. 35, pp. 18829 to 18832.)

The following letters and other memoranda tend to throw light upon and explain the nature of the Central Company transactions with the Belt and other companies.

As to the purpose of the Central Improvement Company, see letter of C. A. Braley, (at that time a director of the Central Company, and attorney for the Trust Company), dated April 19, 1895, and addressed to State Realty Company, wherein is the following recital:

"The Central Improvement Company has now been incorporated for the purpose of taking title to all of such tracts of land and reimbursing you through the Suburban Belt for all moneys expended in reference to such purchases for the benefit of said Railroad Company." (Vol. 21-10745).

Neal S. Doran, auditor of the Belt Company, in his letter (Rec. 55-33199), says "The total capital stock of the Central Im-
915 provement Company is 2000 shares. This company is authorized to secure property for the Suburban Belt, the Union Terminal, the Air Line and the Kansas City, Pittsburg & Gulf Railroads."

In the letter of Auditor Doran to Willey, auditor of the Trust Company, December 6, 1899, appearing in Rec. 55-34046, he says that, in compliance with Willey's request, he inclosed certain statements, a portion of the latter being "statement of real estate, title to which is in the name of the Central Improvement Company, and purchased by them for the use of the Union Terminal R. R. and the Kansas City Suburban Belt Railroad Company, and the Kansas City & Independence Air Line. The interest of the Kansas City Sub. Belt. R. R. in these properties is represented by 1153 shares of Central Improvement Co. stock purchased."

The letter of Trimble & Braley, attorneys for the Trust Company, (Rec. 32-17068), in respect to one of the Central Improvement Company's purchases, is attached to Belt voucher in Rec. 32-17069, and by reference thereto, it will be seen that this purchase of property was by the Belt Company charged to right of way of the Union Terminal Railroad Company. The Belt Journal voucher (in Rec. 32-17144), shows that the moneys advanced the Central Company are charged by Belt Company to right-of-way the body of the voucher being as follows:

"Kansas City Suburban Belt R. R. Journal Voucher.

Right of way real estate represented.

By capital stock of Central Imp. Co. March 31, 1898: For 795 shares of the capital stock of the Central Improvement Company, owned by this Company on March 31st.	To stocks and bonds owned. $79,500.00	$79,500.00

The ownership of this stock represents right of ways lands, and lands adjacent to our right of way, occupied by this Company. As this is practically a part of the cost of road, the above account is opened to show it as such."

In the connection, see letter of Nolthenius, vice president of the Trust Company, to Doran, auditor of Belt, Belt Company voucher, based upon said letter, appearing in Rec. 32, pp. 17146-47, wherein it is shown that the Belt Company made payment of $800 to the Clerk of the Circuit Court in condemnation proceedings on lands of the Union Elevator Company, (this being on real estate purchase No. 27). By reference to the Belt voucher, it will be seen that
916 this expenditure was charged by the Belt Company to its right of way.

In the letter to said Doran by Nolthenius, treasurer of Central Improvement Company, and Belt voucher (Rec. 32-17170-'71), it appears that, in connection with real estate purchase No. 30, the costs of that property, as shown by the Belt Company on account of the same, was $813.86, and, by reference to the voucher thereto attached, $493.53 of this amount was charged to right-of-way, and the balance was charged to taxes, *sus*pense, etc.

As shown by the testimony in Rec. 25-13377, R. J. McCarty, auditor of the Belt Company, on April 3, 1900, gave a receipt to the Trust Company for the Central Improvement Company's books.

Wright's statement concerning Central Improvement Company:

In the testimony of Accountant Wright, the following statements are made, in respect to the Central Improvement Company: That the Central Company paid no salary of any kind to its officers or clerks (Rec. 54-32965); that money was paid by the railroad companies for taxes and interest on Central Company property, but no Central Company stock was issued therefor; that the Belt Company paid more money to the Central Company than it had stock issued for the same, that is, the Belt Company paid money to the Central Company for taxes and other exepnses, for which the Belt Company was credited by the Central Company, but the same was charged to the account of interest and taxes (Rec. 54-32930-'31, 32938 and 33289).

In Central Company voucher (Rec. 54-32373), is shown the payment by Belt Company to Central Company of $2,665.21, for which only $1,600 of Central stock was issued, the balance being taken up by the taxes and interest paid by the railroad company. In Rec. 54-33374-'75, there is a letter from Hastings, assistant treasurer of

the Central Company, calling for $74.14 for payment of taxes upon real estate purchase No. 10, and a Belt voucher, showing this amount charged by Belt Company to accrued taxes; and in Rec. 54-33376 to 33382 inclusive, there are shown letters of Barnhart, tax commissioner, and of Hastings, assistant treasurer of the Central Company, wherein is listed the Central Company "property, held in trust for the K. C. Sub. Belt R. R." and showing a call by Hastings upon the Belt for $318.67 and $504.13 for taxes upon certain Central Company real estate therein mentioned; and it will be seen that the Belt voucher, at page 33382, charged to
917 "Accrued Taxes" the total amount of this payment of $822.80 made to the Central Company. Johnson's statement (Rec. 18-9217 to 9244) shows that the Central Company from its inception to March 23, 1900, received but $974.26 in rents, none of it coming from the railroads, for the use of a certain Central Improvement Company property; and, as shown by Wright's testimony (Rec. 54-33084) there is no evidence of the railroad companies involved ever paying the Central Improvement Company any rent for the use of the properties standing in the name of the Central Company.

Real Estate Purchases Nos. 1 to 30, inclusive, and "A" and "B".

3. The intervenor's claim, as the purchaser at the foreclosure sales, is based, principally, upon the proposition that all these properties were necessary for the use and operation of the railroads, for which they were respectively bought, and that, under the circumstances shown in evidence, each property came under the after acquired property clause of the general mortgage executed by the railroad interested in that property. It became important, then, to state the facts as to each purchase for the purpose of ascertaining whether it is or is not covered by any of the general railroad mortgages in controversy, and under which the intervenor claims title.

These facts must come almost entirely from two witnesses, the said James H. Pickering, and George C. Ward. Their testimony on this subject covers several volumes of the record, and to which are attached blueprints, showing locations of the different tracts of land; the title to those shown in yellow being still standing in name of Central Company, while those tracts shown in red have passed out of the Central Company.

Witness Ward was tax collector for the Southern Company, and prepared a deed record for the Gulf road from Kansas City to Port Arthur, and, also, as to all the terminal properties; and having examined the records with reference to all the various tracts in [troversy,], stated he was familiar with the titles to all said properties (Rec. Vol. 25-13276-'7). For convenience, these properties are herein referred to as "Real Estate Purchase No. 1", etc., to avoid lengthy descriptions, which can readily be had, if desired, by reference to the records, cited in respect to each tract.

In the following statements, in reference to the testimony of Pickering and Ward, the intention is merely to give the effect, or substance, and not the full statements of the witnesses.

Real Estate Purchase Number 1.

918 For map showing Purchase No. 1, see blue print, Rec. 25-13299-*a*. Pickering testified that purchase No. 1 is on a switch from the main line, extending on First Street towards Central Avenue some distance from Schwarzschild & Sulzberger Packing House; that he built the railroad track which runs up over purchase No. 1, and that Purchase No. 1 is on the Union Terminal and is convenient for team track advantages, and team tracks are very important in connection with the Union Terminal road (Rec. 35-18690-1-2); that the whole spur on Tract No. 1 is used for an unloading track, there being a demand therefor, and it became necessary to accommodate certain business that had been offered to the road; that Tract No. 1 is excellently located for additional team tracks to be built upon it (Rec. 35-18839-'40).

Ward testified that purchase No. 1 stands in the name of the Central Company, (Rec. 25-13279).

Real Estate Purchase No. 2.

For map showing Purchase No. 2, see blue print, page 13299-*a*, Record 25.

Pickering testified that he urged the purchasing of the tract, called Real Estate Purchase No. 2, for switching yards, which were needed for switching facilities in Kansas; that two tracks were built upon this land and were used for switching and storing cars, the tract being necessary for the economical handling of cars, and absolutely necessary to the railroad as it existed at that time, and also at the time he testified (Rec. 35-18692-'3); that at the time this tract of land was purchased, he didn't expect to at once fill the entire tract with railroad tracks, but intended to use as much as was necessary, with the idea that, in the future, additional tracks would have to be put there, and that, from an economical standpoint of railroading, he considered this tract to be absolutely necessary and indispensible to the operation of the Union Terminal railroad, its present and future necessities, and for that reason advised the purchase of it (Rec. 35-18697); that tract No. 2 is of such a character that it could only be used for railroad tracks, spurs or switches (Rec. 35-18695), and, with industries along the ground, such as factories and the like, which would have to be reached, he thought this purchase No. 2 was advisable for the handling of cars and switching tracks to such industries, etc.; that the tract was not purchased for the purpose of locating factories on it, but for the purpose of placing tracks on it for switching purposes (Rec. 35-18807-8-9).

919 Ward testified that Real Estate Purchase No. 2 stands in the name of the Central Company (Rec. 25-13279), and lies along the right of way of the Union Terminal and adjoins it (Rec. 25-13299).

Real Estate Purchase Number 3.

For map showing Purchase No. 3, see blue print, page 13308 Record 25.

Pickering testified that Purchase No. 3 is the approach into the

Schwarzschild & Sulzberger plant, and the purchase was absolutely necessary to enable the Union Terminal road to obtain a connection with Schwarzschild & Sulzberger; that he built the tracks upon this tract, which tracks required only a part of the whole tract but it was found to be more economical to purchase the entire tract of land, as the balance of it, not so used for the track to said plant, is of such a character that it could only be used for railroad purposes, spurs or switches (Rec. 35-18694-'5); that tract No. 3 is absolutely necessary and indispensable to the Belt railroad, is cut off on both sides by railroad tracks and could not, for that reason, be used for business industries or factories (Rec. 35-18809-'10, and 18697).

Ward testified that Purchase No. 3 stands in the name of the Central Improvement Company (Rec. 25-13279), and adjoins the right of way on the main track of the Belt road, and has a spur into the Schwarzschild and Sulzberger packing house (Rec. 25-13300).

Real Estate Purchase No. 4.

For map showing Purchase No. 6, see blueprint, page 13305-*a*, Record 25.

Pickering testified that he urged the acquisition of Real Estate Purchase No. 4, as being necessary for the Union Terminal railroad because needed for tracks and for economical handling of its business, and it was so situated as to be an ideal location for railroad yards, and for which purpose it was purchased; that he built tracks upon this tract, and, the Santa Fe yards being just south of it, the transfer of cars from the Santa Fe yards could be switched to this before being taken east for distribution; that, in his judgment, this tract is a desirable and necessary property for the Belt road and its allied lines, and it was economical railroading to acquire it (Rec. 35-18695-'6-'7); that at the time of its purchase, it was not intended to build railroad tracks over the entire tract at that time, but
920 it was thought that the growth of the railroad company's business which might reasonably be expected, would be such as to require additional tracks to handle such business in the future a large part coming from the Santa Fe, and that he regarded this tract as necessary for the construction of the tracks, which — would require for switching purposes, and, for that reason, he advised its purchase (Rec. 35-18695, 18810, to 14).

Ward testified that Purchase No. 4 stands in the name of the Central Improvement Company (Rec. 25-13279); that it is at the end of the Union Terminal in Argentine, has a connection with the Santa Fe track, and lies between the main line of the Union Terminal and the spur that connects with the Santa Fe (Rec. 25-13301).

Real Estate Purchase Number 5.

For map showing Purchase No. 5, see blue print, page 13302-*a*, Record 25. This tract of land has been disposed of.

Pickering testified that there was a switch track known as "Commercial" switch, run down through tract No. 5, in the East Bottoms,

to accommodate a paper mill, which was afterwards burned down, or was moved away. (Rec. 35-18813-'14.)

Ward testified that this tract No. 5, has been sold by the Central Improvement Company to the Heim Brewery Company (Rec. 25-13279).

Real Estate Purchase Number 6.

For map showing Purchase No. 6, see blueprint, page 13305-*a*, Record 25.

Pickering testified that he urged that this tract be acquired for the purpose of getting connections with the Union Pacific and Wabash roads, and that he built the connections running down to those roads; that a freight house was put on this land for the use of the Frisco Road under a contract made by the Belt to build such freight house for the Frisco which used the track for loading and unloading its merchandise, and the balance of the ground was used for the approaches to the freight house, and for teams to load, and unload upon this track No. 6; that there was a great volume of business done there, and this tract of land was, at the time it was purchased, and is now, absolutely necessary for the operation of the road (Rec. 35-18697-'99).

Ward testified that the title to tract No. 6, stands in the Central Improvement Company (Rec. 25-13280) and that the main line of the Belt passes through this tract of land, and there is, also,
921 a connecting track from the Belt running on Santa Fe Street to the connection with the Wabash, Santa Fe and Union Pacific roads, and has a freight depot or shed on it (Rec. 25-13304).

Real Estate Purchase Number 7.

Johnson's testimony in Record 19, pages 9616-9625, shows that the title to this tract was taken in the Central Company by error, and that the land was afterwards transferred to the Trust Company.

Ward testified that the title was taken in the name of the Trust Company originally, but that it was afterwards put on the books of the Central Improvement Company by error (Rec. 25-13280).

Real Estate Purchase Numbers 8, 14, 15, 16, and 17.

For map showing purchases Nos. 8, 14, 15, 16, and 17, see blue print, page 13308-*a*, Record 25. Title to all these properties, comprising 57 acres, has passed from Central Improvement Company to J. P. Kerr (Rec. 25-13280-'87), by order of this court, and since this action was instituted.

Pickering testified that the object of having Fairmount Park was to create traffic, for the Belt and the Air Line, and that the park did create a very heavy passenger traffic during the summer months (Rec. 35-18770-1-2-3-4).

These purchases constitute a part of Fairmount Park (Rec. 25-13280-'87, and blue print, page 13308-*a*).

Real Estate Purchase Number 9.

For a map showing purchase No. 9, see blue print, page 13306-a, Record 25.

Pickering testified that, after Real Estate Purchase No. 9, was acquired, some tracks were constructed on it, the spur, marked "YY", running to an elevator, and to another industry on Owen Avenue; that the spur on this tract was built by him, and, at the time he left the railroad, and at the present time, this tract of land was absolutely necessary and indispensable to the railroad for the operation of the road (Rec. 35-18700-'1).

Ward testified that the title to tract No. 9 is in the name of Central Improvement Company (Rec. 25-13280), and that a spur track runs through it (Rec. 25-13306).

Real Estate Purchase Number 10.

For map showing Purchase No. 10, see blue print, page 13306-a, Record 25.

922 Pickering testified that, as to Purchase No. 10, track "YY", running through it is the Missouri Pacific connection with the Belt, also connection with one or two industries located on the track and the main line of the Belt runs through this tract of land; that he built two spurs on the river bottom there on this tract No. 10, because they were necessary, and that portion of Tract No. 10, marked "River' is of such a nature that, if it was filled and brought to a level of the track, it could be used for switches, and this land when filled, would become valuable for switching purposes; that this whole track No. 10 is valuable for additional tracks, and is so located that its ownership is necessary for the economical operation of the Belt and its allied lines, and, it was and is absolutely indispensable in the light of economical railroading, that this tract should have been acquired and held by the Belt for such tracks and spurs as might be needed (Rec. 35-18701-2-3), and that, if that portion of it, lying towards the river, had been filled, he would have built additional tracks on it that this tract No. 10, is of such a nature and size that it can be used to great advantage for storage tracks, side tracks, switches or spurs (Rec. 35-18703-'4).

Ward testified that the title to Purchase No. 10 is in the name of the Central Improvement Company, subject to the reservations of one hundred foot right of way of the Kansas City Suburban Belt (Rec. 25-13280 and 13306), which now runs through it.

Real Estate Purchase Number 11.

For may showing Purchase No. 11, see blue print, page 13307-a, Record 25.

Pickering Testified that he was and is acquainted with the location of the lots, representing Purchase No. 11, and that it was economical railroading to acquire the entire lots, instead of the bare right-of-way, in as much as the Union Terminal railroad runs diagonally across them; that one hundred feet is the usual width of right-of-way, though fifty feet would be the least economical width right-of-way, and, that the property included in this Purchase No.

11, is absolutely necessary for the operation of the Union Terminal Railroad (Rec. 35-18705-'6).

NOTE.—By reference to the scale of measurement on the blue prints, showing Purchase No. 11 (Rec. 25-13307-*a*, *b* and *c*,) it will be seen that, in order to have the usual width of right-of-way of one hundred feet the entire lots covered by Purchase No. 11, would be taken in. The scale is one inch to one hundred and fifty feet, and there is no point on this Purchase No. 11, where a full width
923 right-of-way of one hundred feet would not take in all of the lots, represented by Purchase No. 11, with the possible exception of a very small portion of the lots set out on page 13307-*a*.

Ward testified that the portion of Purchase No. 11, lying south and west, of the Union Terminal right-of-way, of lots 14, 15, 16, 17, and 18, in Loomis' Riverside Addition to Kansas City, Kansas, was sold to August Uihlein, on April 4, 1904, by T. T. Crittenden, receiver of Central Company, for $2,500.00, and the balance of it stands in the name of Central Improvement Company (Rec. 25-13280-'1, 13307).

The description of the portion sold of Tract No. 11 is found in the copy of receiver's deed, made under the order of this Court, and appearing in record 25, pp. 13282-'6, inclusive.

Real Estate Purchase Numbers 12 and 13.

For map showing Purchase Nos. 12 and 13, see blue print page 13305-*a*, Record 25.

Pickering testified that the right of way of the old Consolidated Terminal passes over the south ends of Purchases 12 and 13, which lots run down in the direction of the river and are below the grade of the Consolidated Terminal road, which is 50 feet above the river, though if a double track should be desired or needed, these lots could be used on which to build it (Rec. 35-18707-18709).

NOTE.—The usual width of right-of-way, as heretofore testified to by withess Pickering, will take in practically the full depth of these lots, and the intervenors feel that the situation of tract 12 and 13 is such that they should be entitled to the entire tract of land.

Ward testified that the title to tracks Nos. 12 and 13 stands in the Central Improvement Company (Rec. 25-13287), and that the main line of the Belt runs through them (Rec. 25-13304).

Real Estate Purchase Number 18.

It appears from Johnson's testimony (Rec. 20, pp. 10145 and 10198) that the title to this tract is in the State Realty Company by tax deed.

Ward testified that the principal part of Purchase 18 is in the name of Belt Railroad Company by sheriff's deed by order of court, and that it was never in the name of Central Improvement Company (Rec. 25-13287-'8). The title, not being in the Central Company, the property is not involved in this cause.

Real Estate Purchase Number 19.

924 From Johnson's testimony (Rec. 20, pp. 10198 to 10223, and 10219), it appears that the title to this property was conveyed by the Central Company to the Belt Company, which apparently owns it, and hence, this property is not involved in this cause.

Real Estate Purchase Number 20.

For map showing Purchase No. 20, see blue print, page 13309-*a*, Record 25.

Pickering testified that if a depot should be located on tract No. 20, the whole of it was necessary, the point in question being a very desirable one for a depot, and, that in acquiring ground for depot purposes, there ought to be sufficient ground secured, as it would not be good policy to acquire a small amount when a sufficient amount could be acquired at a low price; that, at the point in question, a large piece of land should be acquired, such as Tract No. 20, which is no more than would be necessary in view of the location of the depot (Rec. 35-18837-'38-'39).

Ward testified that this Purchase No. 20 is in the name of Central Improvement Company (Rec. 25-13288), lies just west of the Belt right-of-way (Rec. 25-13309), and that there is a little depot there, about half way (Rec. 25-13317-'18).

Real Estate Purchase Number 21.

For a map showing Purchase No. 21, see blue print, page 13305-*a*, Record 25.

Pickering testified that a part of the freight house at Second and Wyandotte, and of the terminal tracks, is located upon this tract No. 21, this land being also used for team tracks and for loading and unloading freight; that he was and is acquainted with the terminal facilities at Second and Wyandotte, and that this tract was absolutely necessary and indispensable to the railroad (Rec. 35-18709-'10).

Ward testified that the Central Company has title to an undivided one-half of that tract, and the Belt Company has a deed to the other undivided half of the lot (Rec. 25-13288); and that the freight house, and one of the tracts running into it, are located on this tract, which lies north of the Grand Central Depot, the space around it being used for tracks and terminals at the depot (Rec. 25-13305).

Real Estate Purchase Numbers 22 and 23.

For a map showing Purchases Nos. 22 and 23, see blue print page 13305-*a*, Record 25.

925 Pickering testified that the Main line of the Union Terminal, or the old Consolidated Terminal, runs through Purchases 22 and 23, and there are one or two spur tracks located upon them, which tracks he built because they were necessary team tracks; that a team track is used for loading and unloading freight, and that portion of tracts 22 and 23, not covered by railroad tracks, is used for an approach by the teams to the cars for the purpose of

loading and unloading them, and both said tracts 22 and 23 are absolutely necessary for the railroad purposes of the Belt and allied lines (Rec. 35-18710-'11); and, that said tracts are used by the main line and team tracks located thereon, and also as an approach for the team tracks (Rec. 35-18822).

Ward testified that a part of this tract has been sold, the description of the sold portion being set out in deed (Rec. 25-13290-'2); and that the deed was made on October 26, 1896, by the Central Company, and conveys all that portion of this purchase that lies north of the Belt right-of-way, and the remainder of the two tracts, Nos. 22 and 23, is in the Central Improvement Company (Rec. 25-13293).

Real Estate Purchase Number 24.

For a map showing Purchase No. 24, see blue print, page 13305-*a*, Record 25.

Pickering testified that tract 24 was purchased, in order to get a switch into the yards, a switch being constructed at that point, and that the ground was absolutely necessary to get an approach to the yards, the leads, and that he built the lead tracks, indicated by the white lines shown on this tract 24; and further, that the portion of the tract, not already covered by these leads, could be used for additional leads, and, that the acquisition of tract 24 was absolutely necessary to utilize the yards there (Rec. 25-18711-'12).

By reference to the map, showing Purchase 24, at page 13305-*a*, it will be seen that the same leads and tracks cover it now as testified to by the witness Pickering, being right in the heart of the present Kansas City Southern.

Ward testified that purchase No. 24 stands in the name of the Central Improvement Company (Rec. 25-13293), and, lying adjacent to the right of way of the Belt, has some of the lead tracks into the Santa Fe yards—the freight yards (Rec. 25-13303-'4).

Real Estate Purchase Number 25.

926 For a map showing Purchase No. 25, see blue print, page 13305-*a*, Record 25. This property has been disposed of.

Ward testified that this tract, having been foreclosed by the Trust Company, the title does not stand in the name of the Central Improvement Company (Rec. 25-13293).

Real Estate Purchase Number 26.

From Johnson's testimony (Rec. 20-10499 to 10523), it appears that the title to this property is in the Belt Company; and hence that this tract is not in controversy in this cause.

Real Estate Purchase Number 27.

For a map showing Purchase No. 27, see blue print, page 13305-*a*, Record 25.

Pickering testified that a part of the freight house, located on said purchase or tract No. 6, is built upon tract No. 27, which became necessary in order to build a freight house of sufficient size,

and, that the portion of tract No. 27, not occupied by the freight house, is used for an approach to the freight house and a platform for the approach of teams; and this tract of land was and is absolutely necessary to the operation of the railroad (Rec. 35-18699-18700).

Ward testified that the title to this tract is in Central Improvement Company (Rec. 25-13293).

Real Estate Purchase No. 28.

It appears from the testimony of Johnson (Rec. 20-10600 to 10-610) and of Ward, (Rec. 25-13293), that the title to this property was taken in the name of the Belt Company.

Real Estate Purchase Number 29.

For a map showing Purchase No. 29, see blue print, page 13306-*a*, Record 25.

Pickering testified that Purchase No. 29 is of such a nature that, if filled and brought to a level of the main line of the Belt, it could be used advantageously in connection with No. 10, for building sidings and spurs, and that it would be economical railroading to have the ownership of tracts numbered 29 and 10; that a spur track was built out on purchase No. 29 under his supervision, two tracks were there, and he would have built more if the balance of tract 29 had not been in the river, there being just enough room for the two tracks, and, if that portion of tracks 29 and 10 in the river had been filled, it would have been needed for additional tracks; and he would have built such additional tracks (Rec. 35-18702-'3).

927 Ward testified that the title to this tract stands in the name of Central Improvement Company (Rec. 25-13293); and that the right-of-way of the Belt runs through this tract 29 (Rec. 25-13306).

Real Estate Purchase No. 30.

For a map showing purchase No. 30, see blue print, page 13310-*a*, Record 25.

Title to this tract has passed from Central Improvement Company, by deed executed by T. T. Crittenden, Receiver, on May 16, 1903, for a consideration of $1.00 and payment of taxes and assessments against the property (Rec. 25-13294).

Real Estate Purchases "A" and "B".

As to Purchases "A" and "B," appearing on Ward's Exhibit 5, in Record 25, page 13305-*a*, witness Pickering says that they were absolutely necessary in the operation of the Consolidated Terminal or Belt road, for switch yard purposes down there, and that the plat shows that the ground was covered solidly with tracks, in fact all the tracks that could be placed upon it; and that switch yards are located upon said tracks, which were needed to accommodate such yards in the proper operation of the railroad (Rec. 35, pp. 18819 to 18821, and 18834-'35).

The master, for his findings, adopts the statements of witness

Pickering, in respect to the utility and necessity of said tracts of land for the railroads adjoining or contiguous to which they are situated; in other words, he finds that the titles to the following tracts should be vested by a decree in the Southern Company, to-wit:

Real Estate purchases No. 1, No. 2, No. 3, No. 4, No. 6, No. 9, No. 10, the unsold part of No. 11, Nos. 12 and 13, No. 20, an undivided half of No. 21, Nos. 22 and 23, No. 24, No. 27, No. 29, and real estate purchases "A" and "B".

It has been conclusively shown by the proofs in this cause that each real estate purchase was made at the direction of the railroad company interested in such purchase, and not by the directors of the common interests of all the stockholders alike, as should have been done in case all such stockholders were intended to be interested alike in each and all of the purchases so made.

It has been suggested by counsel for the defendant that there are discrepancies in book-keeping, which do not at all times indicate that the exact amount of money required for each purchase
928 was furnished by the particular road alleged to be interested in such purchase. It would seem that, though such be the case in some rare instances, yet that fact should not militate against the principle involved in this controversy, and that is, that each road interested in these respective tracts of lands indicated what it desired the Central Company to buy, how much was to be paid for the tract bought, and generally arranged the details of such purchase. It is shown by the foregoing facts that the object in placing the titles to these properties in the Central Company was to avoid the effect of the general mortgages executed by these different railroads upon their properties then owned, and thereafter to be acquired. These properties in controversy were acquired subsequently to the execution of these mortgages, and it was unquestionably the effort of these different railroad companies to place the titles to these properties in the Central Company, so as to avoid the operation of the general mortgage upon their properties, and one object in doing so was unquestionably to have these properties so that any surplus, not then actually needed for railroad purposes, could be sold to an advantage, and the money realized therefrom go to the railroad companies, respectively, rather than be held for the satisfaction of the general mortgage indebtedness.

Francis A. Wright, the principal accountant for the defendant, in his cross-examination, admits that whenever money was received by the Central Company, the railroad supplying or paying it was credited accordingly on the Central books, and that such credit was likewise made when moneys were paid for taxes or interest, though sometimes carried to the interest on tax account, and in that way, no stock would be issued for such items of payments (Rec. 54-33028); and further, that when calls were made, from time to time, to pay interest or taxes, they were always made upon the company which, according to the "heading" in the company's ledger, was interested in such property (Rec. 54-33029).

Counsel for defendants have suggested that after the various rail-

road companies acquired the Central Company stock, they bought and sold such stock to each other, and call attention to an instance where the Gulf Company purchased from the Belt Company at par, 40 shares of Central Company stock, and paid the Belt Company $4000.00 in cash therefor (Rec. 53-32280). Mr. Wright, however, explains that transaction in a very satisfactory manner, as appears in his testimony (Rec. 54-33033 to 33035), in which he states in substance, that the Gulf Company had $19,000.00 of stock issued to it, but, by the stock ledger of the Central Company, it is
929 shown that the Gulf had 235 shares of Central stock, or $23,500.00, par value. The Gulf Company received five shares from the Belt, and also 40 shares from the Belt, and the balance of 190 shares was issued direct to the Gulf Company; Five Hundred (500) dollars was originally advanced by the Belt upon Purchase No. 6, and later on, the Gulf refunded the amount to the Belt, thereby simply equalizing between them, and issuing stock to the right party as to this No. 6, purchase (Rec. 54-33034); and as to the 40 shares obtained from the Belt, the $4000.00 was paid by the Gulf to the Belt, (not entered on Central Company book), and thereby simply adjusting this matter as between the Gulf and the Belt Companies (Rec. 54-33033).

In this connection the defendant has cited the case of Humphreys v. McKissick, 140 U. S., 304, in which several railroad companies combined to construct an elevator to be connected with their respective roads, each to contribute an equal amount towards its cost, and each to receive corresponding certificates of stock in a corporation organized to take title to the elevator and to construct it. This arrangement was carried out. The Wabash, one of the railroads, had executed a mortgage on its railroad between certain termini, in which the following language was used: "as said railroad now is, or may be hereafter constructed, maintained, operated, or acquired, together with all the privileges, rights, franchises real estate, right of way, depots, depot grounds, side tracks, water tanks, engines, cars and other appurtenances thereunto belonging." It was contended in that case that the Wabash Company had a separable interest in the elevator property, and that it was within the lien of the Wabash mortgage, but it was finally held by the United States Supreme Court, on an appeal from the Circuit Court, that the interest of each railroad company in the elevator was as a stockholder in the company which constructed the elevator, that neither company had any separable interest in the elevator property, and that neither the stock of the elevator company, nor any interest in the elevator itself, was within the mortgage lien.

In the case of Pardee v. Aldridge, 189 U. S., 429 (also cited by defendant), it was held that where a railroad company mortgages its road, including all appurtenances and appendages of said railroad, then owned, or afterwards to be acquired, or used for and pertaining to the operation of said railroad, a sale under said mortgage does not include land acquired by the Company after the mortgage, for the purpose of re-sale, notwithstanding there was evidence

that the company intended to use the land for main track,
930 sheds, and such switches and side tracks as should be necessary for the operation of the road.

Counsel for defendant have also made further citations of authorities, to the effect that a Congressional or State land grant to aid in the construction of a railroad, does not pass as an appurtenance thereto; R. R. v. Parker, 143 U. S., 43; Wilson v. Beckwith, 117 Mo., 61; nor would land purchased by the railroad for the purpose of cutting wood and timber therefrom, and to be used on the railroads; Dinsmore v. R. R., 12 Wis., 649; nor will town lots or other lands situated outside of the layout of the roadway, and purchased by the Company for re-sale, be included within the mortgage; Calhoun v. R. R., 2 Fipp. U. S., 242; R. R. v. Livermore, 47 Pa. St., 469; Seymour v. R. R., 25 Barb., N. Y., 284; nor will the mortgage include land purchased by a railway company for a general manufactory for cars, and intended for the use and accommodation of the road; Eldredge v. Smith, 34 Vt., 484.

In the judgment of the Master, these authorities do not reach the point involved in the case at bar for the reason that the proofs here show that the specific properties desired by each of the three railroad companies involved, were paid for by and with the moneys of that company, and for its purposes. There were no undivided interests, as in the elevator case, where three roads built the same elevator.

The theory upon which the conclusion of the Master is reached, is based upon the principle that the Central Company was simply used for the purpose of holding the titles to the particular properties belonging to each one of these railroads, and to all intends and purposes, it acted as a trustee, and was not a beneficial owner, the intention being, as already stated, to place these properties beyond the lien of the general railroad mortgage, which covered after acquired properties.

The proofs show that the intervenor acquired, at the foreclosure sales, all the interests of the Gulf, Air Line and Belt Companies, as to all properties legally covered and included in the mortgages foreclosed; hence it must be shown that the real estate purchases in controversy were appurtenant to the railroads, along which they are contiguous, for if they are not appurtenant, and do not come within the class of cases which would otherwise bring these properties within the lien of the general railroad mortgage, then, of course, the titles to such properties did not pass by the foreclosure sales to the intervenor, and they would still be in the Central Company, giving value to its stock.

Under the facts, the Master finds that a certain portion of said
931 properties were and are appurtenant and needful for railroad purposes, and are of such character as would come within the after acquired property clause of the mortgages.

The Belt Company pledged its Central Company stock to the Trust Company, for the purpose of securing its large indebtedness to that company, and, subject to the rights of the intervenor herein the Trust Company has the undoubted right to subject such col-

lateral to the payment of the Belt obligations to it, in so far as it affects the properties which have not been purchased by the intervenor at such foreclosure sales.

It is the opinion of the Master, and he so finds, that the intervenor is entitled to the judgment order and decree of this court, requiring the Central Company and its receiver, to convey to said intervenor those portions of said real estate hereinbefore found to be appurtenant to said railroads, and included within the after acquired property clause of their mortgages.

IX.

Townsite Company Stocks and Lands.

In paragraph 11 of the intervening petition, the intervenor states that in connection with the contract between the Belt Company and the Connecting Company, and as a part of the obligation of the Belt thereunder to procure a right of way for the railroad of the Connecting Company, the Belt Company purchased and acquired certain lands along the line of said railroad in addition to those required for the right of way, and took the title to such other lands in a Missouri corporation called the "Northern Townsite Company", hereinafter referred to as the "Townsite Company"; that in so purchasing land for the right of way, it frequently became necessary, in the economical handling thereof, to purchase larger tracts than required for the purposes of the right of way, out of which the right of way would be carved, and also to purchase lands for townsites, and the title to the latter class was also taken in the name of the Townsite Company; that all of the money used in the purchasing said lands, aggregating $46,463.75, was furnished and provided by the Belt Company, excepting $6720.07, which was furnished by the Trust Company; that the capital stock of the Townsite Company to the extent of 439 shares was issued to the Belt Company to represent the moneys contributed by it in the purchase of said lands, the purchase of which was incidental to the construction of the railroad, and the titles to said lands (excepting such as may be held to have been purchased with moneys furnished by the Trust Company) in equity belonged to the Belt Company and were covered by the after-acquired property clause in the mortgage of the Connecting Company, which has been foreclosed and by virtue of which foreclosure the intervenor
932 became vested with the title to said lands, so owned in equity by the Belt Company, and became entitled to the capital stock so issued by the Townsite Company to the Belt Company; that the Trust Company denies the right of the intervenor to said lands or the capital stock or any part thereof, and claims to hold said capital stock as collateral security to an alleged indebtedness from the Belt Company to the defendant Trust Company; wherefore, the intervenor asks for a decree, requiring the Trust Company to turn over to it all of the capital stock representing moneys advanced by the Belt Company, the cancellation of any and all capital stock of

the Townsite Company issued without consideration, or the conveyance to the Belt Company of all of the properties and assets of the Townsite Company upon repayment to the Trust Company by the intervenor of the said sum of $6720.07, so advanced by it to the Townsite Company.

The Trust Company, in paragraph 11 of its answer to the intervening petition, alleges that the Townsite Company was organized by its own stockholders for the purpose of acquiring and dealing in lands along the line of the railroad of the Connecting Company, but denies that the Belt Company and the Trust Company furnished $46,463.75; but, on the contrary, states that a much smaller amount was furnished, and that the total amount furnished by the Belt Company for the purchase of said lands in which the Townsite Company had, or claimed to have, an interest, was $6286.57, and that the Belt Company received from said townsite Company 439 shares of its capital stock, of the par value of $100.00 each, on account thereof; and that the total amount furnished by the Trust Company for the purchase of said lands in which the Townsite Company had, or claimed to have an interest, was $6720.07, and that it received therefor 489 shares of the capital stock of said Townsite Company; defendant denies that in equity the lands represented by the money furnished by the Belt Company belong to it, or were covered by the after acquired property clause in the Connecting Company mortgage, or that the foreclosure proceeding vested the title to said lands, or any part of them, or of the capital stock, in the intervenor. Defendant alleges that it holds said 439 shares of the capital stock as collateral security to a bona fide indebtedness from the Belt Company to the defendant; wherefore, defendant claims that the intervenor is not entitled in law or equity to any interest or title in said land or stock, and that the same were not covered by the terms of the mortgage.

It is not controverted that it was the duty of the Belt Company, under its contract with the Connecting Company to furnish the right of way for the latter's railroad (Rec. 15, pp. 8174 to
933 8191); that the Townsite Company was organized for the purpose of acquiring this right of way, together with other real estate along the line of the railroad, or that lands, other than the right of way, were so acquired and the title taken in the name of the Townsite Company. There is a dispute, however, as to the amounts of money actually furnished and paid out by the Belt Company or the Trust Company in the purchase of these lands. The Trust Company contended that the Belt Constructing the Connecting Company road advanced $30,062.75 in payment of lands, the title to which was taken in the name of the Townsite Company, and in addition thereto paid the Townsite Company $6288.57, in part payment of Townsite Company stock, that the Trust Company also paid the Townsite Company $6720.07 in part payment of Townsite stock, and, further that the Townsite Company received $10,053.24 from various parties in payment of certain lands that had theretofore been purchased by the Belt Company and the title taken in the name of the Townsite Company, and that these amounts are

the only moneys that the Townsite Company ever received from any source.

Under the issues made by the pleadings, the material inquiry here is simply as to whether or not the Belt Company, in equity, has acquired title to any part of these lands, or to the Townsite Company stock by reason of the foreclosure proceeding under the Connecting Company mortgage, or whether said Townsite Company stock, now held by the Trust Company, shall be retained by it as collateral security for its indebtedness against the Belt Company.

It is not thought necessary to encumber the record with the legal descriptions of all of the properties standing in the name of the Townsite Company at the time of the filing of its answer but a list of such properties will appear in the answer of the Townsite Company and its receivers. In Johnson's testimony (Rec. 16, p. 8443) he gives a list of the properties purchased and describes them.

A copy of the deeds of trust executed by the Belt and Consolidated Companies will be found in Rec. 21, pages 10953 to 10977 and 10978 to 11001; a Decree of Sale in Rec. 48, pages 28775 to 28809; a Commissioner's Report of Sale, Rec. 57, pages 34811 to 34832; an Order and Decree Affirming Sale, Rec. Vol. 57, pages 34833 to 34838; a Commissioners' Deed to the Southern Company, Rec. 48, pages 28877 to 28893.

The circumstances under which the Trust Company acquired said Townsite Company stock have already been stated in connection with the other collateral securities turned over to it and need not be again repeated.

934 In their argument before the Master, counsel for the complainants have endeavored to show that the Southern Company has very much the same rights to those lands held by the Townsite Company, or to its stock, as to those lands held by the Central Company but, in the judgment of the master, the difference is a very material one. There is no proof in this record that any particular parts of the funds furnished by either the Belt Company or the Trust Company went into the purchase of any specific lands; in other words, the funds furnished by the Belt Company were provided by it by reason of its contract with the Connecting Company to build the railroad belonging to that company, and it became its duty to acquire the necessary right of way for that purpose. As an incident to the purchase of such right of way, it was deemed wise to also purchase additional lands out of which to carve the right of way or to [pay] out townsites, etc.

In the discussion of the other collateral turned over to the Trust Company, and *occupying* relatively the same position as this Townsite Company stock, the conclusion has heretofore been reached by the master that such stocks were not included within the after-acquired property clause of the mortgages, and that same conclusion applies to this stock. Inasmuch then as the stock in controversy, was turned over by the Belt to the Trust Company as collateral security and is unaffected by the lien of the Connecting Company mortgage, it necessarily follows that the Trust Company is entitled to retain such stock for the purposes of the pledge.

The Townsite Company and its receivers, by virtue of the sale of a portion of the lands purchased, as shown in Rec. 16 at page 8443, had on hand on June 10, 1905, the sum of $10,560.48.

For the reasons above stated, the master is of the opinion and so finds, that the complainants are not entitled to a decree requiring the Trust Company to turn over said shares of the capital stock of the Townsite Company to them, or to a decree requiring the Townsite Company to make a conveyance to the Belt Company of all its properties and assets upon the payment to the Trust Company of $6720.07, so advanced by it to the Townsite Company.

X.

Amusement Company Stock; Elevator Company Stock.

The Trust Company holds as collateral 25 shares of the Amusement Company stock, and 425 shares of the Elevator Company stock, but in as much as the proofs do not show that the intervenor has any superior rights or equities to these stocks, by
935 reason of its purchases at the foreclosure sales, the Master will not take the time of the Court in making a special report upon these stock items, as in his opinion, they come within the principle that they are not included in the after acquired property clause of the foreclosed mortgages.

XI.

As to Whether the Claim of the Southern to the Properties Pledged by the Belt is Barred by the Statute of Limitations and by Laches.

1. Statute of Limitations.—It is not disputed that all of the properties pledged to the Trust Company to secure the Belt indebtedness to it, were pledged on or prior to July 20, 1899, with the exception of the steel rails, and the open account of $133,000.00 held by the Belt Company against the Gulf Company, for switching charges, and both of which items were also pledged on February 1, 1900.

It is not controverted that the first assertion of a claim by the Southern Company to any of the pledged properties, was when it filed its original intervening petition in this cause, on February 27, 1905, which was more than five years after the pledge of each and all of the different items of the collateral securities.

Sections 4271 and 4273, Revised Statutes of Missouri, 1899, which have been expressly pleaded by the Trust Company in its answer in bar of the claims of the intervenor in respect to said collateral securities, are as follows:

"Sec. 4271. Period of limitation prescribed.—Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued."

"SEC. 4273. Within five years * * * fourth, an action for taking, detaining or injuring any goods or chattels, including actions, for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

The foregoing statutes of limitations are controlling in this cause.

Miles v. Vivian, 79 Fed. 848-852.
Harpending v. Dutch Church, 16 Peters, 455.

936 The cause of action, if any, of the intervenor, is either (1) "for the recovery of specific personal property", or the taking or detaining thereof, or (2) for an "injury to the rights of another", and, in so far as such cause of action may be affected by said statutes, it is immaterial whether the action, attempted to be asserted by the intervenor, be regarded as the one or the other.

On the theory that the intervenor seeks relief for "injury to the rights" of the Southern Company, then the gist of its cause of action must be on account of the alleged breach by the Trust Company of its duty to the bondholders, caused by its receiving, while trustee in the Belt mortgage, the properties pledged as above stated.

On the assumption that the taking of such securities constituted a breach of duty on the part of the Trust Company, it was, as hereinafter stated, in the 13th subdivision of this report, the breach of an implied duty, rather than of an express duty, and hence is covered by said five year statute of limitations, and the principles, announced in Frismuth v. Farmers Loan & Trust Co., 95 Fed., 7, and 107 Fed. 169, would be entirely applicable to the facts of the case at bar.

It would also follow, in case the Trust Company was guilty of any such breach of duty in so receiving from the Belt Company the properties pledged, such breach of duty was an accomplished fact the very moment that each property was pledged, and it is not disputed that all the pledges of said properties were made more than five years before any claim was asserted by the Southern.

It is true that the Southern Company was not incorporated until March 19, 1900, and, as a corporate entity, could not have maintained an action before that date, but such fact does not materially affect the operation of the statute of limitations for the reason that as claimed by the Trust Company, all the rights acquired by the Southern in the premises were of a derivitave nature, that is, were derived from and acquired by the Southern Company as purchaser at the foreclosure sale; in other words, the Southern was subrogated to the same right and lien which had belonged to the bondholders, and not a new right, and hence, it is apparent, that if the statute of limitations has run against the bondholders, it has likewise run

against the Southern Company, which had no superior right to the bondholders.

In this connection, it may be suggested that the Southern is chargeable with all the acts and omissions of the reorganiza-
937 tion Committee, to which it succeeded, and it is not disputed that this Committee had, in December, 1899, acquired substantially all of the bonds of the Belt Company for reorganization purposes, and was from that date, and until March 19, 1900, when said bonds were turned over to the Southern Company, practically the sole bondholder of the Belt Company.

The claim of the intervenor as to the pledged properties is not covered by the provision in respect to "an action for relief on the ground of fraud", so as to permit an action to be brought at any time within ten years after the discovery of the facts, constituting the fraud, because, first, the gist of the action is the breach of duty on the part of the Trust Company in receiving the properties in pledge, and whether done fraudulently or otherwise, would be immaterial (Frismuth v. Trust Co., 107 Fed. 169); and, second, because there are no sufficient averments as to such fraud, and of what it consisted, nor is there a sufficient showing that any diligence was used to discover the alleged fraud at any earlier date, nor that any means were used by the Trust Company to prevent the discovery of such fraud.

Wood v. Carpenter, 101 U. S., 135;
Bank v. Carpenter, 101 U. S., 567;
Bent v. Priest, 86 Mo., 475.

The mere fact that the Trust Company was trustee in the Belt mortgage does not justify the intervenor in invoking the rule to the effect that the trustee cannot claim the benefit of the statute of limitations to shield himself from the consequences of his wrongful acts, for the reason that such rule only applies to cases of express trust, and not to cases where the breach, if any, has been of implied duties by the trustee.

Frismuth v. Trust Co., 107 Fed., 169;
Landis v. Saxton, 105 Mo., 486.

The effect of said statutes of limitations, as affecting the duties and liabilities of the Trust Company, as trustee, in the mortgages in controversy, is more fully considered in the 13th subdivision of this report on the Southern's intervention, and to which reference is here made.

For the foregoing reason, the Master is of the opinion that respondent's plea of the statute of limitations is well taken and should prevail, as against the claim of intervenor, in respect to the properties pledged as collateral securities for the Belt obligations to the Trust Company, except as next hereinafter stated.

938 The conclusions reached in this report by the Master, as to the application of the statute of limitations, and the principles of laches, to said pledged properties, are not, however, to be understood as, in any wise, affecting or changing any specific find-

ings or conclusions by the Master, in respect to any superior rights or equities found by him to exist in favor of either the intervenor or respondent.

2. Laches.—The Trust Company contends that the Southern Company and the Belt bondholders have been guilty of such laches as to estop them from asserting title to the pledged properties, because of certain equitable considerations, which are opposed to the granting of the relief sought by the intervenor; in other words, it has been insisted that the intervenor's conduct has been such as to have induced the respondent to adopt a course of action, which it would not otherwise have done, and that it would be inequitable to now permit the intervenor to obtain an advantage thereby over the respondent.

The point is made that the reorganization Committee and its successor, the Southern Company, were in position prior to the foreclosure sale of the Belt railroad property, to have asserted the claim, now asserted by the intervenor, to the collateral securities in controversy, and that, in justice to the rights of the respondent, it should have been done, so that the latter could have pursued such other remedies, as were then open to it, in respect to the collection or protection of the Belt indebtedness owing to it.

The intervenor maintained silence as to its claims upon the pledged securities until many years after the appointment of the Belt receivers, and the sale of its properties by foreclosure proceedings, and, also, after it had received the active and influential cooperation of the Trust Company in putting through the reorganization plan, in its entirety, and, by so doing, the intervenor received all the advantages and benefits of its own conduct and silence in the premises, without giving the least intimation that it claimed any interest in the properties pledged for the large Belt indebtedness to the Trust Company.

Counsel for intervenor answer the foregoing suggestions by stating that, if the properties pledged were covered by the mortgage lien, the respondent had constructive notice thereof, and, was otherwise familiar with all the transactions of the Belt and allied companies. Through the efforts of the reorganization Committee, assisted by the Trust Company and others, sufficient Belt bonds and stocks had been deposited with the Committee in December
939 1899, to make the plan operative, and, in the following March the Southern Company was organized.

On April 2, 1900, the mortgage executed by the Southern Company shows that, in exchange for its own securities, it had become the owner, for reorganization purposes, of 897 Belt bonds, out of a total of 1000 bonds, and, also of 46322 shares of Belt capital stock, out of a total of 47500 of such shares (Rec. Vol. 57-35196), so that, for all practical purposes, the Southern was the owner of substantially all of the Belt bonds and stocks, and, through such ownership, had placed its agents and nominees in charge of the properties and books of the Belt Company, and, from which books and corporate records, it could easily and readily be ascertained that the properties in question had been pledged to the Trust Company.

On September 6, 1900, nearly six months after the incorporation of the Southern Company, the receivers were appointed for the Belt Company, at the instance of the Southern, and through the Provident Company, as trustee, which filed the foreclosure bill; the foreclosure decree being made on November 6, 1901, and the sale on December 31, 1901, to the Southern Company. During this period, no claim was asserted by the Southern Company, nor until February 27, 1905, when the intervening petition was filed in this cause.

In the meantime, all the properties of the Belt Company, which had pledged the securities in dispute to the respondent, had been foreclosed, or otherwise disposed of, long before the assertion of intervenor's claim, so that nothing was left, out of which the respondent could have possibly protected its Belt indebtedness, if it lost the collateral securities pledged therefor.

Under all the facts and circumstances, in respect to the dealings of the reorganization Committee and Southern Company, with the Trust Company, in regard to the reorganization scheme, and the various interests therein involved, it would seem that the laches of the intervenor has operated to the prejudice and injustice of the respondent, which, under different circumstances, might have taken steps to protect its interests, either before or at the time of the Belt foreclosure sale.

In this connection, it may be suggested that, by the 10th article of the Belt mortgage, the majority of the bondholders had the right to remove the trustee by writing, signed by them, and which they did in fact, by removing the Trust Company, as trustee, before the filing of the foreclosure bill; and, hence, the fact that the Trust
940 Company was a trustee in the Belt mortgage, was no hindrance to the assertion and prosecution of the intervenor's claim, in as much as the intervenor was really the sole bondholder, and could remove the trustee, if it so desired. It can hardly be contended that the Committee and the Southern were ignorant of the pledges of the disputed properties to the Trust Company, for the reason that, in the minutes of the Committee, on January 17, 1900, it appears that the Committee was negotiating with the Trust Company for the release by it of the Union Company stock held as collateral (Rec. Vol. 41-22208), and which negotiation was closed on June 6, 1900 (Vol. 41-22304).

In the opinion of the Master, however, the laches question is not especially important, as respecting the claim of the intervenor to the properties in controversy, if he is correct in the conclusions heretofore stated, to the effect, first, that said properties are not covered by the terms of the Belt mortgage, and, second, that, even if they were included therein, the claim of the intervenor therefor was barred by the statute of limitations of this State, when the intervening petition, containing such claim, was filed in this cause.

XII.

As to the Liability of the Southern Company for the Floating Debt of the Belt Company.

The Trust Company contends that, in carrying out the provisions of the reorganization plan, under which the Southern Company was organized, the latter became liable thereunder for the Belt indebtedness to the Trust Company, and, for that reason, the Southern Company is not entitled to the possession of the properties pledged as collateral security until it pays the Trust Company the full amount of the indebtedness secured thereby.

The claim of the Trust Company, in respect to the Southern Company's liability for the general and unsecured indebtedness of the Belt Company is fully stated in paragraphs 15 to 20, both inclusive, of the Trust Company's answer to the intervening petition, and it is based substantially upon the following allegations:

(*a*) That, on or about June 14, 1899, William F. Harrity, B. M. Baker, August Heckscher, Edward Wagner, Samuel R. Shipley, Silas W. Pettit, and Winthrop Smith, calling themselves a Reorganization Committee, entered into an agreement for the reorganization of the Gulf, Belt, and Port Arthur Channel & Dock Companies, and their so-called subsidiary or auxiliary companies, including the Belt, Union, Consolidated and, Air Line Companies, and, also
941 formed and promulgated a plan or reorganization, dated November 7, 1899, by which they invited all the holders of the bonds and stocks of said companies to deposit the same with said Committee, which then proposed to organize a new corporation, to be known as the Southern Company, and which should acquire all the properties of the above named companies, and issue, in payment therefor, the bonds and stocks of the new corporation on the terms and in the manner provided in the reorganization plan.

(*b*) That, after the promulgation of the plan of November 7, 1899, the requisite number and amount of bonds and stocks were deposited with the Committee, which, on December 20, 1899, declared the plan operative, and thereafter caused the incorporation of the Southern Company to acquire the properties of the aforesaid companies pursuant to said plan, and, thereupon, practically all the stocks and bonds of the old companies, including the Belt, were exchanged for those of the new company, as set out in the reorganization plan, and, subsequently, the Southern Company caused the election of officers and directors of the Belt Company who managed and operated it "in the interests of, and as a component part of, the railroad system," of the Southern Company.

(*c*) That the organization of the Southern Company, the exchange of its stocks and bonds for the stocks and bonds of the Belt Company, and the other steps taken in pursuance of the said reorganization plan, effected a consolidation of the Southern Company and the Belt Company under the Statutes of the State of Missouri or a consolidation de facto, and that, by reason thereof, the Southern Company

thereby became and is liable for all debts incurred by said Belt Company, including its debts to respondent Trust Company, and, further, that the Southern Company is estopped to deny such consolidation or to claim that the same was not legally complete.

(*d*) That the reorganization Committee, when working out the plan of reorganization, expressly represented to, and promised, the Trust Company that, in consideration of the debt due and owing from the Belt Company to the respondent, the Committee would provide for the payment of, or would pay, or cause to be paid, all the debts and obligations due to the respondent from all the corporations, including the Belt Company, proposed to be consolidated and included in said reorganization plan, and, also, that the new and reorganized company would pay such debts; that certain members
942 of said Committee, constituting a purchasing committee, purchased, at the Gulf foreclosure sale, all of the assets and properties of the Gulf Company, and, thereafter, assigned their bid therefor to the Southern Company, which entered into a contract with said Committee, wherein and whereby it assumed and agreed to complete and carry out all the obligations undertaken and assumed by said Committee, and, by reason of which, the Southern Company became and is liable to respondent for all the Belt obligations to it.

(*e*) That, at the time of the foreclosure and sale of the Belt Company's assets, the Southern Company, under the reorganization plan, became and was the owner and holder of nearly all of the Belt bonds and stocks, which enabled it to procure such foreclosure, and, as a result of the reorganization plan of exchange of stocks, the Belt stockholders became the owners of a large amount of Southern Company stock, which was then, and is now, of much greater market value than the total claims of the Trust Company against the Belt Company, and, hence, it is alleged by the respondent that said "scheme legally implied the payment by said Southern Company of all the claims of the respondent against the Belt Company."

(*f*) That, if by the reorganization scheme and exchange of securities, it was intended by said reorganization Committee and the Southern Company to deprive respondent of its right to collect its claim from the Belt Company, while valuable interests were being secured by the operation of the reorganization plan, to the Belt stockholders, then that the foreclosure of the Belt properties, under such circumstances, would be a fraudulent scheme and should be held void as to respondent, and the property thereby acquired by the Southern Company should be held subject, and be subjected, to the payment of the debts and claims of the respondent, "even if it should be held by the Court that a legal consolidation, or actual or de-facto consolidation, was not brought about as hereinabove alleged, whereby the Southern Company became legally obligated to pay the claims of this respondent against said Belt Company."

Analysis of the Reorganization Plan and Agreement.

1. The liability, if anything, of the Southern Company, for the floating debt of the Belt Company, is created by the reorganization

plan and agreement, as shown in the record, and specific references are made herein to such parts thereof as are deemed material to the issues in this cause. The Trust Company was a large holder of the securities of the Gulf and Belt Companies, which were sur-
943 rendered by it under said plan and agreement, and in lieu thereof, it received and retained certain securities of the Southern Company. (Rec. Vol. pp. 29973-29974).

It is claimed by the Southern Company that the Trust Company was a party to the reorganization plan and agreement, and received the benefits thereof, and agreed to become bound by its terms, and, hence, cannot now claim adversely to its provisions. The effect of this contention will be hereafter determined.

The reorganization Committee was composed of the said Harrity, Baker, Hecksher, Shipley, Pettit, Smith, Wagner, Sielcken and Max Pam and the Trust Company was designated by the Committee as one of the depositaries, named in the Modified Plan and Agreement for the reorganization of the Gulf Company, and its terminal companies. This plan is dated Philadelphia, November 7, 1899, and was addressed "to the holders of the bonds and stocks of the Gulf, Belt, Union, Consolidated, Air Line and Port Arthur Channel & Dock, Companies", (Rec. Vol. 13-6762 to 6776), and, the reorganization agreement between the Committee and the holders of the mortgage bonds, stocks, and evidences of indebtedness therein mentioned, who shall become parties to it, and therein called depositors, is dated June 14, 1899, (Vol. 13-6776); and it is specially recited in said plan that it shall form a part of the "agreement with the same force and effect" as though therein incorporated, and "the two are to be read together as forming parts of one and the same instrument."

It is contended by the Southern Company that said reorganization plan and agreement were both made solely for the benefit of the bondholders and stockholders of the companies involved therein, and not for the benefit of the other creditors of said companies.

After stating that the New York Committee had abandoned the plan theretofore formulated by it, and had approved and adopted the plan of the Philadelphia Committee, published on August 17, 1899, the last named Committee declared in said modified plan that it had formulated and adopted said plan as the basis of the reorganization of the railroad system composed of the Gulf and its associated companies, and that it "had for its ultimate purpose [*and*] unification of the main line and terminals into one ownership and under one management", and that such object was sought to be accomplished "by having the Gulf Company, when reorganized, acquire the capital stock of the other two companies, and, having thus acquired the control and possession, to thereafter adjust the bonded indebtedness standing against the properties of the Belt Com-
944 pany and the Port Arthur Channel & Dock Company, by retiring the present bonds and issuing in lieu thereof new 3½% bonds to be based upon and restricted to the net earnings of said prospective properties as they might appear on future operations."

The plan adopted for such a reorganization was drawn upon the following basis:

"The property of the existing Kansas City, Pittsburg & Gulf Railroad Company will be sold, and it is expected and intended that the same will be purchased by the Committee, and if so, a successor company will be organized, to which the same property will be conveyed, together with the stocks and bonds of the Port Arthur Channel & Dock Company deposited thereunder, and those of the Kansas City Suburban Belt Railroad Company and its constituent companies deposited hereunder, if sufficient are so deposited to warrant the retention of that property by the new company, and said new company will issue in payment therefor the new securities hereinafter mentioned, and which new securities will be disposed of as hereinafter stated.

By this means, therefore, the following results will be attained:

(*a*) That the new company, which will own the main line and property of the present Kansas City, Pittsburg & Gulf Railroad Company, will also own the bonds and capital stock of both the Kansas City Suburban Belt Railroad Company, the bonds of its constituent companies, and the bonds and capital stock of the Port Arthur Channel & Dock Company, and thereby all three properties will be under one corporate ownership, management and control. Said bonds and stocks so purchased will be pledged under the new first mortgage to be created.

(*b*) The payment of the floating debt and the existing Car Trust obligations.

(*c*) Adequate provision for working capital for future requirements.

(*d*) The reduction of the fixed annual charges to less than the minimum earnings under probable conditions.

(*e*) Such control of the reorganized system, until the earnings of the property shall have placed it in a satisfactory financial position, as shall render additionally secure the new first mortgage.

(*f*) Or, in the event that either or both of the said terminal properties are not so acquired, then, (under arrangements already provided) the requisite terminal facilities at Kansas City and on the Gulf will be otherwise secured—in which event the amount of the new securities, to be issued, will, of course, be correspondingly reduced.

It is intended, as soon as practicable, that the new company acquire the properties of the terminal companies in fee, and bring them directly under the lien of the mortgage." (Rec. Vol. 13, pp. 6764-6765).

In the statement of "Conditions of Participation" in the benefits of the modified reorganization plan, there is a provision requiring the payment of $10 per share by each one of the depositing stockholders of the Gulf Company; and it is also provided therein "that all the stocks and bonds deposited under this plan are to remain in the hands of the Committee as existing obligations and securities of the respective companies issuing the same, to be hereafter disposed of in such manner as may be deemed expedient by said Committee for the reorganized or new company, or cancelled, if deemed proper by it." (Rec. Vol. 13-6767).

2. It is also stated that, as a consideration for the conveyance or delivery of the property and securities of the old companies to the reorganized or new company, it is contemplated that said reorganized or new company shall issue the following securities:

"First. First mortgage, 50 year, 3 per cent gold bonds, interest payable semi-annually, for $30,000,000.00.

These bonds to be secured by a first mortgage upon all property of the Kansas City, Pittsburg & Gulf Railroad Company and its branches, extensions, terminals, equipment and other property embraced in the reorganization as carried out, and also upon the stocks, bonds or other securities of the Kansas City Suburban Belt Railroad Company, and its constituent companies, and of the Port Arthur Channel & Dock Company, of and to the extent acquired as mentioned. These bonds are to be appropriated approximately as follows:

To provide for the conversion of the existing First Mortgage Bonds of the Kansas City, Pittsburg & Gulf Railroad Company at the rate of $750 of the new First Mortgage Bonds, for $1000 of the existing First Mortgage Bonds	$18,000,000.00
To provide for the conversion of the existing First Mortgage 6 per cent — of the Kansas City Suburban Railroad Company at 133 per cent.	1,330,000.00
946 To provide for the conversion of the existing First Mortgage 5 per cent Bonds of the Union Terminal Railroad Company at 100 per cent	2,000,000.00
To provide for the conversion of the existing First Mortgage 5 per cent Bonds of the Consolidated Terminal Railroad Company at 100 per cent	750,000.00
To provide for the conversion of the existing First Mortgage 5 per cent Bonds of the Kansas City & Independence Air Line Railroad Company at 100 per cent	300,000.00
To provide for the conversion of the existing First Mortgage 5 per cent Bonds of Port Arthur Channel & Dock Company at 50 per cent	817,500.00
To be sold for the necessary cash requirements of the new company	3,000,000.00
To be reserved for the future requirements of the New Company	3,802,500.00
Total authorized issue	$30,000,000.00

Second. Preferred stock not to exceed $21,000,00, in shares of $100 each, entitled to non-cumulative dividends to the extent of but limited to 4 per cent per annum out of the surplus net earnings in each fiscal year, before any dividends for such year shall be paid on the common stock.

Stock trust certificates will be issued for said preferred stock and will be appropriated approximately as follows:

To provide for the conversion of the existing First Mortgage Bonds of the Kansas City, Pittsburg & Gulf Railroad Company at the rate of five shares (i. e., $500) of said preferred stock for $1,000 existing first mortgage bonds	$12,000,000.00
To those of the holders of the capital stock of the Kansas City, Pittsburg & Gulf Railroad Company who may pay the sum of $10.00 with each share deposited by them as condition for participation in the new company or to the syndicate who may pay the same	2,400,000.00
To provide for the conversion of the First Mortgage Bonds of the Kansas City Suburban Belt 947 Railroad Company and its constituent companies at the rate of two and one half shares (i. e., $250) of said preferred stock for each $1,000 of existing First Mortgage bonds, viz:	
Kansas City Suburban Belt Railroad Company	250,000.00
Consolidated Terminal Railroad Company	500,000.00
Consolidated Terminal Railroad Company	187,500.00
Kansas City & Independence Air Line Railroad Company	75,000.00
To provide for the acquisition of the capital stock of the Kansas City Suburban Belt Railroad Company at the rate of one share of new preferred stock for each four shares of said Belt Company stock	1,187,500.00
To provide for the conversion of the First Mort- Bonds of the Port Arthur Channel & Dock Company at the rate of five shares (i. e., $500) of said preferred stock for each $1,000 existing First Mortgage Bonds	817,500.00
To be sold for the necessary cash requirements of the new company	3,000,000.00
Balance	582,500.00
Total authorized issue	$21,000,000.00

Third. Common stock to the amount of not exceeding $30,000,000, in shares of $100 each.

Stock trust certificates will be issued for said common stock and will be appropriated approximately as follows:

To those of the holders of the capital stock of the Kansas City, Pittsburg & Gulf Railroad Company, who may pay the sum of $10.00 with each share deposited by them as a condition for the participation in the new company, or to the syndicate who may pay the same	$24,000,000.00

To provide for the acquisition of the capital stock of Kansas City Suburban Belt Railroad Company at the rate of $75 (i. e., 75 per cent) for each share of stock of the Suburban Belt Railroad Company	3,562,500.00
948 To provide for the acquisition of the Bonds of the Port Arthur Channel & Dock Company at the rate of five shares (i. e., $500) of said common stock for each $1,000 of Existing First Mortgage Bonds	817,500.00
To provide for the acquisition of the capital stock of the Port Arthur Channel & Dock Company at the rate of 75 per cent (i. e., $75 per share) for each share of said stock	1,181,250.00
Balance	438,750.00
Total authorized issue	$30,000,000.00

3. The statement of the existing securities of the properties included in the reorganization, as appears in Rec. Vol. 13, pp. 6771 to 6772, is as follows:

"Bonds: Kansas City, Pittsburg & Gulf Railroad Company 5's issued	$23,000,000	
Due on Lake Charles and other tracks	1,000,000	
		$24,000,000
Kansas City Suburban 6's		1,000,000
Union Terminal 5's		2,000,000
Consolidated Terminal's 5's		750,000
Kansas City & Independence Air Line 5's		300,000
Port Arthur Channel & Dock Company 5's		1,635,000
		$29,685.000
Shares: Kansas City, Pittsburg & Gulf Railroad	23,000,000	
Due for construction but not yet issued	1,000,000	
		$24,000,000
Kansas City Suburban Belt Company		4,750,000
Port Arthur Channel & Dock Company		1,575,000
		$30,352,000

Under this plan the holders of the present securities of the Kansas City, Pittsburg & Gulf Railroad and the two Terminal Companies who shall deposit the same under the plan and reorganization agreement will receive as follows:

949 Kansas City, Pittsburg & Gulf Railroad Company:

For present bonds, in addition to the payment in cash of the defaulted coupon of April 1st, 1899.

In New First Mortgage 3 per cent Bonds (75 per cent)	750
In new preferred stock (50 per cent)	500
	$1,250

For present stock: One share of new common stock for each share of present stock to those who may deposit hereunder and pay the sum of $10.00 with each share so deposited, and for which payments shares of new preferred stock will also be issued at par.

Kansas City Suburban Belt Railroad Company:

For present bonds.	In new First Mortgage 3 per cent bonds (133 per cent)	$1,330
	In new Preferred stock (25 per cent)	250
		$1,580

For present stock. One-quarter of a share of new preferred stock and three-quarters of a share of new common stock of the company as reorganized for each share of the present stock to those who may deposit hereunder.

Union Terminal Company:

For present bonds.	In New First Mortgage 3 per cent bonds (100) per cent)	$1,000
	In new preferred stock (25 per cent)	250
		$1,250

Consolidated Terminal Railroad Company:

For present bonds.	In new First Mortgage 3 per cent bonds (100 per cent)	$1,000
	In new preferred stock (25 per cent)	250
		$1,250

Kansas City & Independence Air Line Railroad Company:

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For present bonds.	In new First Mortgage 3 per cent bonds (100 per cent)	$1,000
	In new Preferred Stock (25 per cent)	250
		$1,250

Port Arthur Channel & Dock Company:

For present bonds.	In new First Mortgage 3 per cent bonds (50 per cent)	500
	In new Preferred Stock (50 per cent)	500
	In new Common Stock (50 per cent)	500
		$1,500

For present stock. Three-quarters of one share of new common stock of the company as reorganized for each share of the present stock to those who may deposit hereunder."

From the last statement, it will be seen that, for each share of Belt stock deposited with the Committee, the depositor was entitled to receive one-fourth share of the new preferred stock and three-fourths of a share of the new common stock of the reorganized company. In brief, it appears that the Gulf bondholders were to get for their bonds seventy-five cents on the dollar in new bonds, and fifty cents in preferred stock; and that Belt bondholders were to get thirty-three cents premium in new bonds, and twenty-five cents in preferred stock.

4. From the foregoing specific appropriations of the stocks and bonds issued in exchange for, or conversion of, those of the old companies, it appears that bonds, of the par value of $3,000,000.00, and preferred stock, of the par value of $3,000,000.00 were set apart to be sold for the necessary cash requirements of the new company and, that bonds, of the par value of $3,802,500.00, were reserved for the future requirements of the new company; and, further, that there was a balance of unappropriated preferred stock of the par value of $582,500.00 and of $438,750.00, par value, of common stock.

The "future requirements of the company", for which bonds of the par value of $3,802,500.00 are reserved, included such extensions, betterments, and new equipments as might be required by the business of the company (Vol. 13-6774).

951 The proceeds of the securities to be devoted to the cash requirements of the company, together with payments of $10 per share by participating Gulf shareholders, are as follows:

By sale of $3,000,000 first mortgage 3 per cent bonds and $3,000,000 preferred stock	$3,500,000.00
From payments of $10 per share by participating stockholders or the syndicate	2,400,000.00
Total	$5,900,000.00

To be applied as follows:

For payment of car trusts and interests adjusted to date of payment, say	1,900,000.00
For payment of floating debts	475,000.00

For payment of receiver's certificates.....	800,000.00
For payment first mortgage coupons, due April 1, 1899,	575,000.00
Working capital and expenses of reorganization.....	2,150,000.00
Total	$5,900,000.00

(Rec. Vol. 13-6774).

The reorganization plan certainly then provided for the possible payment of floating debts to the extent of, at least, $475,000.00 and, out of the proceeds to be derived from the disposition of the securities of the Southern Company, and from the assessment on the Gulf participating stockholders. It is shown in the record that more than one million dollars was paid out on account of floating debts, the particulars of which are hereinafter stated.

The reorganization plan clearly shows that the new securities, to be issued by the new company, "will be disposed of as hereafter stated", and that "by this means, that is, such disposition of the new securities, the following results will be obtained" * * * that is, "the payment of the floating debt and the existing car trust obligations," thereby clearly meaning that, from the proceeds of the disposition of the new securities, the floating debt and existing car trust obligations were to be paid.

It is also provided in said plan, (Vol. 13-6773), that if the "holders of the bonds and stocks of the companies forming the Kansas City Belt Line system elect not to join in the proposed reorganization", then that "the new company will secure complete terminal facilities at Kansas City, under arrangements already perfected,
reaching the same industries by railroad connections and
952 communications fully equal to those it now has by means of the said Belt Line."

5. Counsel for both intervenor and respondent have called attention to certain parts of the reorganization agreement of June 14, 1899, and which are herein copied as being somewhat explanatory of the powers, duties and objects of the reorganization Committee.

Among the reasons assigned in the June 14, 1899, agreement for the then proposed reorganization plan, are the following:

(*a*) That the properties of the Gulf, Belt and Port Arthur Channel & Dock, Companies, formed a through and continuous line of communication from Kansas City to the Gulf of Mexico;

(*b*) That the Gulf had gone into a receivership, and that the other two might likewise become involved, and

(*c*) That it was "necessary for the protection of the interest of the holders of the stocks and bonds" of said companies that they should be "by means of consolidation or stock control, or in some way, united and legally placed under the practical management, direction and control of one corporate organization, with, if possible, but one class of encumbrance secured upon the whole system, and one set of shareholders." (Vol. 13-6776).

To become parties to said contract, the bondholders and stockholders were required to transfer and deposit their bonds and stocks

with the Committee, taking therefor certificates of deposit which could only be transferred subject to the contract. The depositors were also obligated to execute any of the papers necessary "in order to vest in them (the Committee) and to enable them to transfer the complete and absolute title to such stocks and bonds".

It is recited in the reorganization agreement that "the above and foregoing plan forms part of the annexed reorganization agreement with the same force and effect as though therein set forth at length and the two are to be read together as forming parts of one and the same instrument", and, in said agreement, it is further stated that the aforesaid plan and reorganization agreement "shall be read as parts of one and the same instrument, but no estimate, statement, explanation or suggestion contained in said plan or this agreement or in any circular issued by the Depositary or by the Committee is intended or is to be accepted as representation, warranty or condition under this agreement". (Rec. Vol. 13-6777).

The seventh paragraph of the agreement is as follows:

953 "The committee shall keep a record of its acts and proceedings. All notices of meetings of the committee shall be in writing, mailed or delivered to the post office address of each member of the committee as filed with the secretary thereof. Any member of the committee, by written appointment, may empower any other member of the committee to vote and act as his proxy with all the powers of the member making the appointment; and a majority of the members of the committee shall constitute a quorum; but no action shall be taken except with the consent of the majority of the whole committee, given in person or by proxy at a meeting, or in writing without a meeting, and such action of the majority shall constitute the action of the committee and shall have the same effect as if assented to by the whole committee. Any member of the committee may resign by giving notice in writing to the chairman or secretary thereof, and the committee may settle any account or transaction with such member and give a full release and discharge upon any such resignation, and any vacancy in the committee may be filed at any time by a designation in writing, signed by a majority of the remaining members, and the committee may in like manner add to its number of additional member or members."

The 12th paragraph of the June reorganization contract is as follows:

"The enumeration of specific powers hereby conferred shall not be construed to limit or to restrict general powers herein conferred or intended so to [*bo*]. It is hereby distinctly declared that it is intended to confer on the Committee, in respect to all securities deposited hereunder, and in all other respects, any and all powers which the Committee may deem necessary or expedient towards carrying out or promoting the purposes of said plan and this agreement, and the methods to be adopted for carrying out the reorganization consolidation or unification of the properties herein mentioned shall be entirely discretionary with the Committee.

Bonds and other obligations deposited under this agreement and said plan, and all securities purchased or otherwise acquired under this agreement, shall not be deemed satisfied, released or discharged by any delivery of new securities, but shall remain in full force and effect for all purposes * * *. No right is conferred, nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder), is created by this agreement or the plan, or is assumed here-
954 under, or by or for any new company in favor of any bondholder or any other creditor or [*or*] any holder of any claims whatsoever against the said companies, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupon stocks, securities, lease, guaranty or otherwise) with respect to any security deposited under this agreement or any moneys paid to or received by the Committee or by the depositor hereunder, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing". (Rec. Vol. 13-6786-6787).

In the 13th paragraph of said agreement is the following:

"Any obligation in the nature of floating debt or otherwise against any company or property embraced in said plan, either as proposed or carried out, or any securities held as collateral for any such obligation, may be acquired or extinguished or held by the Committee at such time, in such manner, and upon such terms as they may deem proper for the purposes of carrying out this agreement, and nothing in said plan and this agreement contained is intended to or shall constitute any liability or trust in favor or in respect of any such obliga- [*to*] acquired or extinguished or held by the Committee'. (Vol. 13-6787).

The reorganization agreement imposed a duty upon the Committee in the following terms:

"It shall be the special duty of said Committee, which they are hereby fully authorized and empowered to perform, to prepare and adopt a plan for the reorganization of the Kansas City, Pittsburg & Gulf Railroad Company, and its property, and also, if necessary, for the reorganization of the Kansas City Suburban Belt Railroad Company, and the Port Arthur Channel & Dock Company and their properties, and for the consolidation of said corporations, if such consolidation can be lawfully made and is found to be practicable, either with or without foreclosure of either or all of said properties, or by means of the acquisition of the stock or other securities, of either or all of said corporations, or in any other manner that may be deemed by said Committee to be most practicable and feasible; and said Committee are authorized to negotiate with bondholders, creditors and stockholders of said companies, or either or all of them, in devising and carrying out said plan, &c." (Vol. 13, p. 6779).

The contract of June 14, 1899, confers upon the Committee the powers possessed by stockholders and bondholders:

955 "The depositors hereby irrevocably request the Committee to endeavor to carry into practical operation any plan so adopted, and this agreement in its entirety, or in part, to such extent and in such manner as the Committee shall deem to be for the best interests of the depositors in the consolidation or acquisition and unification of the properties finally embraced in the readjustment * * * to purchase at any time, and at such prices as they shall deem proper, or to pay, compromise, or settle with the holders of coupon notes or other indebtedness, or car trusts or other obligations of any of the said companies * * * and to apply for that purpose any money received from the sale of stock or obligations of any new company to be formed * * * with plenary powers to enter into arrangements for decrees or for facilitating or hastening the course of litigation, or in any way to promote the consummation of said plan, and to do whatever in the judgment of the Committee may seem necessary to promote or procure the sale as an entirety, or the joint or separate sale, of any property or franchises herein concerned, wherever situated, * * * to adjourn any sale of any property or franchises * * * to bid, or refrain from bidding, at any sale * * * to hold any property or franchises purchased by them * * *. The Committee may procure the organization of one or more new companies, or *that* may adopt or use any existing or future companies, or they may cause to be made such consolidation, leases, sales, or other arrangements, conveyances or transfers of any properties or securities, acquired by them, and take such other proceedings as they may deem needful * * * for carrying out any or all the provisions thereof * * * and the Committee may vote upon all the stock of such new corporation for all purposes in their judgment necessary to carry out said plan, until the same shall be finally delivered to the depositors who shall be entitled to receive the same * * * the Committee may proceed under this plan * * * with or without foreclosure." (Vol. 13-6780-81).

As to the Liability of the Southern Company for Belt Debts upon a Theory of a Consolidation of the Two Companies.

The contention of the Trust Company, in the 17th paragraph of its answer to the intervening petition, is that the organization of the Southern Company, and the exchange of its stocks and bonds for those of the Belt Company, and the other steps taken, pursuant to the reorganization plan, effected a consolidation of the Southern and Belt Companies, under the Missouri Statute. The Southern Company, however, contends that the effect and operation of the reorganization plan and agreement did not, in any sense, create
956 either a statutory or an equitable consolidation of those two companies into the new one, and, hence, that there could be no statutory or other liability on the part of the Southern Company for the Belt debts.

In this connection, it is well to make a brief review of some of the underlying facts.

It is not controverted that the Gulf road defaulted in the payment of its interest April 1st, 1899, that receivers were then appointed, and that, thereupon, a decree of foreclosure and sale was rendered February 5, 1900, and the property sold at such foreclosure sale on March 19, 1900, to the Southern Company, which became the purchaser thereof, and took possession on April 1, 1900, and has been operating the property since that time. The Belt Railroad Company was placed in the hands of receivers September 6, 1900, in a suit instituted by the Provident Company, the trustee named in the first mortgage on the Belt property. A decree of foreclosure and sale was rendered on November 6, 1901, and the foreclosure sale had on December 31, 1901, the Southern Company becoming the purchaser thereof, and continuing to operate the property since that time. A Philadelphia Committee, on August 17, 1899, promulgated a plan, which, on November 7, 1899, was modified, and under which the stockholders and bondholders of the Gulf Company and its allied companies including the Belt, deposited their securities and in lieu thereof finally obtained new securities of the Southern Company. The Trust Company, being the owner of a large amount of these securities, including those of the Belt Company, deposited them with the reorganization Committee, and obtained in lieu thereof certain stocks and bonds of the Southern Company, which the Trust Company still retains. The Trust Company was also one of the depositaries in the modified plan or reorganization, and it is claimed by intervenor that it is abundantly shown by the testimony in the record, that the respondent actively co-operated in the reorganization of the Belt properties, and induced its correspondents to accept said plan and to exchange their securities for the Southern Company securities. The effect of the Trust Company's participation in the reorganization plan is hereinafter considered.

It is not controverted that the bondholders and stockholders of the Belt Company received the stocks and bonds of the Southern Company in the ratio provided by the reorganization plan, and that the Southern Company thereby became the owner in some capacity of practically all of the outstanding stocks and bonds issued by
957 the Belt Company, and the former bondholders and stockholders of the latter company became the owners by exchange of the stocks and bonds of the Southern Company.

Missouri Statutes Relating to Consolidation.

1. The sections of the Missouri statutes which bear upon this subject of railroad consolidations, are numbers 1059, 1060 and 1061, (R. S. No. 1899):

"Sec. 1059. Companies may consolidate, when. Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in whole or in the main, and form one company owning

and controlling such continuous lines of road, with all the powers rights, privileges and immunities and subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of stockholders regularly called for the purpose, or by the approval in writing, of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy from the office of the secretary of state shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company, under such corporate name as may have been adopted."

(Here follows a prohibition against consolidation by competitive roads, either in whole or in part, and declaring that any such consoldiation "shall be void," etc.)

"Before any railroad companies shall consolidate their roads, under the provisions of this article, they shall each file with the secretary of state a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their
958 respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders to be called for the purpose of considering the same, sixty days' public notice of the time, place and purpose of such meeting having been given by advertisement in some newspaper printed in the county where the general offices of said company or companies of this state are situated."

This section contains a general authority for railroad companies to consolidate "in the whole or in the main" and casting a full liability upon the successor company in either case; it provides two general methods of consent in consolidation which "may" be adopted, viz: One under which the contract or terms of consolidation are fixed in the first instance by a majority vote of the stockholders of each company, and one needing only the approval in writing by such a majority; and a prohibition against consolidation of competitive roads (immaterial here).

Sec. 1060 provides (*a*) that any railroad company may "aid" a connecting line company by means of subscription to its capital stock "or otherwise"; (*b*) for extension of, intrastate railroads into adjoining states allowing the one company to "build, buy, sell, lease or consolidate" with any railroads in such adjoining state; (*c*) for "any railroad company" to "lease or purchase all or any part of a railroad, with all its privileges, rights, franchises, real estate and

other property, the whole or a part of which is in this state", if the lines connect "within or without this state" etc., and (*d*) that any railroad corporation (of another state) may extend its road "into and through this state, and for such purposes be treated as a domestic corporation" etc.

Then follows a provision for assent by a majority vote of the stockholders to such aiding, purchasing, etc., or other "arrangements" "or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof signed by the president and secretary of said company or companies, shall have been filed in the office of the secretary of state", etc.

Sec. 1061 provides that any Missouri railroad corporation "may acquire any line of railroad within or without this state which shall form a continuous line", etc., "and may acquire and may hold the obligations and stock of other companies owning or operating such lines of road," etc., Provided, that no such line of railroad shall be so purchased until "a majority vote of the stockholders of the companies shall have been taken in regular meeting", or until a
959 majority of the holders of the stock of such company shall have consented thereto, in writing, and a certificate thereof, signed by the president and secretary of said company or companies shall have been filed in the office of the secretary of state."

The Southern Company claims that it had the express statutory power, by Sec. 1061, R. S. Mo., 1899, to acquire and hold the stocks and bonds of the Belt Company, and that the exchange of stocks and bonds was in effect a purchase and sale (citing Harriman v. Northern Securities Co., 197 U. S., 244); and, further, that none of the steps, provided for in Sec. 1059, R. S. Mo., 1899, in relation to the consolidation of railroad companies were taken by the companies involved in this cause, nor does the record show that there was any intention to invoke the provisions of that section, or to form a statutory consolidation.

Counsel for the Southern Company insists that, in order to effect a statutory consolidation under Sec. 1059 R. S. Mo., 1899, it is necessary that,

"(*a*) The Companies interested shall enter into a contract fixing the terms and conditions of such consolidation.

(*b*) Such contract shall be ratified and approved by a majority in interest of all stock held by each company proposing to consolidate, either

(*c*) At a meeting of the stockholders regularly called for the purpose, or

(*d*) By the approval in writing of the persons or parties holding and representing a majority of such stock.

(*e*) A certified copy of such articles of agreement with the corporate name to be assumed by the new company shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy in the office of the secretary of state shall be deemed conclusive evidence thereof.

(*f*) The boards of directors of the several companies shall then proceed to carry out said contract according to its provisions, calling

in the certificates of stock then outstanding in the several companies or roads, and

(*g*) Issuing certificates of stock in the new consolidated company under such corporate name as may have been adopted.

(*h*) Before any railroad companies shall consolidate their roads under said statute, they shall each file with the secretary of
960 state a resolution accepting the provisions thereof to be signed by their respective presidents and attested by their respective secretaries under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each at a meeting of the stockholders to be called for the purpose of considering the same, sixty days' public notice of the time, place and purpose of such meeting having been given by advertisement in some newspaper printed in the county where the general office of said company or companies of this state are situated."

It is strongly contended by the intervenor that none of the foregoing requisite steps to bring about a consolidation were ever taken either by the Belt Company, or the Southern Company, and, further, that the record does not show, as required by the statute any contract between the companies contemplating the consolidation, nor any meeting of the stockholders to ratify any such contract, nor was there any approval in writing of such contract by parties holding and representing a majority of the stock, nor was there any certified copy of such contract, or articles of agreement, with the corporate name of the new company filed with the Secretary of State, nor, in fact, were any of the pre-requisites of a consolidation had or complied with by the companies interested. On the other hand the

2. Trust Company's Contentions, as presented by its learned counsel are, in substance and effect, that by reason of said reorganization plan and agreement, and the steps taken thereunder, there was, in fact, effected a consolidation between the Belt and Southern Companies, and that the reorganization Committee was authorized by said agreement to create a new corporation for the purpose of uniting the Gulf, Belt and Dock lines of road into one, as the interests of the bondholders and stockholders of said companies demanded it, that the new corporation was to be created whether the Belt properties were sold or not, under the mortgage covering them, the plan and agreement, however, expressly providing for such sale and the hastening of it, if the reorganization Committee deemed best; that these agreements contemplated that the old companies were to lose the actual control and management of their respective railroad lines, franchises and properties, which was done in carrying out the reorganization contract; and that, by obtaining the three lines of roads with their franchises the new company would have a connected and complete line from Kansas City to the Gulf; that the bondholders and stockholders of each company were to receive, and did receive,
961 bonds and stocks in the new company based upon the combined property of all the companies; and that, in order to determine how to issue the stocks and bonds of the new company to the stockholders and bondholders of the old companies, the

equities of each of the corporations in its respective properties had to be estimated and the stock and bonds issued accordingly; that when the reorganization agreements were fully executed, in the respects above mentioned, the new company had everything and the old companies had nothing, except the right to exist as corporations; that, in substance and effect, everything was done and accomplished in the way of carrying out the details of the reorganization plan and looking to a union, merger and consolidation, of the interests of said companies, that could possibly have been done in the case of a purely statutory consolidation; that, in substance and effect, this was not a case where purchasers under a mortgage unite to incorporate, but it was essentially a combination of bondholders and stockholders for the *purchase* of consolidation, and that the foreclosure sales of the properties of the different corporations interested were merely incidents in the general plan.

The question is, then, broadly presented, whether, under said plan and agreement adopted by the Philadelphia Committee, there was such a consolidation in this cause as would make the Southern Company liable for the unsecured debts of the Belt Company.

The proposed plan, however, did not, specifically, require that the terminals at Port Arthur and Kansas City should be brought into the reorganization; on the contrary, they might or might not be included, as appears by the following language:

"(*f*) Or in the event that either or both of said terminal properties are not so acquired, then (under arrangements already provided) the requisite terminal facilities at Kansas City, and on the gulf, will be otherwise secured—in which event, the amount of the new securities to be is-ued will, of course, be correspondingly reduced."

It is manifestly the fair intendment of that provision that, if sufficient of the securities of the terminal properties should be deposited to "warrant the retention of that (those properties) by the new company", then the plan contemplated that the terminal properties, together with the Gulf properties, should be operated in the same interests, and thereby, in the language of the plan, "All three properties will be under one corporate ownership management and control".

It was recited that "it was intended as soon as possible, that
962 the new company acquire the properties of the terminal companies in fee and bring them directly under the lien of the mortgage". The intention of the plan, in a general way, was that the properties, belonging to the terminal companies, should be brought into the reorganization, provided the necessary securities of those companies were deposited with the reorganization Committee, but, nevertheless, it is also true that the new company was to be organized to own the Gulf properties, regardless of whether the terminal properties should then or thereafter be acquired.

Respondent's Authorities on Consolidation Proposition.

3. In support of its contention in respect to the alleged consolidation between the Belt and Southern Companies, the respondent relies, among others, upon the following cases:

In U. S. v. N. S. Co., 120 F. R., 725, it is said:

"It is the common experience of mankind that the actions of corporations are dictated and that their policy is controlled by those who own the majority of their stock. Indeed, one of the familiar methods in these days, and about the only method of obtaining control of a corporation, is to purchase the greater part of its stock."

In the cast at bar, the Belt Company was not a party to the reorganization agreement, though perhaps, ninety-nine per cent of the stockholders were depositors of their stock with the Committee.

Morawetz on Corporations, in Section 939 and 947, says:

A distinguishing feature of a consolidation is the union of the shareholders of the two companies, thereby forming one company."

"A railroad company formed by the consolidation of several companies, and invested by law with all their property, rights and franchises, is entitled to enjoy the franchises of each of the several companies upon the road originally belonging to it."

In the U. S. v. W. 193 U. S., 197, in which the stock of two competing lines was put into the hands of a corporation as a holding company by the stockholders, who took therefor stock in the new company, the court said (p. 326):

"Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the consolidated Companies.

* * * Necessarily also the constituent companies ceased,

963 under such a combination, to be in active competition for trade and commerce along their respective lines, and have become practically one powerful consolidated corporation by the name of a holding corporation, the principal if not the sole object for the formation of which was to carry out the purpose of the original combinations under which competition between the constituent companies would cease."

The Court speaks of it as a "scheme or device" (p. 327).

In McCracken v. Robinson, 57 R. F., 377, it is said:

The corporate organization was the machinery which they had brought into existence for carrying out the enterprise."

In Pingree v. M. C. R. R., 118 Mich., 337, the court says:

"The intention to consolidate may be an important consideration."

Then he quotes from an author who says:

"A clear intention to consolidate, together with the performance of acts reasonably appropriate to that end, must be shown in order to establish a consolidation,"

if the act is consistent with a different intent. In State to use, &c., v. B & L. R. Co., 77 Md., 492, the court says:

"The act of assembly enables two corporations to consolidate upon such terms as may be agreed upon. This agreement refers to the adjustment of the interests of the stockholders and the settlement of the terms on which they shall hold the stock in the new company, and to matters belonging to the organization of the new company and such like things."

Such agreements we have here elaborately drawn.

"Technically speaking, however, and for general purposes, it may

be conceded that the consolidated company is a new corporation; but, touching the business of the old companies and the rights of their respective creditors, we think the consolidated company ought to be regarded as the continuation of the old companies under a new name, and that, to that extent, it ought not to be regarded as a new corporation." And a similar statement of the law is to be found in State ex rel. v. Garroutte, 67 Mo., 445, and in Section 956 of 2 Morawetz on Private Corporations." 173 Mo., 410.

The Supreme Court of Illinois (160 Ill., 382), says:

"When the rights and franchises and effects of two or more
964 corporations are, by legal authority and agreement of the parties, combined and united into one whole and committed to a single corporation, the stockholders of which are comprised of those (so far as they choose to become such) of the companies thus agreeing, this is in law and according to a common understanding, a consolidation of such companies, whether such single corporation, called the Consolidated Company, be a new one then created or one of the original companies continuing in existence, with only larger rights, capacity and property."

Again:

"The consolidation of the stock and property of several corporations, into one was not a sale; and it did not affect real estate any, but included franchises and personal property."

Wabash Ry. v. Ham., 114 U. S., 597.

Williamson v. N. J. S. R. R., 26 N. J. Eq., 398.

"It cannot be doubted that under this agreement it was contemplated that the consolidated companies should go out of existence and that their officers should resign their trusts in favor of the new company; that their boards of directors should be supplanted by another board; the names of whose members were contained in the agreement; that the stock of the constituent companies should be surrendered and new stock taken therefor, or in lieu of that, that the old stock should be recognized as the stock of the new company; that the road should be operated by men holding their commissions from the new company, and that the entire administration of the functions of the constituent companies should be surrendered to the new corporation. In short, nothing was left of the constituent companies but the memory of their existence—the mere shadow of a name. But the new company which took their place suddenly sprang into life with a new corps of officers and a full equipment for the successful operation of the road."

Yazoo, &c., Ry. v. Adams, 180 U. S., 18.

If there was a consolidation, liability by the consolidated company results necessarily.

"Now, where one corporation goes entirely out of existence by being annexed to, or merged in another corporation, if no arrangements are made respecting the property and liabilities of the corporation, that ceases to exist, the subsisting corporation will be entitled to all the property and answerable for all the liabilities."

Thompson v. Abbott, 61 Mo., 177.

965 "The natural idea of such a statute, I take it, is that the new corporation which springs from the two consolidating ones represents each one, as well in its duties or obligations assumed to others, as in its right to enforce the performance by others of their obligations. The idea of a transfer of properties and franchises involves as the correlative idea an assumption of those duties and obligations which were predicated upon possession and operation of such properties and franchises, and which gave strength and inducement to corporate promises."

Polhemus v. R. R., 123 N. Y., 508.
Matter of Brewing Co., 154 N. Y., 273.
—— ——, 160 Ill., 373.

In Morrison v. Am. S. Co., 79 Miss., 723, the court, after a review of the authorities, says:

"The foundation of the liability of a consolidated corporation may rest on a statute or on agreement either express or implied; if the statute does not provide that the new company shall assume the debts and liabilities of the constituent company, and there is no expressed agreement respecting the same, the debts of the original company follow as an incident of the new consolidation, and become, by implication, the obligation of the new corporation."

"The new corporation thus created was in reality the embodiment under another name, of the two formerly existing. They had been joined together in every faculty and function, and moulded with an indivisible unity with none of their rights impaired and none of their responsibilities abated. If this were not the result of the consolidation, very great inconvenience and injustice could arise. The act enables two corporations to consolidate upon such terms as may be agreed upon. This agreement refers to the adjustment of the interest of the stockholders and the settlement of the terms on which they shall hold the stock of the new company, and to matters belonging to the organization of the new corporation, and such like things. Whatever else it may be competent to determine by agreement, the combining companies could not, by any contract between themselves, conclude the rights of persons who have been injured. Their agreement to consolidate brings the new corporation into existence, and then its liabilities are determined by the just construction of the statute which authorizes the consolidation".

State to use, &c., v. B. & L. R. R. Co., 77 Md. (1893), 492.

"Since by authority of law and the act of the parties, the consolidated corporations are moulded into one, with none of
966 their rights impaired and none of their responsibilities lessened, there is no good reason why the same proceedings may not be had against the new corporation as might have been had against the old, to compel payment of liabilities. It avoids circuity of action. It allows the party unto whom the contract was made, and to whom the injury was done, to proceed directly against the corporation, which by virtue of the consolidation proceedings is made liable for it."

Langhorne v. R. R. Co., 91 Va., 375.

In the C. & S. F. & Co. v. Ashley, 43 N. E. 375, it is said:

"What was done must be considered in order to determine whether there was a consolidation or not. We must look to the results accomplished rather than to the means, steps or proceedings by which these results were reached." (Idem l. c. 375) and

"When the rights, franchises, and effects of two or more corporations are by legal authority and agreement of the parties combined and united into one whole and committed to one corporation the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is in law and according to common understanding, a consolidation of such companies, whether such single corporation called the consolidated company, be a new one then created, or one of the original companies continued in existence with only larger rights, capacities and property. Meyer v. Johnson, 64 Ala., 656. This is true whether or not the old company have nominally continued in existence."

Berthold et al. v. Holladay-Klotz Land and Lumber Co., 91 Mo. App., 233.

In Wabash v. Ham., 114 U. S., 587. Mr. Justice Grey, rendering the opinion of the court, states the rule to be that the property of a corporation is a trust fund for the payment of its debts and all of its creditors are entitled to be paid before the shareholders get anything and where a new company was formed from the aggregation of four railroad companies, the creditors were given a preference over the stockholders in the new company to the extent of the assets coming into the hands of the new company from the old.

In Hawkins v. Central Ry. Co., 119 Ga., 159-163, decided in 1903, the court held that all rights of stockholders were inferior to those of creditors and that where shares had been issued to the stockholders of the old companies in exchange for shares in the companies consolidated, it would have been mere repudiation to preserve the
967 rights of the shareholders, by issuing such stock of the consolidated company in exchange for their holdings in the old, without protecting or providing for the rights of the creditors in the old company.

In Shadford v. Detroit Railroad, 130 Mich., 300; 89 N. W., 969 (1902), we have a case where two companies were consolidated on the basis that the stockholders in the old companies received shares of stock in the new company and the bondholders of the old companies received bonds of the new company and the new company took over the properties of the old. In that case it was contended that the creditors had no remedy except by suit in equity, to compel the stockholders to pay assessments to the full value of their stock or to reach the stocks and bonds which had been received by the stockholders of the old company, but the court said, p. 306:

"The law will not permit the creditors of two corporations to be deprived of the assets of such corporations in payment of their debts and turn them over to suits in equity against the stockholders when the union or consolidation with another corporation is effected without the passage of a dollar or other valuable consideration between the corporation themselves."

And again, on p. 307:

"It is also contended that the old company was insolvent and that therefore plaintiff was not prejudiced by the consolidation or transfer. The consolidated company cannot raise this question. The question is not whether either of the old companies were solvent or insolvent, or whether both were solvent or insolvent. By the consolidation the new company is burdened with the debts of the old and the sole question then is, Has the new company sufficient assets to pay its debts, which will include those of the old companies?

Citing Grenell v. Detroit Gas Co., 112 Mich., 70:

"It paid nothing to its vendor for this plant, but dealt with its stockholders, paying to them in its own capital stock the price of its purchase, thus in effect closing out the corporate business and dividing its assets amongst its stockholders. * * * A corporation cannot sell all of its property and take in payment stock in a new corporation under an arrangement that has the effect of distributing the assets of the vendor amongst its stockholders to the exclusion and prejudice of its creditors; and a company making such a purchase, in consideration of an issue of its own stock to such stockholders, takes the property subject to the rights of the creditors. Such an arrangement is a diversion of a trust fund."

968 In Central Trust Co. v. Cincinnati Trust Co., 58 Fed., 500 and in 138 Fed. Rep. 804, Judge Taft, on p. 805 says,

"The well understood purpose of every reorganization agreement of this kind when entered into by all the stockholders and all the bondholders, is to wipe out all the obligations and readjust the debts and interests between the creditors and the stockholders, the bondholders thereby agreeing in effect to look to the railroad alone for the payment and accept the new mortgage deed on that in lieu, i. e., in payment of the old;" and the surplus funds from the sale were paid to the creditors and not to the bondholders.

In Higgins v. California Asphalt Co., 81 Pac., 1070, the Supreme Court of California held that the debts of a corporation cannot be avoided by any scheme of a new corporation organized by the incorporators or shareholders of the old corporation. Citing Hibernia Ins. Co. v. St. Louis & N. Co., 13 Fed. Rep., 516, which case is cited in Carson v. Hofins by the Supreme Court of Washington 87 Pac., 631-633, to the effect that the assets of an insolvent corporation constituted a trust fund for the benefit of its creditors, and no subterfuge will be permitted to prevent the distribution of such funds amongst the creditors.

Respondent claims that one of the clearest constructions of the questions before the Master is had in Chicago & Santa Fe Railroad Co. v. Ashling, 160 Ill. 373; 43 N. E.; where the court held that a consolidation and not a mere purchase by one corporation of the property of another, was effected by a transfer of all the property, stock and franchises of the latter under an arrangement by which the stock of the former is issued to the stockholders of the latter in exchange for their stock. And the court there held that a corporation which is in effect consolidated with another is estopped to assert that the proceedings for consolidation were not in accordance with the

terms of the suit in an action against it to recover the amount of judgment against the first corporation on the ground that there was a consolidation. The court said:

"It is true that what was done must be looked to in order to determine whether there was a consolidation or not, but we must look to the results accomplished rather than to the means, steps or procedure by which these results have been obtained. P. 381. There is no magic in words. Merely calling a transaction a purchase and sale will not prevent it from being a consolidation."

In Montgomery-Webb Co. v. Dienelt, 133 Pa. State 585, it was held that, where one corporation sells its property to another,
969 thereby forming a new corporation composed mostly of the same persons, the transfer is fraudulent and void as to creditors of the old corporation and persons, who hold stock in the new corporation solely in consideration of their claims as creditors of the old, are charged with notice of the fraud and are not innocent purchasers as against creditors of the old corporation, who did not assent to the change. And it was held that the latter might follow the specific property of the old corporation as in other cases of transfers fraudulent as to creditors, the court saying:

"This was a transfer of property by a debtor with the retention of an interest in himself within the settled rule of law that makes such transactions void as to creditors."

Thompson v. Abbott, 61 Mo., 176, has been cited as stating the proper rule of law, in Berry v. K. C. Railroad Co., 52 Kans., 759, Id. 774.

In State ex rel. v. Smith, 173 Mo., 398, it is held:

The new company is the heir to the obligations of the old and if the new refuse to carry out the obligations of the latter, the obligee can maintain an action against it for the resulting damages in its own name."

In Powell v. North Missouri Company, 42 Mo. 63, the action was to recover as secretary of one of several corporations, which had been consolidated into the defendant company. The syllabus stated concisely the decision of the court. (3) Although by the old common law the dissolution of a corporation extinguished its debts, yet courts of equity in such cases will consider the property and effects as a trust fund for the payment of creditors and for the shareholders, into whosoever hands they may come. (4) A corporation cannot give away the effects belonging to it to the prejudice of creditors. A court of equity will follow the trust into the hands of other than bona fide creditors and purchasers. The case of Thompson v. Abbott, 61 Mo., 176 (1875), is, perhaps, the leading case in the State of Missouri upon this subject. This was a suit where the plaintiff had been employed by the Board of Education to teach school in a certain district at a stipulated price and for a stipulated period. He began work and received a part of the stipulated salary, but before payment was completed, the district was disorganized and its territorial limits merged into the City of Springfield. The petition set up that the city received the moneys coming to the old district and had exclusive care and control of all school property and that it

succeeded to all the rights of the old district, and prayed judg-
970 ment for the money due from the old district. On demurrer, it was held that the city of Springfield was liable for this debt, the court saying by Wagner, Judge:

"Where one corporation goes entirely out of existence by being annexed to or merged into another corporation, if no arrangements are made respecting the property and liabilities of the corporation that ceased to exist, the subsisting corporation will be entitled to all the property and be answerable for all the liabilities. * * * Its property passed into the hands of the defendant and when the benefits were taken the burdens were assumed."

In Hughes v. School District, 72 Mo., 643 (1880), Chief Justice Sherwood cites with approval the language of Judge Wagner; and in Evans v. Exchange Bank, 79 Mo., 182, the question coming again before the Supreme Court in 1883, was decided as before. The petition in this last case alleged a deposit by the plaintiff in a certain bank; that said bank went into liquidation; that thereafter the defendant bank was organized as a banking corporation and came into possession of and received for plaintiff's use as the successor of the first bank, the money so deposited. The court held that the petition stated a cause of action against the defendant. In the opinion, Judge Henry said:

"If, as alleged, defendant is the successor of the City National Bank, and the funds and property of the latter passed ino the hands of the former, its liability, to depositors of money in the latter bank has been expressly held in Hopper v. Moore, 42 Ia., 563. * * * Any other doctrine, it seems to us, would be monstrous. As well contend that because one has changed his name by legislative enactment, he thereby avoids all obligations incurred in his former name. * * * To prevent an escape from its liabilities by such contrivances would not be very creditable to the law."

In Kinion v. Kansas City Ry. Co., 39 M. A., 382, the Court held:

"Technically speaking, however, and for general purposes, it may be conceded that the consolidated company is a new corporation but, touching the business of the old companies, and the rights of their respective creditors, we think the consolidated company ought to be regarded as the continuation of the old companies under a new name, and that, to that extent, it ought not to be regarded as a new corporation. Mr. Morawetz, in his treatise on the law of corporations in discussing this question said: 'In considering the rights of the creditors of the original companies, the consolidated company
971 may be regarded as a continuation of each of these companies with a change of its name and constitution, and of the amount of its capital stock." 2 Morawetz on Private Corporations, Sec. 956."

In Berthold v. Land Co., 91 M. A., 233, Judge Goode said:

"It is a settled rule of equity jurisprudence that where one corporation is consolidated with another, or merged in another, which takes its property, such new corporation is bound to discharge the liabilities of the old one." (Citing Thompson v. Abbott, 61 Mo., 176; Hughes vs. School District, 72 Mo. 643; Evans vs. Exchange Bank,

79 Mo., 182). "The new company took those assets cum onere—impressed with a lien in favor of the creditors of the old; for they were acquired by a transaction outside the ordinary course of business."

The court further held to the same effect in Kearns v. Illinois Southern Ry. Co., 114 Mo. App., l. c., 167; Manny v. National Surety Co., 103 Mo. App., l. c., 721.

In Missouri Land Co. v. Reinhard, 114 Mo., 218 (1892), it was held that the capital stock and other property of a corporation are in equity as between creditors and stockholders, deemed to be a trust fund for the payments of its debts and where such property has been divided amongst the stockholders leaving debts unpaid, the stockholders are bound to refund; but the court says that the creditor of the corporation may enforce his claim against another corporation purchasing the property of the debtor, pending suit in the absence of actual fraud in the sale, holding that the remedy against either the stockholders or the new corporation is by bill in equity (which is in the form in which relief is sought in the pending case).

In State ex rel. v. Smith, 173 Mo., 398 (1902), and in Springfield v. Hobart, 98 Mo., 227, it was held that the relator in becoming surety for the obligation of one company to another, was bound to a consolidated company when that other company and a third corporation were consolidated into a new corporation. In rendering the decision, Burgess, Judge, cited- Kinion v. Railroad, 39 Mo. App., 382, used the language:

"Literally speaking, it is a new corporation, but substantially it is but a continuation of the old companies under a new name."

In I Thompson on Corporations, Sec. 565, it is stated to be the general rule that the new company succeeds to the rights, duties obligations and liabilities of the constituent companies, whether arising ex contracto or ex dilecto; and it has been held
972 further that the new company is the heir to the obligations of the old and that if the former refuse to carry out the obligations of the latter, obligee can maintain an action against it for the resulting damages.

And in the case of Hageman v. Southern Electric Co., 202 Mo., 249:

"In the Wabash case, the Supreme Court of the United States said: 'It was contended that the property of the Toledo and Wabash Railway Company was a trust fund for all its creditors, and that upon the consolidation the Toledo, Wabash and Western Railway Company took the property of the Toledo and Wabash Railway Company charged with the payment of all its debts. The property of a corporation is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property to the debtor, without authority of law, and in fraud of existing creditors, is void as against them.'

(Railroad v. Ham, 114 U. S., l. c., 594). To the same effect are the following cases: Milling Co. v. Commission Co., 128 Mo., 491-495; Atlas National Bank v. Moran Packing Co., 138 Mo., 59; Calihan v. Powers, 133 Mo., 481-498; Schufeldt v. Smith, 131 Mo., l. c., 286; Meyer v. Folding Chair Co., 130 Mo., 195."

Status of Belt Company Before and After Foreclosure Sale.

4. It is not disputed that the Belt Company continued to be operated by its own officers and employees until September 6, 1900, when its properties were, by order of the United States Court at Kansas City, put in possession of Knott and Swinney, receivers, who continued their operations until the foreclosure sale and delivery of possession to the Southern Company in January, 1902. Knott subsequently resigning and Swinney continuing as receiver; and that, on April 27, 1903, said United States Circuit Court, in the Belt foreclosure suit, rendered a deficiency judgment for $242,854.40 against the Belt Company, and ordered execution thereon (Rec. Vol. —, p. —).

In the present suit, brought by the Cambria Company, September 6, 1900, the Belt Company, and the Trust Company, were made parties defendant, and, there was filed a stipulation signed by
973 the Trust Company and its receiver, providing for the filing of the ancillary bill in this case, and also providing that the Belt Company should be a party to the ancillary bill, so that the Trust Company might have any amount found due to it upon the accounting included in a judgment against the Belt Company. That stipulation, omitting the names of the parties, is as follows:

"It is hereby stipulated and agreed by and between Stuart R. Knott and Edward F. Swinney, receivers of the Kansas City Suburban Belt Railroad Company, complainants in the cross bill in the above entitled cause, and the defendants the Guardian Trust Company and Francis M. Black, its receiver, Second Street Improvement Company and Cambria Steel Company, as follows:

First. That the said complainants shall withdraw or dismiss their cross bill heretofore filed herein and shall file an amended cross bill, in the nature of an ancillary bill in this cause making the Kansas City Suburban Belt Railroad Company a co-plaintiff with them in said amended ancillary cross bill, and also making the Cambria Steel Company, the complainant in the original bill herein, a defendant in said amended ancillary crossbill, and that said amended ancillary crossbill shall be filed on or before the 15th day of November, 1901, and that the defendants, the Guardian Trust Company and its receiver, and the Second Street Improvement Company and the Cambria Steel Company, shall have leave to plead or answer to said amended ancillary cross bill, on or before the first Monday in December, 1901.

Second. That the accounting between the Kansas City Suburban Belt Railroad Company, and its receivers, and the Guardian Trust Company, and its receiver, sought by said amended ancillary cross bill, shall be expedited by all of the parties hereto, and whatever bal-

ance, if any, that may be found due to the said Guardian Trust Company or its receiver from the Kansas City Suburban Belt Railroad Company or its receivers shall be entered up in this cause as a judgment in favor of the said Trust Company and its receiver and against the Suburban Belt Railroad Company and its receivers, without the necessity of presenting any claim therefor by way of cross bill, or other affirmative pleading; and whatever balance, if any, that may be found due to the said Suburban Belt Railroad Company, or its receivers, from said Guardian Trust Company, or its receivers, shall be entered up in this cause as a judgment in favor of the said Kansas City Suburban Belt Railroad Company and its receivers and against the Guardian Trust Company and its receiver.

974 Dated this — day of November, 1901."

Counsel for the Southern Company are insistent that a statutory consolidation of two companies must inevitably result in the extinction, as legal entities of the constituent companies, and the creation, ipso facto, of a new company, and, hence, that in view of the facts stated in regard to the continued existence of the Belt Company, it has not been extinguished in the sense that it would have been, had there been a statutory consolidation between it and another company into a new corporation.

Intervenor's Authorities on Consolidation Proposition.

5. The leading authorities cited by counsel for intervenor, against the alleged consolidation of the Belt and Southern Companies, are the following:

In construing the Missouri statutes, providing for the consolidation of corporations, Judge Pollock, in Jones v. Electric Co., 135 Fed., 153, says:

"It is fundamental law that the right to exercise such a vital power of a corporation as contemplates the turning over of all its corporate property, including its right to be a corporation and to hold and use its corporate powers, franchises and privileges, and which results, wherein employed, in the extinguishment of its corporative life, must be found in some positive plenary legislative grant either in the articles of association of the corporations consolidating or in the general law of the land. Such power cannot be implied. Nugent v. The Supervisors, 19 Wall., 241; Pearce v. Madison, etc., R. R. Co., 21 How., 441; Clearwater v. Meredith, 1 Wall., 25. It is also firmly settled by authority, if ample statutory power is found wanting authorizing either of the constitutent companies to consolidate with each other, the entire consolidation is unauthorized and void. St. Louis Railroad v. Terre Haute Railroad, 145 U. S., 393; Louisville & Nashville R. Co. v. Kentucky, 161 U. S., 677."

In Pullman Company v. Missouri Pacific, 115 U. S., 587, the court says (page 595):

"This (consolidation under the Missouri statute) clearly contemplates the actual dissolution of the old corporations and the creation of a new one to take their place."

The Supreme Court of Missouri, in the case of State ex rel. v.

Lesueur, 145 Mo., 322, 328, in speaking of the consolidation of railroads under the Missouri statute, says:

"We are of the opinion that the consolidation, when completed in the manner provided, does create a new corporation, 975 just as effectually as any other mode allowed by our laws. The new corporation owns all the property, whereas the old companies only owned each its part. * * * By the consolidation the old companies are dissolved, and a new corporation formed."

The court there held that, upon the consolidation, the new company thus formed was required, by virtue of Section 21 of Article X of the Constitution, to pay into the State treasury the fees provided for upon the organization of corporations.

In Railroad Company v. Missouri, 152 U. S., 301, the court, in speaking of the Missouri statute, said:

"Looking at the act in question in this case, we find that by Section 1, any Missouri railroad company, whose track should connect with the road of an adjoining state, was authorized to make and enter into an agreement with such connecting company for the consolidation of the stock of the respective companies whose tracks should be so connected, making one company of the two, whose stock should be so consolidated upon such terms, conditions and stipulations as might be mutually agreed between them; that by Section 2 'such consolidation shall not be made unless the terms and provisions thereof shall be approved by a majority of the stock, or the holders of a majority of the capital stock in each of said companies whose stock shall be consolidated'; that by Section 3 the board of directors were authorized to adopt by resolution a new corporate name for the consolidated company, and call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company; and, providing that a copy of the consolidation agreement and the name adopted for the new company 'shall be filed with the secretary of state, and shall be conclusive evidence of such consolidation, and of the corporate name of the consolidated company.' It is difficult to see how the legislature could provide more clearly for the extinguishment of the prior companies and the formation of a new one than by providing that the two companies shall become one, that new certificates of stock shall be issued in exchange for the stock of the constituent companies, and that the consolidation agreement shall be recorded with the secretary of state as the charter of the new company. In our opinion, this was the effect of the act in question."

In Adams v. Railroad Company, 24 So., 211, it is said:

"It is in the interest of clearness of definition that consolidation should be limited to signify such union of two or more corporations as necessarily results in the creation of a third new corpora- 976 tion, and, as we understand the decision, this is what is known as the American doctrine, and the better view."

In Vicksburg Telephone Co., v. Telephone Co., 30 So., 725, the court says (728):

"There seems to be a great confusion as to the differences between consolidation and merger and sale. Rightly understood, there never

can be a consolidation of corporations except where all the constituent companies cease to exist as separate corporations, and a new corporation, to-wit: the consolidated corporation, comes into being. A merger, rightly understood, is not the equivalent of consolidation at all, but exists where one of the constituent companies remains in being, absorbing or merging in itself all the other constituent companies."

In Lee v. Atlantic Coast Line Railroad Co., 150 Fed., 775, it is held:

"There is a distinct difference between a consolidation and a merger of two railroad companies. In a consolidation, both go out of existence as separate corporations, and a new corporation is created, which takes their place and property; while in case of a merger one loses its identity by absorption in the other, which remains in existence, and succeeds to its property, and issues its own stock to the stockholders of the merged company."

In this connection it may be stated that it has been persistently suggested by counsel for the intervenor, that if a statutory consolidation was effected of the Southern and Belt Companies, it would, under the authorities quoted, result in those two companies going out of existence, and the formation of a new corporation, which, of course, cannot be true, as the Southern Company is existent and operating its railroad system, and, the respondent is now here suing it and the Belt Companies, and seeking to obtain a judgment against one or both of them, which is at variance with their corporate nonexistence. In fairness, however, to the Trust Company, it should be stated that the real basis of its charge that there was a consolidation, arises not only from the ownership by the Southern of the stocks and bonds of the Belt, but, also, by reason of the reorganization proceedings, which resulted in the acquisition of all the Belt properties under circumstances, which, it is alleged, constituted a consolidation.

Intervenor's Ownership of Belt Stock.

6. The mere ownership by the Southern of stock in the Belt Company would not be sufficient to justify the conclusion that
977 there was either a partial or full statutory consolidation, merger or other union of corporate interests between the two companies. It is a well known fact that many railroad systems are interested, in greater or less degree, in the stocks and bonds of subsidiary companies. As one of the results of the modified plan of reorganization, the reorganization Committee became the holder, and afterwards the Southern Company became the owner of, nearly all of the stocks and bonds of the Belt Company, which was expressly authorized and permitted by said Section 1061 (R. S. Mo. 1899).

In Pullman Palace Car Co. v. Missouri Pacific Railway Co., 115 U. S., 587, it appears that the Missouri Pacific Railroad Company acquired and owned the capital stock of the St. Louis, Iron Mountain and Southern, and the question arose as to whether the Missouri Pacific road controlled the Iron Mountain by ownership, lease or other-

wise, and the Missouri statute concerning consolidation of corporations was drawn in question. The court held that both companies, notwithstanding such stock ownership, continued to be separate, independent companies, and that the obligations of one company were not enforcible against the other.

In Peterson v. Chicago, Rock Island & Pacific Railroad Company, 27 Sup. Ct. Rep., 515, decided by the Supreme Court of the United States in April, 1907, it appears that the Chicago, Rock Island & Pacific Railway Company owned a controlling interest in the stock in the Chicago, Rock Island & Gulf Railroad Company, a corporation of the State of Texas. Service of summons was had upon an agent of the latter in an action against the former upon the theory that there was an identity of interest, or an agency, sufficient to warrant the proceedings. The court held that the attempted service was not sufficient to give jurisdiction, saying:

"This record discloses that the officers and agents of the Gulf Company controlled its management. The fact that the Pacific Company owns the controlling amount of stock of the Gulf Company and has thus the power to change the management does not give it present control of the corporate property and business. * * * The conduct and control of the business in Texas was intrusted to the Gulf Company. As the largest stockholder the Pacific Company had an interest in that business, but a separate corporation had been legally created in Texas, with authority to make contracts and control its own affairs and carry on its own business. This separate corporation had its own officers, a large amount of its own property, was responsible for its contracts and to persons with whom it dealt."

978 In Atchison, Topeka & Santa Fe Railroad Co. v. Cochran, 43 Kan., 225, it appeared that the company owned the capital stock of the Southern Kansas Railway Company. An action was brought against the Santa Fe to recover for personal injuries occasioned by the employees of the Southern Kansas. It was held that the fact that the Santa Fe owned the capital stock of the Southern Kansas did not render it liable in the action, the court holding where the rights and powers of a railroad in relation to a connecting road are those of a stockholder merely, the former, as such stockholder, is not liable for the negligence of the latter.

To the same effect see:

Commonwealth v. Bridge Co., 64 Atl., 909, 911.
Ulmer v. Lime Rock Railroad Co., 57 Atl., 1001, 1006.
Exchange Bank v. Construction Co., 25 S. E., 326.
Jessup v. Illinois Central, 36 Fed., 735, 741."

It would seem, then, that the Southern Company had the lawful right to own and hold the stocks and bonds of the Belt Company and that such ownership of itself did not have the effect of constituting a consolidation of the two companies, as both corporations continued to exist, and each controlling its own property, through its own officers, until September 6, 1900, when the receivers were appointed for the Belt Company, and which receivers continued to operate the

property until January 1, 1902, at which time the Southern Company, as the purchaser at the foreclosure sale, received the commissioner's deed and entered into possession of the property and has continued its operation.

The distinction between a statutory consolidation, and the acquisition by one company of the securities of another company, as provided in said Sections 1059 and 1061 (R. S. Mo. 1899), is clearly stated in Burge v. Ry. Co., 100 M. A., 464, in which the court say:

"There are two methods recognized by the statutes of Missouri, by which railroad corporations may become associated or merged. By Section 1059 of the Revised Statutes of 1899, provision is made for the amalgamation of two or more railroad companies in this state, and the formation of one company. Section 1061 contemplates the manner adopted by defendant in this case, and expressly legalizes the extension of the line of any railroad company organized under the laws of this state, by acquiring by purchase any line of railroad within or without this state, and the acquisition and ownership of the assets and property of the company so bought. Under the section of consolidation (1059) the absorbing corporation succeeds to all the powers, rights and property of the consolidated companies and becomes subject to all their obligations and liabilities. Under the section making valid the purchase by one railroad company of the line and property of another railroad company, no responsibility is imposed on the purchasing company for the obligations of its vendor. It is manifest that no statutory liability resulted from the mere purchase by defendant, and in the absence of averment and proof that it acquired and succeeded to the line and property of the selling company otherwise than as a purchaser in good faith and for a valuable consideration, the transaction in no wise differs in legal effect from the purchase of any other property, realty or personalty and no duty is developed by law upon defendant to respond to the liabilities, whether in tort or in contract, of the selling corporation. A mere purchase in good faith for value, imposes no such obligations. Howell v. North Mo. R. R. Co., 42 Mo., 63; Hoard v. C. O. R. R., 123 U. S., 222; Fogg v. Blair, 133 U. S., 534."

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In the Burge case, the court construes said section 1059 as providing for the amalgamation of two or more railroad companies in this state, and the formation of one company. The statutory corporate formalities, requisite to effect such purposes, are plainly stated, and, are such as to really appeal to one's intelligent judgment as being reasonably necessary to protect and safeguard both the corporate and individual interests involved in the consolidation of corporations, desiring to unite into one corporation. In the case at bar, the proofs in the record do not show the necessary corporate action, or in fact, any action whatever, on the part of the Belt Company, providing for the terms and conditions of a consolidation with the Southern Company, or any other company; in fact, there was no corporate action whatever as to the alleged consolidation. In as much as there was no contract between the two companies, it necessarily follows that there could not be any approval or ratification of

it by a majority in interest of the shareholders, either at a stockholders' meeting, called for that purpose, or by the approval in writing of such contract by a majority of the stock interested.

It is not pretended that the Belt Company, as a corporation, was a party to the reorganization plan and agreement, but simply that its stockholders became depositors thereunder. In other words, there *was* no regular corporate proceedings, as provided by the statute, but merely the individual stockholders' action, and, through which latter, it is claimed by the respondent, there was a substantial compliance with the Missouri Statute.

980 After a careful examination of all the authorities, cited by counsel, the Master is not convinced that there has been a statutory consolidation, as charged in respondent's answer to the intervening petition.

If he is right in such conclusion, then how can there be a de jure consolidation in this case, which could only arise from a compliance with the Missouri Statute? If merely a de facto consolidation, or some kind of amalgamation of interests has been effected between the Belt and Southern Companies, then other questions, affecting the Trust Company's connection with the reorganization plan and agreement, may be determinative of respondent's claim against the intervenor for the Belt indebtedness; and these questions are hereinafter considered.

There can be no doubt as to the soundness of the proposition that, where the assets of a company have been, by voluntary corporate action, removed beyond the reach of its creditors, the latter can, by bill in equity, follow such assets and subject them to the payment of their debt, as stated in Berthold v. Lumber Co., 91 M. A., 238, as follows:

"It is a settled rule of equity jurisprudence that where one corporation is consolidated with another, or merged in another, which takes its property, such new corporation is bound to discharge the liabilities of the old one."

The principle invoked by respondent is unquestionably applicable to all cases in which the assets of a corporation are by it voluntarily turned over to another company in disregard of the rights of the former's creditors, but, even in such cases, the liability of the company taking such assets would only extend to the value thereof in excess of any contract liens thereon.

In other words, there would not be created a general liability but simply a limited liability to the extent of the fair value of the assets, improperly or wrongly diverted from the payment of the claims of the creditors.

Effect of Foreclosure Sale and Intervenors' Purchase of Belt Properties.

7. If there was no strictly statutory consolidation in this case then the next question for consideration is whether a consolidation was effected by reason of the foreclosure of the Belt mortgage, the sale thereunder, and the purchase by the intervenor of the Belt properties.

It is not disputed that the respondent Trust Company was a party to the foreclosure proceedings, and that the decree of fore-
981 closure was and is in full force and effect and is conclusive as against the respondent in respect to the existence of the mortgage, the indebtedness secured thereby, and its non-payment. No issue has been made by the pleadings or otherwise as to the regularity or validity of the foreclosure sale, at which the intervenors acquired the mortgaged properties and assets of the Belt and allied companies, forming the Belt system. In the legal enforcement of the mortgage lien, securing the bondholders, the properties of these companies, respectively, were subjected to the payment of their bonded indebtedness, were sold at public vendue to the highest bidder, and the purchase price was paid therefor, as provided in and by the foreclosure decree made in this court, and, thereupon, the title to said properties was conveyed to the purchasers at such foreclosure sales. The proceeds of the sales were, as required by the decrees, paid into court and there constituted a trust fund, in lieu of the properties sold, and subject to distribution by the court, pursuant to the mortgage liens.

If the Southern Company had acquired the Belt's properties outside of a foreclosure, and without giving sufficient consideration therefor, then equity would follow such properties into the intervenor's possession, and, to the extent of their value, as above stated, it would apply the same to the satisfaction of the Belt indebtedness; but that condition of things is not involved in this case.

As to the effect of foreclosure proceedings on the Belt roads, the following cases are in line, and, especially, the Wisconsin case, which is exhaustive in respect to many of the questions raised by the respondent, and, for that reason, it is copied more extensively than would otherwise have been done.

In Hoard v. Chesapeake & Ohio R. Co., 123 U. S., 222, it is held: "A railway company organized to receive, hold and operate a railroad sold under foreclosure of a mortgage, in the absence of a statute or contract, is not obliged to pay the debts and perform the obligations of the corporation whose property the purchasers buy."

The Supreme Court of this state in Dickey v. Railway Co., 122 Mo., 223, followed the ruling in the Hoard case, where there was a deed of conveyance by one railroad company to another, without the intervention of foreclosure proceedings.

In Holton v. Railroad Co., 25 Mo. App., 322, cited with approval in the Dickey case, supra, it appears that Holton conveyed to the Mississippi Valley & Western Railway Company, a right of way over his land for the consideration of $100.00 in money, and
982 the company's agreement to furnish him an annual pass during his natural life over its railway. Three years later, the property and franchises of the railway company were sold under foreclosure to one Stone, who thereafter sold the railroad property and franchises to the St. Louis, Keokuk & Northwestern Railway Company, whose agents in recognition of plaintiff's claim, issued to him an annual pass until the first of January, 1885, when they declined to issue it to him any further. He then brought suit against the last named company for damages for failure to comply with his

contract with the Mississippi Valley & Western Railway Company, and, it was held that he could not recover; that the defendant, by purchasing the railway property from Stone, who had purchased it at the foreclosure sale, did not become liable to pay any of the debts of the Mississippi Valley & Western Railway Company, unless it agreed to pay them, and no such agreement had been alleged or shown.

In National Foundry Works v. Oconto Water Co., 105 Wis., 48, the language of the court, beginning at page 53, is as follows:

"Appellant's counsel mainly rely on the proposition that where one corporation goes out of existence by being annexed to or merged in another, no arrangements being made respecting the payment of the liabilities of the former, the latter will be entitled to all the property and answerable for all the liabilities. That is familiar. No need exists to go outside this state for authority to support it. Knight v. Ashland, 61 Wis., 233. In that case, speaking of the devolution of liability of a town that had passed out of existence, upon an existing town to which the territory of the former had been attached, it was said that the authorities are that the simple vacation of a town by legislative enactment, and the attachment of its territory to another town without any direction as to the payment of the liabilities of the former, renders the latter liable for such liabilities. Other cases are to the same effect. Schriber v. Langlade, 66 Wis., 616; Butternut v. O'Malley, 50 Wis., 333; Pennison v. C. M. & St. P. R. R. Co., 93 Wis., 344. However, the applicability of that principle to the facts of this case is not perceived. The Oconto Water Company did not go out of existence either by being annexed to or merged in another corporation. True, it went out of business, and for all the purposes of its organization was destroyed by the enforcement of the Andrews & Whitcomb mortgages, but not by any contract with the defendant corporation, or any arrangement with it or any person or party with whom or to which it was a party, by which the mere destruction of the corporation was of any benefit to such person or party, or by which such person or party
983 obtained any property or right not paid for at its full value by a cancellation of the mortgage indebtedness which antedated the lien of the plaintiff so far as relates to the owners of the mortgages or the persons claiming under them. There was no merger of corporate interests, or attachment of the rights of one to those of another; but one was, to all intents and purposes, destroyed as an artificial body, and another corporation, new and distinct from the old one, was created, with such powers as it was the bona fide purchaser of, under proceedings adverse to the old corporation, and which it had the right to exercise by force of the statu-e. A moment's consideration of the reason of the rule invoked by plaintiff will show that it has no room to operate here. It is a rule of equity and to prevent fraud; so, where all the property of one corporation is transferred to another without other consideration than that growing out of or incidental to the consolidation, the presumption arises either that it was the intention of the parties that the successor corporation would assume the payment of the debts that were equitably a claim upon the property succeeded to, or that the transaction

was a fraud on creditors and voidable as to them. The idea is that a successor corporation receives benefits from such a succession equitably applicable to the payment of the debts of the former proprietor and, therefore, to the extent of such benefits, is liable for such debts. From that, a contract liability is implied, which the successor corporation cannot be heard to deny, otherwise it would be allowed to defend on the ground of such wrong-doing as, of itself, would avoid the transaction altogether as to creditors, on the ground of fraud. As said in Mt. Pleasant v. Beckwith, 100 U. S., 514, 'The corporate property passes into the hands of its successor, and where the benefits are taken the liabilities are assumed, the rule being that the successor who takes the benefits must take the same cum onore, and it cannot deny that it is liable for the attendant burdens.' Here, if the Andrews & Whitcomb mortgages were valid liens upon the water works property paramount to plaintiff's claim, so that by the enforcement of the mortgages, the purchaser at the foreclosure sale only obtained the benefit of the mortgage security, they became possessed of no benefit that they did not fully pay for, or anything that was equitable applicable to the payment of plaintiff's claim. The essential or prior equity of plaintiff in the property, which is an absolute essential to the liability of the new owner of such property for the debts of its predecessor, does not exist, so the principle invoked does not apply.

The learned counsel for appellant, overlooking, as it seems, the reason of the rule which makes a successor corporation liable
984 for the debts of its predecessor, seek to apply it as broadly as the literal sense of the language of the proposition of law will permit, that is, to take in every case of a corporation that succeeds to the property of another, regardless of whether it thereby takes anything of value to which creditors have a legal or equitable right, or whether the succession is by contract and voluntary or adverse and involuntary as to the old proprietor. * * * The Court held that such proposition was directly contrary to the whole purpose of the statute; that the legislative intent was to give full effect to the mortgage as security, while the construction contended for would destroy the security; that the proceedings under such a law are adverse to the old corporate organization, which, of itself, distinguishes them from those that render a successor corporation liable for the debts of its predecessor; and that there is no good reason why the two situations should ever be confounded. That was affirmed in Smith V. C. & N. W. R. Co., 18 Wis., 17. In that case there was the additional element that the mortgage sale was for the benefit of the stockholders and creditors under an agreement that there should be a reorganized corporation in which the stockholders and creditors of the old company might participate. Yet the court held that the sale cut off all the rights of the old company and its creditors; that the reorganized company was a new and entirely independent organization against which the creditors of the old company had no claim whatever except such as they obtained by the agreement entitling them to become stockholders in such company * * * If the learned circuit judge interpreted the

statute correctly, we cannot see why the defendant corporation is not liable for the debts of the old company, if it is indebted. If its liability goes to that extent, the act would be inoperative and useless in most cases; for no purchasers of the assets of an insolvent corporation would take the risk of organizing under the act when to do so would make them liable for the debts of the old corporation. We think the purpose of the act was to secure to purchasers at judicial sales the right to use and enjoy the franchises which had been conveyed to them in form under a judgment or decree. To the same effect are Wright v. M. & St. P. R. Co., 25 Wis. 46; Gilman v. S. & F. du L. R. Co., 37 Wis., 317; Pennison v. C. M. & St. P. R. R. Co., 93 Wis., 344; Menasha v. M. & N. R. Co., 52 Wis., 414; Memphis W. Co., v. Magnes & Co., 83 Tenn., 37; Hoard v. C. & O. Ry., 123 U. S., 222; Chesapeake & O. R. Co., v. Miller, 114 U. S., 176; Cook v. D., G. H. & M. R. Co., 43 Mich., 349; Houston & T. C. R. Co. v. Shirley, 54 Tex., 125; Thornton v. Wabash R. Co., 81 N. Y., 462; Glenn v. Statler, 42 Iowa, 107.

985 The foregoing is but a small part of the numerous cases in the books on the question under consideration. They show how frequently the principle, which protects the right of creditors to be paid out of corporate property against schemes worked out by contract or by legislative enactment to merge one corporation or all the property of one corporation in another has been confounded with the circumstances of a corporation by adverse proceedings to enforce a mortgage upon corporate property, becoming legitimately possessed of it by a sale, cutting off the rights of creditors having a junior or no lien on said property. In the former case the new possessor of the property takes what the creditors have a right to resort to for the satisfaction of their claims; in the latter such possessor takes only that for which full value was parted with to the old company at the time the mortgage was placed on the property, or thereafter, pursuant to its terms. In the former circumstances the proceedings are all voluntary; in the latter, involuntary and adverse. The defendant became the bona fide owner for full value, of the property of the Oconto Water Company, and all the franchises possessed by it for the profitable use and enjoyment of such property. The purchasers at the foreclosure sale took title to the property with the incidental right conferred by Sec. 1788, Stats. 1898, to form a new corporation to take the same by assignment and possess the rights of the old organization. When the mortgages were given, Sec. 1788, Stats. 1898, became a part of them and a very material element in the value of the security. The right guaranteed by such section was as much a part of the mortgage security as the tangible property described. The theory of the appellant is that the statute, clothing a corporation, circumstanced as the defendant is, with the right to exercise the powers, privileges and franchises possessed by the old corporation, which it shall have acquired bona fide, by mortgage sale, or by assignment based on a title acquired through such sale, instead of adding to the value of a corporate mortgage covering all the property of the corporation, tangible and intangible, impairs it and may destroy it, because a new corporation cannot be organized

with the benefits of the statute without incurring the penalty of being liable for all unsecured indebtedness of the old corporation, whether before the foreclosure sale the owner of the mortgage indebtedness had a first lien on the property or not. In other words, that the statute not only operates to prevent the general creditors from being cut off by the foreclosure proceedings, but transposes the parties so as to give the general creditors a claim on the property paramount to the mortgage. The statute will not admit of a construction leading to such an absurd result even if the question were an open one, and it is not, as we have seen. The manifest purpose of it, as indicated, is to add to the value of a corporate mortgage of the kind under consideration. That is too plain to admit of serious controversy. Candor compels us to say that we do not think that the contrary theory merits the consideration we have given to it, since its fallacy is so glaringly apparent and has so often been exposed in this and other courts."

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Counsel for the Trust Company rely upon the case of Chicago Ry. Co., v. Ashling, 43 N. E., 373, in which it appears that the St. Louis Company conveyed all its physical property and franchises to the Santa Fe Company without consideration, and without making any provision whatever for the payment of its debts. Mary L. Ashling recovered a judgment against the St. Louis Company for the negligent killing of her husband, and in the suit against the Santa Fe Company it was held that the conveyance to it amounted to a consolidation under the Illinois statute, which, however, does not provide for a statutory consolidation, or state the method or manner in which consolidations are to be affected. The Santa Fe Company did not, as in the case at bar, acquire the St. Louis Company's properties at a foreclosure sale thereof, and pay the purchase price into court for the benefit of those entitled to it, nor as the result of a bona fide sale to it, in which the consideration passed to the St. Louis company, and stood in lieu of its property, and so became subject to the claim of creditors. Hence, it would seem that the Ashling case is distinguishable from this case, and could hardly be considered as an authority applicable to the construction of the Missouri consolidation statute, respecting the creation of a new company.

The Master has endeavored to make a critical examination of all the authorities submitted by counsel on the consolidation issue, distinguishing, as best he could, the conclusions of the court in each case by reference to the particular points involved therein, so as to reach a proper conclusion as to the legal significance of the specific transaction entered into by the Southern and Belt Companies, pursuant to the reorganization plan and agreement, and, including the foreclosure sales of the properties, comprising the Belt system. In his opinion, there was no consolidation effected by what was done by the corporations involved, but that the transaction, when considered in its entirety, was in fact a reorganization scheme, intended to bring about a certain union or combination of properties, by which combination additional strength would be given them as a whole, as they were all dependent upon each other for the present

as well as future railroad advantages and benefits; but such
987 combination or union of these properties was to be consummated only after their purchase at the foreclosure sales under the mortgage liens thereon, thereby intending to first acquire the titles, pursuant to the contract liens on the properties, and then utilize the properties so purchased by uniting and combining them in one corporation, which would be able to realize better results from the joint operation of the roads concerned than had been done in their separate operations. It will be readily conceded that, under the facts shown in evidence, in respect to the capitalization and bonded and other indebtedness of the different railroads, involved in the reorganization scheme, in connection with their earning capacities and expenses of operation, it was a wise policy that dictated the organization of one great corporation to manage the whole, and the only question in dispute at this time is as to the effect of such reorganization arrangement upon the rights of the Trust Company as a creditor of the Belt Company.

The equitable rule, to which respondent's counsel refer, aims at the prevention of fraud, and is applicable wherever corporate property is transferred to another corporation "without any other consideration than that growing out of, or incidental to, the consolidation" in which event the legal presumption arises, either that the successor corporation assumes the payment of the debts that should have been paid out of or from the property so transferred, or that the transaction was fraudulent and should be avoided as to creditors. The successor corporation, having received actual substantial benefits belonging to the company, transferring its property, and equitably applicable to the payment of its debts, should, to the extent of such benefits, be liable for such debts, but this principle cannot be invoked where the transfer is involuntary and for sufficient consideration, for in such case the creditors have no legal or equitable right to be protected in the absence of such fraud, actual or constructive, as should impeach the transaction in the interest of bona fide creditors.

The following authorities from the U. S. Circuit Court support these general propositions:

In Farmers Loan & Trust Co. v. Louisville Ry. Co., 103 Fed. 110, Circuit Judge Woods delivering the opinion, the syllabus is,

"A plan of reorganization made by railroad bondholders for the purpose of purchasing the property at foreclosure sale, and by which stockholders in the old company are permitted to convert their stock into stock of the new company on the payment of a stipulated difference, is not for that reason fraudulent and void as to general
creditors of the old company, where it does not appear that
988 any of the stockholders, as such, were parties to the plan, that it caused or in any way affected the foreclosure proceedings, or deprived the general creditors of any rights so that whatever rights, if any, are secured to the stockholders are at the expense of the bondholders and not the unsecured creditors."

In this case, it appears that a receiver was appointed for the purpose of preserving the unity of the railroad property in-

volved. Subsequently, default was made in the payment of interest on the company's bonds, but "before the filing of bills for foreclosure, a committee of bondholders was appointed, who devised a scheme of reorganization, in pursuance of which they made a contract with a syndicate, which included some of the officers of the company by which such syndicate agreed to purchase for cash certain bonds and stocks of the new company, and to deliver certain of such stock to stockholders of the old company, who should elect to exchange their stock therefor, and to pay a stipulated sum per share in cash. The plan was carried into execution, and the bondholders' committee purchased the property at the sale under foreclosure decree for a sum much less than the mortgage indebtedness thereon. The company was unquestionably insolvent and it was not shown that such arrangement in any way affected the foreclosure proceedings; nor did it appear that stock in the new company received by the stockholders in the old was of any greater value than the cash payment required to be made by them therefor. Held that such arrangement did not constitute a fraud upon the unsecured creditors of the old company, nor operate to their injury, so as to entitle them to place the property again in the hands of a receiver, to be operated for their benefit until their claims were discharged."

In this case, Judge Woods cites with approval the statement of Judge Jenkins in Paton v. R. R. Co., (C. C.) 85 Fed., 838, as follows:

"The question is presented whether any plan of reorganization can be sustained, which does not comprehend the protection of the rights of general creditors of the corporation, or in other words, whether bondholders have the right to agree with stockholders upon terms, which may be agreed upon to give the latter an interest in the new corporation, without including creditors in such plan of reorganization or at least tendering them the chance of joining therein. I fail to see any just reason why, in the absence of fraud or oppression, such arrangements should not be upheld in a court of equity. It was competent for these bondholders to exclude stockholders from any agreement. It was also competent for
989 them to exclude creditors. The bondholders, under different mortgages could agree among themselves, without reference to creditors or stockholders; and in case of agreement with stockholders, unless the scheme is clearly one to secure to the stockholders that which should justly go to the creditors—unless it can be said that it was a scheme to defraud creditors—I perceive no reason which should justify denunciation of the plan. To the contrary, such plans or reorganization have met with general approval, because they tend to avoid sacrifice and loss and are beneficial to the public. Robinson v. Railroad Co. (C. C.) 28 Fed., 340; McIntosh v. R. R. Co., (C. C.), 34 Fed., 582; Central Trust Co. of N. Y. v. U. S. Rolling Stock Co., (C. C.) 56 Fed., 5, 7; Penn Transp. Co.'s Appeal, 101 Pa. St. 576."

In Armour v. Bennets' Sons (C. C.), 123 Fed., 56, Circuit Judge

Severens delivered the opinion, and it was held that a new corporation, regularly organized by the officers and stockholders of one existing for the purpose of acquiring its property and assets and which did acquire the same by purchase at judicial sales, cannot be treated as a continuance of the old corporation, and liable at law for its debts, whatever may be its liability in equity to creditors of the old corporation, in respect to the property, if fraud is shown in the transfer.

The Court said:

"They (meaning the stockholders) cannot gain profits from the assets of the corporation, to the detriment of the lawful rights of creditors any more than any other person can. To be sure the relation of the stockholders, and especially of the directors, to the subject matter, may afford reason for close scrutiny of such transactions; but in the end the question is one of fair dealings in the exercise of a legal right (1 Morawetz on Corp. par. 811). All this is inconsistent with the idea that a new corporation, organized with the intention of acquiring for it the assets of an existing one, must, upon acquiring them, be regarded as the old corporation in a new dress and so liable for the old debts."

The Southern was, and is, in all essentials, a new corporation, (and not the continuation of the old Belt Company), organized, primarily, to acquire, hold and operate the Gulf road, with the necessary terminals at Kansas City and the Gulf of Mexico, and, contemplating the ultimate ownership of the Belt system at Kansas City, if the same could be acquired in the manner provided in the reorganization plan; and it was understood that all these roads had to be bought by the reorganization Committee, at the
990 various foreclosure sales thereof, which were made subject to the proper orders of court providing therefor.

There was, then, no merger of corporate interests by corporate action, between the Belt and Southern Companies. There were no transfers of the properties of the Belt system by the corporations owning them, otherwise than through the foreclosure sales, regularly and legally made, and the considerations paid for such properties were large and sufficient; being approximately the full amount of the bonded indebtedness upon each railroad foreclosed; and, in this connection, it may be properly suggested that there has been produced in this cause, considerable testimony, tending to show that all the roads, forming the Belt system, were extravagantly built and were bonded largely in excess of their actual cost, though such fact, even if proven, does not determine their value at the time of the several foreclosure sales, but could only be considered along with all the other proofs, if any, as to the real actual values of the foreclosed properties, at the times they were sold.

Summarizing the proofs, as the Master finds them to be, he has reached the following conclusions, in respect to the effect of the foreclosure sales of the properties comprising the Belt system, and now owned by the Southern Company:

1. The foreclosure sales were legally made, and the Trust Com-

pany, though a party to the foreclosure proceedings, has not at any time objected to the regularity thereof, or the sufficiency of the amounts received for the properties sold.

2. In the record there is no direct testimony by either party showing the actual, fair, reasonable value of said properties at the time of, or prior to, the foreclosure of the mortgage liens thereon.

3. The union, or combination, of all the roads of the Belt system and Gulf road into the Southern Company, pursuant to the reorganization scheme, created and gave to the reorganized system a much larger value than was the aggregate value of all said roads as separate institutions, managed as they were prior to the date they were sold to the reorganization Committee; and, further, that, by reason of the additional value given to said properties as parts of the reorganized railroad system, the Southern Company was enabled to issue its thirty million dollars of bonds, twenty-one million of preferred stock, and thirty million of common stock, the whole aggregating eighty-one million, par value, and approximately, more than four times the amount paid by the Committee for said properties at the foreclosure sales thereof.

991 4. There is no sufficient proof, in the record, showing what was the market or other value of the stocks and bonds of the Southern Company, which were given to the stockholders of the Belt Company, though such values, if shown, would be no fair criterion on which to base the actual value of the Belt property, turned over to the Southern Company, in the manner hereinabove stated.

5. If respondent's contention is correct to the effect that there was a consolidation, de facto, by which the intervenor became liable for the Belt indebtedness, still there is no proof in the record to show that the Belt properties, sold under the mortgage foreclosures, were worth anything in excess of what they brought at the sale; and in the absence of such proofs, the Master finds that the amounts, for which they were, respectively, sold, was and is their fair, market value at that time.

6. There is no evidence in the record showing actual frauds either at or in the inception of the reorganization scheme, or in any proceeding thereunder; including the foreclosures of the mortgage liens on the properties sold and the conveyance to the Southern Company.

7. That, for their mutual protection and self interest, the bondholders interested in all the railroad companies involved, had the right to combine together for the purpose of acquiring all the properties thereof, and then uniting them in one system, and without consulting either the stockholders or creditors of the constituent companies owning such railroads; and, furthermore, that it was competent for the bondholders, in furtherance of their own business interests, to use the stocks and bonds of the new company as they saw fit, provided, that it is not shown that in so doing, it was part of their scheme to give something of value to the stockholders that should have gone to the creditors.

8. It is not shown in the record that the reorganization scheme

in any way deprived the unsecured creditors of any rights they would otherwise have had in case such scheme had never been consummated. There is no pretense that the Trust Company was prevented from bidding on, or buying, said properties, because of any secret understandings, nor is there any satisfactory proof in the record to the effect that the conduct of the Trust Company, in respect to said foreclosure sales, was in any wise changed or altered on account of the reorganization plan and agreement.

992 *As to Reorganization Plan and Agreement Expressly Providing for the Payment of the Floating Debt of the Constituent Companies.*

8.—It is claimed by the Trust Company that it appears from the reorganization plan and agreement that the floating debts of the constituent companies were to be paid, whether more or less than $475,000.00, the amount named therein, which was simply in the nature of an estimation. The intervenor contends that no such liability was intended to be, or was in fact, created by the reorganization plan. The relations of the parties interested will be helpful in determining the meaning of that part of the agreement. The reorganization Committee was merely an agency constituted by such bondholders and stockholders of the Gulf Company and its allied companies, as saw fit to act in concert under the proposed reorganization plan and agreement, which were expressed to be for the benefit of the participating bondholders and stockholders. General or unsecured creditors of those companies were not parties thereto, the manifest purpose and object being to protect the interests of the stockholders and bondholders of those companies, which had become insolvent, and which then or shortly afterwards would have to be administered by the court. It became necessary for them to devise some plan for the disposition of the properties belonging to those companies, which would preserve them for the benefit of stockholders and bondholders, which could only be done through concerted action on the part of the security holders, and hence, the modified Philadelphia Plan of November 7, 1899, was adopted for that purpose.

As heretofore stated, the reorganization agreement gave the Committee plenary power to alter or modify the terms as might seem necessary or desirable, the intention being to include the Belt terminals, as heretofore stated, if sufficient of its securities were deposited with the Committee, otherwise, arrangements for other terminals at Kansas City were to be made. The provision in the plan, as to using $475,000.00 for paying floating debts of the constituent companies, was, perhaps, more in the nature of a detail in the general plan, so as to advise the depositing security holders of the probable disposition of the moneys, to be realized from the securities to be issued by the new company, as there is nothing in the plan, or in the agreement, indicating the amount of the floating debts to be paid, or their nature, and certainly nothing as to the Belt indebt-

edness to the Trust Company. The provision in the plan relating to certain securities, aggregating $3,000,000, and reserved in
993 the treasury for future requirements, might properly be considered as another such detail in the plan.

It is urged by counsel for the Southern Company, that, in as much as the reorganization plan and agreement were for the benefit solely of the security holders of the properties involved, it necessarily follows that the Trust Company can claim no privity of contract, nor can it maintain an action upon it or claim any right or benefit from it.

In St. Louis v. Contracting Co., 101 S. W., 6, the Supreme Court of Missouri held:

"There is a broad distinction between the principle involved where a contract is entered into between two parties for their own use and benefit, and where they made a similar contract for the benefit of a third party. A breach of the first would create no cause of action in favor of a third party, even though he was thereby deprived of large benefits which would have flown to him had the contract been performed; while in the latter case the breach would create a cause of action in his favor, even though the benefits he would have received from its performance might have been insignificant as compared to those he was deprived of by the breach of the former * * *. From what has thus been stated it can be seen that the character and value of the benefits and their loss or reception have no weight whatever in determining the question as to whether or not the contract was made for the benefit of third parties, who in this case are the property owners * * *. All of the well-considered cases start out by the assertion of the broad proposition that the contract must be made for the benefit of the third parties, as its object, and they must be the parties intended to be benefited thereby."

The Court continues:

"So it seems clear to us that whatever benefits that may accrue to the property owners as a result of street improvements is purely an incident to the improvement, and not an object intentionally sought to be obtained by the contract which was made for the improvements. Third persons who are only collaterally and incidentally benefited by the terms of a contract have no cause of action for its breach."

"The courts are not uniform in their opinions as to the principle upon which this class of actions are maintained. Many of them base their opinion upon the ground that the obligee in the contract owed the third party some debt or duty, either legal or equitable, and that by accepting the contract the law creates a privity of
994 consideration between them upon which he could maintain a cause of action for its breach. Vrooman v. Turner, 69 N. Y., 280. But in applying that principle to this case, we are confronted with the proposition that the city owned no duty to the property owners to increase the value of their property, but were merely creating a fund, or providing a means, out of which the

contemplated improvements could be paid. To this proposition the respondent might reply that while that may be true, yet the law required the city to let the contract at the lowest price obtainable, and that the property owners had the right to avail themselves of that price. In answer to that contention it may be said that, in all the cases where third parties have been permitted to recover upon a contract entered into for their benefit, said third parties had either adopted the contract or complied with the provisions thereof relating to them, or that the debt or duty which was owing to the third party had passed or vested in the obligee of the contract before the suit was instituted."

Neither the bondholders, stockholders, nor the reorganization Committee, owed any legal or equitable duty to the Trust Company, unless such duty can be implied in some way from the reorganization plan and agreement. The Trust Company as a creditor was not intended to be, and was not in fact, a party to the reorganization agreements, though it received benefits therefrom in the exchange of its old securities for the new ones of the Southern Company; nor does the evidence in the record show that it ever changed or altered its position in any way on account of said floating debt provision.

In Howsman v. Water Co., 119 Mo., 304, a contract had been entered into between the town of Trenton and the Water Company, by which the Water Company agreed with the town to furnish, at all times an adequate supply of water for fire and other purposes for public and private use, and further agreed and "should said Water Company, from lack of water supply, or other cause, except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect."

The plaintiff's dwelling being destroyed by fire, he sued the Water Company, for a breach of its obligation above quoted. The court held that there could be no recovery by the reason that the contract was not *name* for the benefit of the plaintiff as its object; and the fact that he was indirectly or incidentally benefited by it did not give him the right to sue upon it. The opinion has citation of many authorities. Similar cases are

995 Metropolitan Trust Co. v. Topeka Water Co., 132 Fed., 702.
Allen Mfg. Co. v. Shreveport Water Works Co., 37 So., 980.

In Sayward v. Dexter, 72 Fed., 758, the court applies the same rule, saying:

"But it is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was made and was intended for his benefit. The fact that he is incidentally named in the contract or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions."

In American Bank v. Railroad Company, 75 Fed., 130, the syllabus is as follows:

"An agreement made by one person with another to pay a debt due by the latter to a third person is not the subject of suit by such third person, when there was no intention to benefit him, and nothing of value came under the contract within the control of the promisor, which, in equity, belonged to such third person, or is subject to a lien in his favor."

The Court said:

"The explicit language of the complaint makes it clear that the promise of the defendant was to pay an existing debt, and it was made for the benefit of the Chicago & Northern Pacific Railroad Company; and no facts are alleged from which an inference may be drawn that the parties to the contract were actuated by a desire to benefit the plaintiff, nor that the scope of their intentions included any provisions for rights or interests other than their own; and, there is no pretense that under the contract anything of value or assets have come to the promisor's hands, or under its control, which, in equity, belongs to plaintiff, or is subject to any lien existing in favor of the plaintiff. The case, therefore, comes fully and fairly within the rule of the decision of the Supreme Court in the case of National Bank v. Grand Lodge, 98 U. S., 123. The rule and the authority of the case cited have received express recognition in the Circuit Court of Appeals for the Ninth Circuit, in the case of Savward v. Dexter, 72 Fed., 765."

In Freemen v. Pennsylvania Co., 173, Pa. St., 274, it is held:

"The holder of coupons representing interest upon railroad bonds had no right of action on an agreement by the lessee of
996 the railroad to apply the net earnings to the payment of the interest coupons, and to buy up the coupons if the net earnings should not be sufficient to pay them; such holder of coupons being a stranger to the contract and the consideration."

In McIlvaine v. Big Stony Lumber Company, 54 S. E., 473, it is held:

"Code 1904, Section 2660, authorizes the assignee of a bond or a chose in action to sue in his own name and to maintain any action which the original obligee party or contracting party might have brought. Held, that such action did not authorize an original creditor to sue at law on covenants of third persons to assume and pay the debt where there was no consideration passing from such creditors to such covenanters, and there was no privity between them."

The Court said:

"The test, therefore, in such a case, seems to be whether or not the promise or covenant sued on was made for the sole benefit of the plaintiff."

In Armour Company v. Construction Co., 78 Pac., 1106, it is held:

"One who furnishes provisions to a contractor doing work for a railroad cannot recover from one who gave a bond to the railroad

to pay persons supplying provisions to the contractor, there being no privity."

One of the leading cases on this question is Second National Bank v. Grand Lodge, 8 U. S. 9, 123, which was an action by the bank against the Grand Lodge of Missouri to compel the payment of certain coupons formerly attached to bonds issued by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge had adopted the following resolution:

"Resolved, that this Grand Lodge assume the payment of Two-Hundred Thousand Dollars bonds issued by the Masonic Hall Association provided that stock is issued to the Grand Lodge by said Association to the amount of said assumption of payment by this Grand Lodge as the said bonds are paid."

The Court held that the bank, as the holder of the bonds, was not in such privity with the contract as to warrant a suit upon it, saying:

"It was a contract made for the benefit of the Association and of the Grand Lodge—made that the latter might acquire the ownership of stock of the former, and that the former might
997 obtain a relief from its liabilities. The holders of the bonds were not parties to it and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they should have in any agreement by which the lodge should undertake to lend money to the association or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far the privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come into the promisor's hands or under his control which in equity belong to a third person. In such a case it is [held] that a third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise as to where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and, therefore, the rule is that the original creditor cannot sue. His

case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor is he sole beneficiary of the contract between the association and the grand lodge. The contract was made, as we have said, for the benefit of the association, and if enforceable at all is enforceable by it. That the several bondholders of the association are not in a situation to sue upon it is apparent on its face."

The Trust Company is not within any of the enumerated exceptions, nor can it be claimed that assets came into the hands of the reorganization Committee or under its control, which in equity
968 belonged to the Trust Company, as the sole beneficiary interested in the provisions contained in the plan and agreement for the payment of the floating debt.

Another strong case in point is that of Meyer v. Ft. Wayne R. R. Co., 132 Indiana, 88, in which the plaintiff agreed to build a station for two companies, which he did, but was not paid by one of them, the road of which was afterwards sold under foreclosure and bought in by the bondholders, who organized a new corporation to own and run it. The new corporation used the station and plaintiff sued it for the amount which the former owners of the road agreed to pay him. It appeared that there was an agreement between the bondholders of the original company that a certain sum should be retained for the payment of small claims as required. The court held that plaintiff could not recover and that the agreement created no obligation in favor of the plaintiff, saying:

"The provision in the contract between the bondholders, which we have quoted, does not bind the appellee to pay the appellant any sum whatever. It simply authorizes the directors to use that sum as they may deem necessary in the payment of claims. But, if it were conceded that the provision does create an obligation in favor of the appellant, still there is no right to recover upon it, because it does not appear that the sum was not properly used to pay the claim specified, or other claims having rightful precedence of the appellant's claim."

From the undisputed facts in the record, it can hardly be claimed that the Trust Company, or any other unsecured creditor of the Belt Company, had a direct interest in the floating debt reservation provision of the reorganization plan, for the carrying out of such provision was clearly within the discretionary powers of the reorganization Committee in every way whatever. The Committee was fully authorized to do as they thought best in respect to paying off such indebtedness as, in their judgment, was necessary or expedient, in furtherance of the purposes of the reorganization plan and agreement; and, hence it appears, in Ingel's testimony (Rec. Vol. 56, pp. 34354 to 34380) and particularly in his exhibit 192, in Vol. 56, pages 34357 to 34368, that the Committee and the Southern Company together paid out in connection with the obligation of $5,900,000.00 set out in the modified plan or reorganiation, the following amounts:

Car Trust Certificates.

Amount called for under the plan... $1,900,000.00

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Amount actually paid out by Committee and Southern Company.....		$2,192,580.40
First mortgage coupons and ad interim interest; amount called for in the plan.....	575,000.00	
Amount actually paid out by Committee		891,913.41
Receivers certificates; amount called for under the plan.....	800,000.00	
Amount actually paid out by Committee and Southern Company.....		821,543.74
Appropriate to floating belt; amount called for in modified plan.....	475,000.00	
Amount actually paid out by Committee and Southern Company.....		1,164,172.56

This statement shows that, as to each item, the amount paid out largely exceeded the original estimate, and, that the joint payments of the Committee and Southern Company, on account of the floating debt appropriation, exceeded the estimate to the extent of $689,172.56. This fact, certainly shows the exercise of the widest discretionary power as to shaping up the details of the reorganization scheme for the benefit of the new security holders, and, one of the largest of which is the Trust Company, as it received bonds and stock of the Southern Company in exchange for, approximately, $850,000.00, par value, of the securities of the old companies. (Rec. Vol. 49, pp. 29972 to 29974.)

In other words, the Trust Company, presumably, received its proportionate benefit from this large expenditure in payment of what are called the floating debts, but which in reality consists of all kinds of items, which the Committee deemed necessary to take care of, so as to secure absolutely the first mortgage lien on the properties transferred to the Southern Company.

By reference to the 13th paragraph of the "agreement," hereinbefore copied it will be observed that the Committee was authorized to acquire, extinguish or hold any obligation in the nature of floating debt, or otherwise, against the company or property embraced in said plan, either as proposed or carried out, or any securities held as collateral for any such obligations, etc.

The testimony of Shipley, Smith, Petitt, Pam, Harrity, Sielcken and Hecksher, members of the reorganization Committee,
1000 and found in Vol. 57 of the Record, is to the effect that the $475,000.00 appropriated, as above stated, for the payment of floating debts, was a lump sum set aside by the Committee to make provision for the payment and discharge of such obligations as the

Committee might find necessary to discharge in order to relieve the properties, to be included in the Southern mortgage, from any liens claimed thereon or from any interference as a matter of business policy, and that said $475,000.00 was simply an estimate or reservation to cover such charges, and further, that at no time did the Committee, in making such estimate, contemplate or include therein the indebtedness of the Belt Company to the Trust Company; but the contracting parties to the reorganization plan and agreement, made an express provision, intending to exclude, and excluding, the Trust Company or any other creditor of the constituent companies from enforcing against the new company to be formed, any right of action which such creditors might have had against the old companies.

The third section of the 12th paragraph of the reorganization agreement, hereinafter copied, provided that no right is conferred, nor any trust, liability or obligation, is created by or for a new company in favor of any claim whatever, against the companies involved, as to any matter or thing. The Trust Company executed said agreement as one of the depositaries thereunder, and also accepted the benefits of its provisions when it exchanged the old securities it held against the constituent companies for the new securities of the Southern Company, and by so doing, it has accepted and agreed to said provisions, and cannot now repudiate them, after receiving and enjoying the benefits thereof. In other words, the Trust Company might have refused to accept the benefits of the reorganization scheme and taken its chances on the outside, but it did not do so. It has, in effect, agreed that it would not assert its creditors' claim either against the Committee or the Southern Company, for if it did so, it would thereby be asserting a claim which would be adverse to the reorganiation plan and agreement, under which it had elected to take the benefits accruing to it as a depositor of its securities thereunder. It would seem, then, that under the circumstances above stated, the Trust Company cannot now maintain an action against the Southern Company to enforce a right or trust in contravention of the terms of said agreement.

It is claimed, however, by counsel for the Trust Company, that it is not attempting to obtain any right inconsistent with the provisions of said agreement, but that, by the terms thereof, it is entitled to be paid by the Southern Company, as the purchaser of the
1001 Belt properties, under the reorganization scheme.

For the reasons above stated, the Master is of the opinion that the Trust Company, in its capacity as creditor, is not directly interested in the floating debt provision of the reorganization plan, but, that any right, which it may have therein is collateral and incidental to the main purpose and object of such plan, and, that the respondent had no such legal or equitable right as entitled it to avail itself of said floating debt provision.

As to any Agreement on the Part of the Reorganization Committee, or the Southern Company, to Pay the Belt Indebtedness to the Trust Company.

9. The alleged liability of the Southern Company arising on account of any promise or agreement by either the Committee or the Southern Company, to pay the Belt debt to the Trust Company, *it* not satisfactorily supported by the proofs in the record.

(1). The evidence relied upon by the Trust Company, to maintain its contention that the Southern Company agreed to pay such indebtedness, is founded principally upon the testimony of Thomas L. Chadbourne. Chadbourne became a general counsel for the Trust Company in October, 1899, and in December, 1899, or January, 1900, he was made the acting president of the Executive Committee of the Trust Company (Rec. 57, pp. 34688 to 34721).

He stated, in substance, that he appeared before the reorganization Committee, on behalf of the Trust Company, and that the Committee promised to pay the Belt indebtedness at that time claimed to be due to the Trust Company; that some time in December, 1899, and before the organization of the Southern Company, he was present at the office of John W. Gates in Chicago, and there were also present Gates, Pam and others, and at which time the assets of the Trust Company were being examined, and when the Belt indebtedness was reached, Gates marked it down as "good" at Pam's suggestion, because it would be taken care of in the reorganization of the road; that he had other interviews with Pam, in which the latter agreed, on behalf of the reorganization Committee, or the Southern Company, to pay the Belt indebtedness to the Trust Company. Chadbourne further stated that later on, Pam, on behalf of the reorganization Committee, or the Southern Company, modified his agreement to the extent that he wished to have an audit made of the books of the Trust Company, and, he stated that, after this audit was
1002 made, he, Pam, in behalf of the reorganization Committee, or the Southern Company, would agree to pay whatever was found to be due the Trust Company from the Belt Company, and, that thereafter, one Hills, acting for the reorganization Committee, and R. J. McCarty, who was to make an examination for the Southern Company, made an examination and audit of the books, and that Hills stated that he had found the amounts all correct. On cross-examination, Chadbourne stated that he did not know what books of the Trust Company McCarty examined, nor did he know anything about the examination; that Pam finally agreed, on behalf of the Southern Company, to pay the debt of the Belt Company, as evidenced by its notes of June 16, 1900, and, further, that at a meeting of the Guardian Trust Company, in the fall of 1900, when Stilwell was trying to get back into the Trust Company, Pam again said he would pay, or cause to be paid, the claims of the Trust Company against the Belt (Rec. Vol. 57-34688 to 34721).

R. J. McCarty stated (Rec. Vol. 56-34267) that, at no time prior to 1905, did he ever make an examination of the books of the Trust

Company at Chicago, or elsewhere, and that no one connected with the Southern Company, or the Belt Company, or its receivers, in so far as he knew, ever made an examination of the books of the Trust Company (Rec. Vol. 56-34267); that Pam never requested him to make any audit of the Trust Company's account, but that he received from Willey (Auditor of the Trust Company), in July, 1900, a detailed statement of the amount the Trust Company claimed against the Belt Company, which Pam requested him to check against the records of the Belt Company for the purpose of seeing how it corresponded as a matter of book-keeping, and that his only object in checking it was to discover what the balances were, and that he did not go into the merits or demerits of the items; that Hills was here in May, 1900, for about ten days, having come to investigate the Belt books, but he never heard of his investigating the Trust Company books (Rec. Vol. 56-34318 to 34323). All of which tends to show that Chadbourne was likely mistaken in his statement as to any promise being made by Pam to pay the Trust Company's claim against the Belt on June 16, 1900.

Max Pam stated that, on behalf of the reorganization Committee, he never promised to pay the obligations of the Belt to the Trust Company, nor were any claims therefor ever presented to the Committee; that on one occasion he was called into a meeting of the Executive Committee or Board of Directors of the Trust Com-
1003 pany, then being held in Chicago, at which were present directors Lambert, Gates and himself, and in answer to a question asked him as to what he knew about the claims of the Trust Company against the Belt, and as to the Trust Company collecting them, he stated that, as a matter of law and fact, the Belt Company did not owe the Trust Company anything, and that, if an accounting was had, it would appear that the Trust Company was indebted to the Belt; that an examination of the Belt books was being made by McCarty, and, also of the Trust Company books, and that, when done, he would take up the question of whether anything could be done towards an equitable adjustment of the claim, and that, as the gentlemen present indicated a desire to litigate the matter instead of waiting until the examination was completed, he then stated that the Belt Company would insist upon its legal defense, and that thereupon he withdrew from the meeting, (Rec. Vol. 57-34947 to 34970). Pem further stated that at that time, he made no promise or statement in behalf of the reorganization Committee (Rec. Vol. 57-34956-34960), nor did he make a promise, on June 16, 1900, to settle the Belt indebtedness, nor was the question reached of making payment of the Trust Company's claims. (Rec. Vol. 57-34961-62 and 34974-75).

He further stated that in answer to a question by Chadbourne as to when he could take up the matter of the Belt indebtedness to the Trust Company, he told Chadbourne that he would do so as soon as McCarty made the investigation, and had time to go over the accounts form the beginning. Pam denied the statements made by Chadbourne and Waterall, to the effect that, in the fall of 1900, at the Baltimore Hotel in Kansas City, he promised to pay the Belt

indebtedness, or that the reorganization Committee had agreed to pay it, or that he had stated that the claim had been approved by the reorganization Committee. (Rec. Vol. 57-34978-'79).

He further stated that, in Washington, D. C., Waterall asked him about the Trust Company recovering against the Belt, and he stated that in his judgment there was very little prospect of its doing so, because, upon a full investigation of the account, it would be found that the Trust Company was obligated to the Belt. That no statement could have been made to Waterall to the effect that the claim had been approved by the reorganization Committee, because it had never been presented to the Committee, and hence the Committee had never been asked to act upon it, nor had it ever acted upon it.

The testimony of J. McD. Trimble (Rec. Vol. 56-34400 to 34402), and of H. H. Harris (Vol. 57-34404 to 34411) as to conversations with Max Pam, substantiate the latter's statements
1004 in the main, to the effect that there would be a fair adjustment with the Trust Company after the proper expert examinations were made of the books of account, to see whether the claim of the Trust Company was a just one.

John W. Gates denied the statement made by Stilwell that he was told by Gates and Lambert that, when the Committee met, there was no doubt that they would pay the Belt debt to the Trust Company, but on the contrary, Gates stated that he never agreed or consented to pay that debt, nor did he know of any promise on the part of the Committee, or any member of it, to pay the Belt floating debts, or any debts against the Belt held by the Trust Company, nor did he ever hear of any claim or agreement to that effect until the commencement of this litigation. (Rec. Vol. 57-35051-35053).

John V. Loughney, secretary of the reorganization Committee, stated that he kept its minutes in writing, and that these minutes show all persons appearing before the Committee, all the claims considered and allowed, and agreements made, and that, by reference to the minutes of the Committee, appearing in Vol. 41-22048-22412, it will be seen that at no time did the Committee, either directly or indirectly, ever agree to pay, in part or in whole, any of the indebtedness of the Belt to the Trust Company. (Rec. Vol. 57-35042-35046).

It is not deemed necessary to refer more at length to the testimony produced on the question of the alleged agreement of the Committee to pay this Belt indebtedness, for the reason that, even if Max Pam did make statements, which led Chadbourne and others to believe that the Committee, in the exercise of the plenary discretion possessed by it, would pay such indebtedness, still his promise did not bind the Committee, unless specially authorized by it to make an agreement on its behalf.

The record in this case nowhere discloses that Pam was authorized by the Committee, or the Southern Company, to agree to pay the Belt indebtedness, or any part of it, to the Trust Company, as fully appears from the testimony of Shipley and others, members of the reorganization Committee, every one of whom states, that at no time did the Committee as a whole, or they, individually, ever agree

to pay said Belt debt to the Trust Company. (Rec. Vol. 57-34857 to 34994.

(2.) There is nothing in the agreement between the reorganization Committee and the Southern Company, by which the latter agreed, or obligated itself to become liable to pay the Belt
1005 indebtedness to the Trust Company. By reference to said agreement, bearing date of October 19th, 1900, and appearing in Rec. Vol. 57, pp. 35091 to 35100, the following provisions will be found:

"And whereas, all the moneys and securities paid into or deposited with said Committee were received by it in trust for the purpose of the reorganization mentioned in the aforesaid agreement of June 14th, 1899, and the plan or reorganization of November 7th, 1899, that is to say, in trust for the parties paying or depositing the same and for the company as reorganized, to-wit: The Kansas City Southern Railway Company, and for the making payment and discharge of the obligations lawfully made or incurred by said Committee in the exercise of the power and discretion conferred upon it, and said reorganization has been so nearly accomplished that the final completion of the same may now properly be by the Committee turned over and assumed by the said The Kansas City Southern Railway Company, and which said Company has already agreed, as part of the consideration for the conveyance to it of the property purchased by said Committee at foreclosure sale as aforesaid, to assume and discharge all the obligations of the said Committee incurred as aforesaid; a list whereof, so far as known, is hereto attached marked "Exhibit A" as a part of this contract."

"6. The Kansas City Southern Railway Company hereby agrees that it will assume and pay all obligations lawfully incurred by said Committee in the purchase of the property of the said Kansas City, Pittsburg & Gulf Railroad Company, under the decree of the Court under which said sale was made and confirmed, or in pursuance and execution of the powers upon its conferred, or otherwise howsoever as such reorganization Committee, and will forever indemnify and save harmless the said William F. Harrity, A. Heckscher, Herman Sielcken, William Edenborn, Max Pam, Samuel R. Shipley, Silas W. Pettit and Winthrop Smith, and each of them, his and their heirs, executors, and administrators, of and from all suits, claims and demands whatsoever arising by reason of anything done or suffered to be done by him, them, or either of them, in or about his and their execution of the duty, power and authority in them vested as such Committee as aforesaid by the agreement of reorganization of June 14th, 1899, and the plan or reorganization of November 7th, 1899, hereinabove mentioned, except only for his or their individual malfeasance or neglect."

In "Exhibit A", which is at p. 35098 of Vol. 57 of the record the only claim of the Trust Company, considered as an obliga-
1006 tion in that connection, is one for $8847.72, being for compensation claimed by the Trust Company as a depositary, in the reorganization plan, and which claim was then disputed by the Committee.

In respect to the Southern Company's paying any of the obligations of the Committee, it will be observed that, in said paragraph 6, the Southern Company only agrees to assume and pay all obligations lawfully incurred by the Committee.

It is evident that this contract of October 19, 1900, cannot be construed to apply to the Belt indebtedness in controversy in this cause, and, that none of the claims of the Trust Company in its answer to the intervening petition, wherein it attempts to fasten upon the Southern Company a liability for said Belt indebtedness are well founded in fact or law, under the terms of the contract

The Master is convinced that the contention of the Trust Company, in this respect, is without merit, for the following reasons:

(*a*) There is no sufficient evidence in the record of the making of any legal agreement, or even of an attempt to do so, by the reorganiation Committee, or by any person authorized to represent them, or by the Southern Company, by which the Belt indebtedness to them, or by the Southern Company, by which the Belt indebtedness to the Trust Company would be discharged, either by the Committee, or the Southern Company.

(*b*) The 7th paragraph of the reorganization agreement provides, as hereinbefore stated, that the Committee shall keep a record of its acts and proceedings, that a majority of its members shall constitute a quorum, and that no action shall be taken except with the consent of a majority of the whole Committee, either at a meeting thereof, or in writing without a meeting. There is no proof nor is it claimed, that the Committee as a whole, ever agreed to pay any part of the Belt debt to the Trust Company. There is no proof in the records of the Committee, or elsewhere in the record in this cause, of any authority having been given by the Committee to Max Pam, or to any other person, by which he, or such person, would be warranted in making a promise or representation, which would be binding on the Committee, even if any such promise or representation had been attempted to be made, and for a sufficient consideration.

(*c*) The testimony of each and all the members of the reorganization Committee in the record is explicit, to the effect that
1007 none of them, at any time, ever promised or agreed to pay the claim of the Trust Company in controversy.

(*d*) There is nothing in the agreement between the reorganization Committee and the Southern Company which binds the latter to pay the Belt indebtedness to the Trust Company.

The position of the Trust Company in its Contention that the Reorganization Plan and Agreement Were Fraudulent as Against it; Also as to Laches.

10. It has been strongly insisted by counsel for the intervenor that, in as much as the Trust Company executed the reorganization plan and agreement as a party thereto, and exchanged its old securities for the new securities of the Southern Comapny, which it ac-

cepted and held, regardless of this litigation, the Trust Company is equitably estopped to now claim that the reorganization scheme was fraudulent as to creditors; and in support of such contention, the following authorities are cited:

Crawshay v. Soutter, 6 Wall., 739.
Matthews v. Murchison, 15 Fed., 691.
Symmes v. Union Trust Co., 60 Fed., 830.
First National Bank v. Radford Trust Co., 80 Fed., 569.
Farmers Loan etc. Co. v. Central etc. Co., 120 Fed., 1006.
Vose v. Cowdry, 49 N. Y., 336.
Union Canal Co. v. Young, 1 Whar., 410.
State ex rel. Pope v. Germania Bank, 90 Minn., 150.
In re Peaslee's Will, 25 N. Y. Supp., 940.

On the other hand, counsel for the Trust Comapny with equal insistence, say that its right to hold the Southern Company liable, either at law or in equity, has been specially preserved in and by a certain stipulation, filed November 6, 1901, in the consolidated Belt foreclosure suit, the last paragraph of which is as follows:

"This decree is entered on the express condition, to which the complainant has assented, that it shall be without prejudice to and shall not bar the right of the Guardian Trust Company, or its receiver, to plead and insist in any litigation now pending or hereafter brought, that the Kansas City Southern Railway Company, by virtue of the manner in which it was organized or for any other reason, is legally or equitably liable for and bound to pay the unsecured debts of the Kansas City Suburban Belt Railway Company, either in full or to pay them to the extent of the value of any property heretofore acquired by it from the Kansas City Subur-
1008 urban Belt Railroad Company, or that thereafter may be acquired by it from said company by virtue of these foreclosure proceedings; and without prejudice to the right of said Guardian Trust Company or its receiver, to plead and insist, in any pending litigation or litigation hereafter brought, that the members of the reorganization Committee of the Kansas City, Pittsburg & Gulf Railroad Company assumed to pay and are liable to pay the unsecured debts of the Kansas City Suburban Railroad Company existing at the time the alleged reorganization was undertaken."

It appears by Ingel's exhibit No. 133 (Rec. Vol. 49-29972 to 29974), that the resultant new Southern securities were received by the Trust Company, on July 26, 1900, in lieu of the old securities owned by it and deposited under the reorganization plan; that the new securities consisted of 614-981.50/1000 Southern bonds, 2951-96.70/100 Southern preferred shares, and 5707-31/100 Southern common shares; and that the old securities exchanged were 410 Union Company bonds, 42 Air Line bonds, 325 Port Arthur Channel or Dock Company bonds, fractional 642/1000 Gulf Company bonds, 13-27/100 Gulf Company shares, 739-72/100 Belt Company shares, and 4389 Port Arthur Channel & Dock Company shares.

This stipulation was entered of record on November 6, 1901, which was after the exchange of securities, which had theretofore

taken place on July 26, 1900; and, the effect of the making of such stipulation, with the assent of the complainant, upon the rights of both the Southern and Trust Companies, is naturally presented for consideration, that is, (*a*) whether the Southern has thereby waived or lost its right to contend that the Trust Company was then, and is now, estopped to claim that it (the Southern) was liable for the Belt indebtedness, and, (*b*) whether the Trust Company has, by reason of the stipulation, acquired any new right, or simply retained its status, whatever it was, in respect to its relations with the Southern.

The history of the stipulation and the circumstances of its making are important for the purpose of showing what was intended to be done. It is not disputed that, just prior to or at the time that the Belt foreclosure decree in the consolidated cause was entered up, the Trust Company asked leave in this court, to file an amended and supplemental answer, stating in effect that the reorganization plan had been promulgated in the interest of creditors of the Belt Company, as well as bondholders and stockholders, and that it had been intended to pay the Trust Company's debt, the reorganization Committee having often promised to pay it until about the time
1009 of the institution of the foreclosure suits, and, that the purpose of such suits was to vest in the Southern Company title to all the Belt property, free from the payment of that Company's floating debt, which was a fraudulent purpose. It was asked that the Southern Company be made a party to the cause, etc. In the Court's order, denying the leave to file such answer, it was provided, however, as a condition of the denial, that the complaint should, within five days thereafter, file in the consolidated cause, the stipulation hereinabove mentioned, which was accordingly done.

It was clearly the object of the stipulation to safe-guard and preserve whatever rights the Trust Company then had "to plead and insist in any litigation" then pending or thereafter to brought, that the Southern Company had, by reason of the manner of its organization, or for any reason, become or was legally or equitably liable to pay the unsecured debts of the belt Company, either in full or to the extent of the value of any property theretofore acquired by the Southern from the Belt Company, or that might thereafter be acquired by reason of the foreclosure proceedings; and, it was also provided that the Trust Company's rights as against the reorganization Committee, should not be prejudiced in any wise, by reason of the foreclosure decree, then about to be entered up in the consolidated cause. It can hardly be reasonably claimed by the respondent that the effect of the stipulation was to create in it a new right, or to enlarge or revive an old one for its benefit, for there is nothing in the stipulation, or the circumstances of its making, to justify any such conclusion, but, on the contrary, the evident purpose was simply to preserve any rights, then possessed by the Trust Company, in respect to the matters mentioned in the stipulation, so that they could thereafter be enforced, regardless of anything appearing in the foreclosure decree; in other words, that the Trust Company would not, on account of such decree, be con-

sidered as having waived any of its rights, whatever they were, as against the Southern Company, for the payment of the Belt indebtedness. The right to bring and prosecute an action to establish a claim, without prejudice on account of another proceedings (the effect of which might be prejudical to such right), is one thing, and the right to recover on the merits of such action is an entirely different thing. The Trust Company's right to sue was preserved by the stipulation, in so far as such right would otherwise have been effected by foreclosure decree, but, the right to recover on the merits, in any suit which might be brought, was necessarily left an open question. If the Trust Company, before the exe-
1010 cutionof the stipulation, had done anything which had already destroyed anl legal or equitable right of recovery, which it might otherwise have had against the Southern Company or the Committee, it will not be seriously contended that the purpose of the stipulation was to cut off the intervenor's right to set up such fact in bar of the prosecution of any suit, which might be brought by the Trust Company, affecting the matter so in controversy.

This Court was not called upon to do so, and did not, in fact, pass upon any of the questions of fact or law involved in this floating debt proposition, and in any way affecting the rights of the intervenor or respondent in their relations to or with each other; on the contrary, while respondent's right to sue was preserved to it, regardless of the Belt decree, there was no other restriction placed upon either intervenor or respondent.

If right in the foregoing conclusions, then it follows that the question raised by intervenor as to the respondent being estopped, by its conduct in the premises, to now assert and claim that the reorganization plan and scheme were fraudulent as to Belt creditors, is wholly unaffected by said stipulation, and can be considered the same as if it had never been made. In this connection, it may properly be again suggested that respondent insists that it is not attacking the foreclosure decree and the sale thereunder, but it is bound by it; and further, that its claim in this cause is not against the property sold under the decree, nor any funds arising therefrom, but, such claim is founded upon the assumption by the intervenor of the Belt debts, by force of the consolidation statute, or other agreements shown in evidence. On that theory, counsel for respondent contend that the doctrine of laches is not involved, for the reason that the issue is merely as to the assumption by the new Company of the debt of the old Company, which is a legal liability, and uncontrolled by any equitable considerations; and further, that the new company, under such circumstances, could hardly be heard to complain because it was not sued sooner (the statute of limitations not having run).

It is not controverted that the Trust Company, a depositary in the reorganization plan, co-operated with the Committee, and used its influence, by correspondence and otherwise, to induce other bondholders and stockholders to deposit their securities with the Committee, as will more fully appear by reference to letters, passing

between it and the Committee, during the reorganization period, and found in Vol. 55, pp. 34488 to 34564 of the Record. The respondent was well acquainted with the purposes of the reorganization scheme, and with such knowledge, entered into the same, depositing its own securities and exchanging them for the
1011 new Southern securities, and advising others to make like exchanges. If so, then how can it now be heard to complain that the scheme was fraudulent as to Belt creditors, notwithstanding respondent's own active and beneficial participation therein.

It has received substantial benefits therefrom, by way of compensation for its services and in the exchange of securities, all of which it has retained, and, by reason of which, it is not in position, after many years of seeming acquiescence in the consummation and carrying out of the reorganization plan, to contend that such plan was fraudulent as to respondent as a Belt creditor. It cannot, under the circumstances shown in evidence, enjoy the benefits of the very scheme it seeks to attack, either directly or indirectly. This principle is well stated in Farmers Loan & Trust Co. v. Central R. Co. of Ga. 120 Fed 1006, in which the intervenor therein recovered judgment against a company, which became involved and was reorganized under a new charter. He thereupon deposited his stock under the reorganization plan and received preference bonds of the new company, and was held that he was bound by his action in entering into the reorganization, and could not assert his judgment, which was obtained against the old company, against the assets of the new company, to the prejudice of the other creditors.

The Court said:

"He therefore became a party to the reorganization, by means of which his equity against the assets of the old company became merged into the assets of the new company. The intervenor cannot be permitted to 'blow hot and cold', and, having entered into the reorganization he must be held to be bound by its action."

In Matthews v. Murchison, 15 Fed., 691, it was held, in substance, that a bondholder of a former organization has no standing in chancery to dissolve the new organization of a railroad company, for which his agent had voted his bonds, though in excess of authority, &c., in as much as he had accepted his share of the new bonds; and, also, that such conduct ratified the act, and "inducing others to believe hs had acquiesced in the reorganization, worked an estoppel."

In Symmes v. Union Trust Co. of N. Y., 60 Fed., 830, it is stated in the syllabus that

"Stockholders who have had full knowledge of a plan or reorganization, and have given it their approval, and subscribed to its provisions in respect of part of the stock owned by them, are estopped, after the reorganization is complete, to main-
1012 tain a suit, as owners of the stock on which they did not subscribe, to overthrow the same on the ground of fraud and conspiracy."

Laches of Respondent Trust Company.

In respect to the contention of intervenor that the respondent is barred by laches from asserting its Belt indebtedness claim against intervenor, it is well to reiterate that the reorganization agreement was promulgated November 7th, 1899, that the Southern Company took possession of January 1, 1902, of the properties formerly belonging to the Belt system, and, also, that the Trust Company failed to assert its claim against the Southern until it was done in this cause in 1905. The Southern securities, which were issued and exchanged for those of the Belt, were promptly listed on the New York Stock Exchange, as well as elsewhere, and, since then, have been sold and resold in this country and Europe, during the period, intervening between the incorporation of the Southern in 1900, and the assertion, in 1905, of respondent's claim against it, as the respondent well knew. In the meantime, the Southern Company was engaged in working out the details of the reorganization plan, and developing its combined railway system, thereby appreciating the value of the very Southern bonds and stocks acquired by the Trust Company under said plan. It is evident that, if the intervenor should have been held liable for all the unsecured indebtedness of the constituent companies of the old Belt system, including the large amount claimed by respondent, the effect of such liability would necessarily have been to depreciate the value of all the Southern securities, and, to that extent, operate to the injury of the security holders.

In view of the intimate connection and knowledge of respondent, as heretofore shown, with the practical working out of the reorganization scheme, and the large financial interests it had in the successful carrying out thereof, it is manifest that its conduct in the premises should not be of such nature as to be prejudicial to the rights of others interested in the Southern, and its securities, that is, should not be such as to influence or cause them to do things, which they would not otherwise have done, provided the Trust Company, at the outset, had promptly asserted the claim in controversy, before the position of others interested had been materially influenced and changed by its conduct in the premises.

In reaching this conclusion, the Master is not unmindful of the controversy between the Trust Company and certain members of the reorganization Committee, in respect to the latter paying, or causing to be paid, the Belt debt to the respondent, all of which preceded the Belt foreclosure. In his judgment, the fact of
1013 such controversy accentuated the importance of active measures by the Trust Company against the Southern, and affords no reason whatever for the respondent's long delay in asserting its claim in this cause. In support of intervenor's contention, the following authorities have been cited, and, in the main, they are influential in that direction:

New York, etc., Co. v. Louisville, etc., R. Co., 97 Fed., 226;
Harriman v. Northern Securities Co., 197 U. S., 244;

Carey v. Houston, etc., Ry. Co., 52 Fed., 671;
Wenger et al. v. Chicago, etc., R. Co., 105 Fed., 796;
Anthony v. Campbell, 112 Fed., 212;
Cutter v. Iowa Water Co., 128 Fed., 505;
Spencer v. Seaboard Air Line, 137 N. C., 107.

In Wenger v. Chicago & E. R. Co., 105 Fed., 796, it was stated, in effect, that the holder of an unliquidated claim for damages against a railroad company was held barred, by laches, from the right to charge a liability upon a reorganized company, succeeding to the property on the ground that it had issued the stocks and bonds to the stockholders of the old company, and the transaction had been completed, before the claim holder asserted his claim against the new company, though he had ample opportunity to do so.

In Anthony v. Campbell, 112 Fed., 212, Judge Thayer, delivering the opinion, said:

"A man cannot remain silent for three or four years, knowing that one corporation, of which he is a creditor, has wrongfully transferred its property to another, and that third parties are dealing with the new corporation, and trusting it on the supposition that the transfer was lawful, and then be heard to assert in a court of equity that because of the alleged unlawful transaction he has an equitable lien on all the corporate assets, which is superior to other creditors. Such conduct evinces an intention or a desire to profit by the mistakes of innocent third parties and ought not to be encouraged. * * * In the present instance the testimony shows that the intervenor took no action until nearly four years after he was advised of the transaction—a period of silence and inactivity, which must be deemed more than sufficient to bar his right to equitable relief on the ground that he has a general lien."

In the opinion of the Master, the surroundings, conduct, and laches, of the Trust Company in this matter, have been such as to preclude it, (a) from claiming that the reorganization scheme
1014 was fraudulent as against it, and, also, (b) from asserting its claim in controversy against the Southern Company.

XIII.

As to the Claim of the Intervenor for $773,246.00 *for Damages to the Bondholders Arising from Misconduct of the Trust Company as Co-Trustee of the Union Company Mortgage.*

In paragraph 13 of the intervening petition, the intervenor, in substance states that the Union Company duly executed its mortgage, or deed of trust, dated February 1, 1893, to the Trust Company, and to the Provident Company of Philadelphia as trustees, to secure its bonds for Two Million Dollars ($2,000,000.00), and that at that time the Union Company had not constructed its railroad but was only the owner of a franchise for the construction and operation of a railroad along the left bank of the Kaw River from

a point at or near Argentine, Kansas, to a point in Kansas City on the State Line between the states of Kansas and Missouri, the purpose of the bond issue being, as expressed in the mortgage, to provide funds with which to construct said railroad, and which was well known to the Trust Company; that said bonds, in the sum of Two Million Dollars, were duly issued and placed in the custody of the Trust Company and that "it then became the duty of the Trust Company under the express terms of said mortgage, as well as by law, to see that, as the bonds of the Union Company were sold, the proceeds thereof, were used in the construction, completion and equipment of the railroad of the Union Company," so that, as the bonds were sold, the proceeds thereof should be added to the Union Company's property, the intention being that the value of the property mortgaged as security for said bonds should increase, approximately, to the full extent of the bonds' proceeds invested in such property, thereby amply securing such bonded indebtedness, from time to time, as the bonds were issued; but, it is alleged, that the Trust Company was unmindful of its duties, and, from time to time, sold said bonds to innocent purchasers for value, and improperly diverted their proceeds from the purposes intended, as above stated, and unlawfully used the same to diminish the alleged Belt indebtedness to the Trust Company, thereby, in no wise, increasing or augmenting the value of the Union property covered by said mortgage; that the Trust Company thus diverted thirteen hundred and fifty of said Union bonds, of the par value of One Million three hundred and fifty thousand dollars, and of the actual value of One Million two hundred and fifteen thousand dollars, from the purposes for which they were issued, as the Trust Company well knew,
1015 and wrongfully neglected or refused to use the bond proceeds in adding to the value of the Union Company's physical property; and, further, that, in breach of its duty as trustee, the Trust Company, from time to time, sold Union bonds after the completion and equipment of the Union railroad, and when there was no necessity for then selling or disposing thereof for the construction, completion and equipment of said railroad; and that by reason thereof, the conduct of the Trust Company, in that respect, constituted a breach of trust, and was fraudulent against the Union bondholders.

Intervenor further stated that it is the owner of all the outstanding Union bonds by purchase from bona fide holders, that the properties and franchises of the Union Company were sold at a foreclosure sale for $1,500,000.00, which was in excess of their full value, and that, after crediting such proceeds upon said bonds, held by intervenor, there remained and still remain due to intervenor the sum of $773,246.00, and interest thereon from January 2, 1902, at five per cent per annum; that if the Trust Company had not wrongfully diverted said bond proceeds from the uses and purposes intended for their application, as set forth in the Union mortgage, then the mortgaged property would have sold for an amount sufficient to have paid said bonds in full, that intervenor was not advised of the acts of the Trust Company in diverting the bond

proceeds, until the facts relating thereto were developed in taking of testimony in this cause. Intervenor asked judgment against the Trust Company for the amount of said deficiency and interest thereon.

Afterwards, on May 20, 1905, the Trust Company filed its answer to the intervening petition, and, in paragraph 13 of such answer, it admits the execution of the Union Company mortgage, that it was one of the trustees therein, and that the purpose of the bond issue was to provide funds to construct its railroad, but otherwise denies all the averments of the intervening petition. It further alleges that the amount of the Union Company bonds delivered to it, and the prices, at which they were so delivered, are fully set forth in its answer to the amended supplemental and ancillary bill, and, that said bonds were in the main acquired by the Belt Company, which had guaranteed the payment of the principal and interest thereof, and was the owner of all the capital stock of the Union Company and operated its line, and, that afterwards, the Belt Company, in the usual course of business, sold said bonds for full value to the Trust Company, and to others, and the Trust Company states that such bonds, as were bought by it from either the Belt Company,
1016 or the Union Company, were bought for full value and in most cases for more than their full value.

Further answering, the Trust Company states "that most of the transactions, in respect to said Union bonds, were done more than ten years prior to the filing of the first intervening petition in this cause, and that all of said transactions occurred more than five years prior to the filing of the original bill herein, and, also, more than five years prior to the filing of said intervening petition, and that, if any rights, equities or causes of action accrued to the intervenor, by reason of such transactions, or any of them, the same accrued to it more than five years before the institution of this suit, and, hence, the respondent pleads, to each and all of said transactions, all the statutes of limitations of the State of Missouri, and particularly Sections 4271, 4272 and 4273, (Rev. Stat. 1899), which sections are now and were, at all times herein mentioned, in full force and effect; that, since the organization of intervenor, it has possessed full knowledge of all the facts and circumstances in respect to the handling and sale of Union bonds by respondent, but, notwithstanding such knowledge, the intervenor has made no protest nor taken any steps to enforce any rights, which it had in and to said bonds or the proceeds thereof, and, by reason of which, the intervenor has been guilty of laches and should not now be permitted to come into a court of equity and assert any claims against respondent on account of said transactions; that the intervenor acquired whatever Union bonds it may hold, through the reorganization Committee and in consummation of the reorganization plan and agreement, pursuant to which the intervenor was caused to be incorporated by the Committee for the purpose, among other things, of issuing its stocks and bonds in exchange for those of the Union Company and other companies, as in said plan and agreement is set forth, and, that the intervenor is the successor company which was proposed to be organ-

ized by said plan, and further, that the owners and holders of Union bonds, from which the Committee acquired the same, were at all times, familiar with all the facts and circumstances surrounding their issuance and of respondent's transactions in reference thereto, and that the Committee, after it acquired said Union bonds and up to the time they were delivered to the intervenor, was at all times familiar with all the facts and circumstances surrounding the same, and, that no steps were ever taken by either the bondholders or the Committee to enforce any rights, which are now claimed in respect to said union bonds or in respect to respondent's transactions in regard thereto.

1017 *Nature of Intervenor's Claim.*

1. Briefly stated, the cause of action is one at law, sounding in tort and praying for a money judgment against the Trust Company as a co-trustee, for alleged breach by it of the alleged duty, created under the terms of the mortgage as well as by law, to see that the Union Company used the proceeds of the bonds issued, in the construction and equipment of its railroad.

The Trust Company, in substance, sets up the following defenses:

(*a*) Denials in substance of all the allegations of the petition;

(*b*) A plea of the ten year statute of limitations;

(*c*) A plea of the five year statute of limitations;

(*d*) A plea of laches;

(*e*) A denial is made that, either by law or the express terms of the mortgage, there was any duty imposed upon the Trust Company to supervise the use or disposition by the Union Company of the proceeds of its bonds;

(*f*) That the Union Company, in furtherance of its own purposes, sold its bonds mainly to the Belt Company, which, as the owner of all the capital stock of the Union Company, had guaranteed its bonds, principal and interest, and had constructed valuable extensions and improvements, and operated its road; and that, thereafter, in the usual course of business, the Belt Company sold said bonds for their full value to the Trust Company and others;

(*g*) It is further denied that the intervenor is entitled to assert any rights as the bona fide holder of said Union bonds for the reason, so it is charged, that it came into the possession of such bonds solely as the result of an exchange thereof for those of the Southern Company, and pursuant to the reorganization scheme hereinbefore referred to, and, further, that the reorganization Committee, before acquiring the Union bonds, examined the property and accounts of the Union Company, and was fully advised in respect to the facts surrounding their issuance and the consideration therefor.

The mortgage executed by the Union Company will be found in Vol. 21, p. 11022, and Article X thereof provides that, "neither of said trustees shall be answerable for any act, omission or default, to which it does not expressly assent, of its co-trustee, or of any agent or attorney selected with reasonable care."

1018 Article XII thereof is as follows:

"Upon the execution and recording of these presents, all the bonds secured hereby shall be executed by the company and delivered to the trustees, and the trustees shall thereupon certify and return to the company, of the said bonds, those numbered 1 to 1850, both inclusive, aggregating the principle sum of One Million Eight Hundred and Fifty Thousand Dollars, without any formality, record, requisition, proof or requirement, and the receipt therefor of the treasurer of the company shall be full acquittance and authority to the trustees for such certification and delivery. And One Hundred and Fifty of said bonds, numbered from 1851 to 2000, both inclusive, aggregating the principal sum of One Hundred and Fifty Thousand Dollars, shall be issued, certified, and held in trust by the Missouri, Kansas & Texas Trust Company, one of said trustees, and the same shall not be negotiated and sold on or before February 1st, 1898, except for the purpose of procuring funds for the payment of any interest coupon or any interest that may before said date become due and delinquent on such of said 2000 bonds as may then be outstanding." (Vol. 21-11025).

The plain provisions of the mortgage would seem to be explicit in relieving the trustees from the duty of inquiring into the use the railroad company intended to make of the bonds.

It became and was obligatory upon the trustees to certify and return to the mortgagor the bonds "without any formality, record requisition, proof or requirement," and it would seem to necessarily follow that the Union Company, so far as the trustees were concerned had the right to do with its bonds as it saw fit, and of which fact every bondholder was advised as he is presumed to have notice of the provisions inserted in the mortgage.

The express terms of the mortgage did not, then, place upon the Trust Company the duties, alleged by the intervenor in paragraph 13, and if any such existed, they must have arisen from implied covenants, and not express ones, on the part of the Trust Company as a co-trustee; in other words, that these alleged duties, (if any), will have to be implied from the relation of the parties, but, in as much as the provisions of the mortgage are explicit as to the requirements made of the trustees, it would seem to be clear that there can be no implied duties, which are inconsistent with the express covenants.

1019 It is contended by the Trust Company that covenants are not to be inferred in a contract under seal, unless it clearly appears therein that the party, against whom the implication is sought to be made, plainly intended to do the act, in respect to which the covenant is sought to be implied.

Frismuth v. Farmers L. & T. Co., 107 Fed., 169;

Fleisher v. Farmers Loan & Trust Company, 58 App., Div. (N. Y.) 473, 619; same case 172 N. Y., 519.

National Water Works Company v. K. C., 78 Fed., l. c., 1., 433, per Brewer J.

In the case last cited Judge Brewer said:

"There are in existence certain trust companies who are engaged

in the business of acting as trustees in mortgages, especially railroad mortgages. They are often trustees in successive mortgages from the same grantor, or from different corporations, having a common interest and control. Any question as to the extent of the notice which these trustees take of the transactions of their mortgagors, and the effect of such notice upon parties purchasing bonds from them, is of vast importance. I am unable to concur in the view of the master. I do not think the duty of this trustee was a continuing duty to the extent that it took notice of whatever its mortgagor did with the moneys which it received upon the sale of the bonds, or of the property which it purchased. If there were such continuing duty, then included in it was the obligation to see that the mortgagor expended the moneys which it received in accordance with the expressed purpose of the mortgage, and to take legal measures to compel execution thereof, a failure to do which would make itself responsible to the parties purchasing bonds for all losses occasioned thereby. There is in the mortgage no clause expressly casting such a duty upon the trustee. It contains some 13 articles providing for certifying the bonds in the first instance, the keeping of a registry for the entry of transfers, and for action in case of a default in the payment of either principal or interest. The only other article is the one containing the covenant for further assurance, heretofore quoted. Unless from it a duty of continuing supervision can be implied, the mortgage casts no such duty, although, as indicated, it specially provides for what the trustee shall do, and when it shall act. Now, I think I am warranted in saying that a mere covenant for further assurance, such as is here found, has not been generally understood as casting a special duty upon the trustee or supervising the action of the mortgagor. It must be borne in mind that the trustee was selected and the terms of the trust prescribed by the mortgagor alone, and that, until after the bonds were negotiated, it was acting only as the latter's agent."

1020 The intervenor cited and relied upon Frismuth v. Farmer's L. & T. Co., 95 Fed., 9, affirmed in 107 Fed., 169. The facts in that case were, however, very different from those in the case at bar. The cause of action stated therein was not so much on account of any covenant, express or implied, as it was for neglect of duty imposed by law, and arising from the peculiar terms of the mortgage, then before the court; and it was held that the six years statute of limitations of New York, covering questions sounding in tort, and not the twenty years statute as to questions of sealed instruments applied, and that therefore the cause of action, if any, in that case, was barred.

In the Frismuth case, the mortgage provided that the trustee should certify the bonds, and retain the proceeds thereof, which were to be paid out only on written orders of the railroad company, stating for what purpose such proceeds were to be used, and that the bonds should be delivered to the company only on like orders. The trustee, however, went ahead and issued and delivered the bonds to the company without requiring it to furnish the written statement or orders required by the mortgage, specifying the purposes for

which the bonds were to be used, and the decision is based on that fact, as will more fully appear from the following extract from Judge Wallace's opinion (95 Fed., l. c., 9):

"The only possible object of the provision, restricting the trustee from delivering the bonds or their proceeds to the Oregon Company except on orders declaring the purposes, for which they were to be used, was to satisfy investors that the trustee was to supervise the operations of the Oregon Company in respect to the purposes to which it intended to make application of the proceeds, and thus effectuate the promises of that company. The several provisions imply the power and the duty of the trustee to refuse to issue bonds except when supplied with evidence that the avails are to be used conformably with the promises of the Oregon Company. The defendant cannot escape responsibility to those who have brought the bonds upon the theory that the mortgage does not contain any covenants by the trustee prescribing its conduct, except in the event of a default in payment. They are entitled to hold the defendant to the performance of the duties which, from the import of the provisions, that — had a right to suppose the trustee would perform. While its terms exonerate the trustee for a misapplication after it has delivered the bonds or proceeds to the Oregon Company, upon orders of the requisite character, they do not absolve it further. They certainly do not protect the trustee in delivering bonds or proceeds which it knows, or has reason to believe, are not to be
1021 applied properly. The instrument is not to be construed as authorizing the trustee to deliver the bonds or their proceeds upon orders containing such vague and indefinite declarations as were inserted in those given by the Oregon Company. Upon such a construction the provision conferring authority would afford no security for the bondholders, and they would be a mere sham. It was intended to restrict the trustee from delivering bonds or proceeds without information of the specific uses to which, from time to time, they were being applied, in order to enable the trustee to ascertain whether they were being expended comfortably to the promises of the Oregon Company."

By reference to the Union Company mortgage, it will be seen that no such provision is inserted therein, and no such duty is devolved upon the trustee. On the contrary, the Trust Company is required to certify and return the bonds to the railroad company without any formality, record, requisition, proof or requirement, and the Trust Company was neither given the right, nor did it otherwise have the right to supervise the action of the Union Company with respect to its use of the bonds. Until there was a default, the trustee had no other duty except simply to certify and return the bonds to the mortgagor.

In a similar suit brought by other bondholders, and involving the same mortgage, the Appellate Division of the Supreme Court of New York, disagreed with the conclusions of both Judge Wallace (97 Fed., 7) and the United States Circuit Court of Appeals (107 Fed. 139) as to their having been any neglect on the part of the trustee, the court saying:

"Our attention has been called to an opinion of the learned Judge of the Circuit Court of the United States (Frismuth v. Farmer's Loan and Trust Company, (95 Fed. Rep., pp. 5, 6, 7, 8, 9) giving a general construction to the very mortgage now before us. We agree in the main with the view taken of the duties of the trustee, as stated by that learned Judge, but we do not construe particular provisions of the mortgage as he does. According to the condition of the mortgage under which these bonds were issued, there was no duty of supervision of the trustee such as would require it to see to the appropriation of the money realized by their sale. To import such an obligation, is to contradict the provisions of the mortgage. Nor do we [*thing*] that the statements delivered by the Oregon Pacific Railroad Company, and upon which the bonds were issued, are so vague and indefinite in their declarations as to have required the trustee to refuse to deliver the bonds upon them."

1022 *As to the Intervenor's Claim Being Barred by Statute of Limitations.*

2. The claim of the intervenor that the Trust Company was guilty of misconduct as co-trustee, even if supported by the proofs in the record, would be barred by the statute of limitations in this state. Both the five and ten year statutes are pleaded. Sections 4271, 4272, 4273, R. S. Mo., 1899, are as follows:

"SEC. 4271. Period of limitation prescribed.—Civil actions other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued.

SEC. 4272. What actions shall be commenced within ten years.—Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenanter in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; third, actions for relief, not herein otherwise provided for.

SEC. 4273. What within five years.—Within five years: First, all actions upon contracts, obligations or liabilities express or implied, except those mention in Section 4272, and except upon judgment or decrees of a court of record, and except where a different time is hrein limited; second, and action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass upon real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the dis-

covery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

If any cause of action at all is stated by the intervenor, it is for an injury to the rights of another not arising on contract which is included in the five year statute. (Sec. 4273 R. S. Mo. 1899).

Frismuth v. Trust Co., 95 Fed., 5, affirmed in 107 Fed., 169.

1023 Under the authorities it would seem to be clear that it is not an action on a covenant, express or implied.

In Frismuth v. Trust Co., 107 Fed., 169, it is held:

"Where a railroad mortgage contained no covenant on the part of the trustee, one cannot be implied unless clearly growing out of the language or the obvious intent of the parties; and a suit by the bondholders secured, against the trustee, for its failure to properly protect their interests, is one for a breach of duty implied by law, and not for a breach of covenant for the purpose of determining the statute of limitations applicable to such suit."

In the case at bar the gravaman of the intervening petition is a breach of trust on the part of the trustee, and counsel for respondent properly contend that the real nature of the charge cannot readily be changed by simply adding to or making use of the words "fraudulent", "Wrongfully", and "unlawfully" for the purpose of coverting the petition into a bill for fraud, and as to which the statutory limitation would not begin to run until the discovery of the fraud by the party complaining thereof. In courts, both of law and equity, it is well settled that the facts from which legal inferences are to be drawn, must be stated and mere conclusions not based upon a sufficient showing of facts must be disregarded. This principle is supported by the following cases:

Frismuth v. Trust Co., 107 Fed., 169.
Fogg v. Blair, 139 U. S., 118, 127.
Ambler v. Choteau, 107 U. S., 586, 591.
Kent v. Canal Co., 144 U. S., 75, 91.
Van Weel v. Winston, 115 U. S., 228.

Hence, it follows that averments of the petition to the effect that the Trust Company "did unlawfully and improperly divert the proceeds of said sales" and "did unlawfully use the said proceeds" and "did unlawfully, in breach of its duty as trustee, from time to time, sell and put afloat the said bonds", cannot be regarded as determinative of the question that the intervening petition is, in fact, a bill for fraud and not an action at law for a mere breach of trust on the part of the trustees.

To be more explicit, this is not an action for relief on the ground of fraud so as to bring the action within the ten year limitation after the discovery of the facts constituting the fraud, for the reason, first, that the averments as to the alleged fraud are not sufficiently pleaded to constitute the action a bill for fraud,

1024 and, second, that the real gist of the intervenor's action is simply a breach of duty, on the part of the Trust Company as trustee, in delivering the bonds of the mortgagor, and the fraud,

if any, would be wholly immaterial, for if the duty existed, and the respondent failed to discharge such duty, the liability would be created, regardless of whether the responded acted fraudulently or otherwise.

Frismuth v. Trust Co., 107 Fed., 169.

The statute, permitting an action to be brought within ten years after the discovery of the facts, constituting the fraud, is aimed especially against concealed or undiscovered fraud, for if the fraud was open or of such nature that it must necessarily be discovered, by reason of the relation of the parties, then the doctrine of laches could be invoked. The fraud must be such a material element in the cause of action that, if the allegations of fraud were stricken out, the right of action itself would no longer exist.

The following cases will bear out these conclusions:

Michoud v. Girod, 4 How., 503.
Veazie v. Williams, 8 How., 134.
Rosenthal v. Walker, 111 U. S., 185.
Meader v. Morton, 11 Wall., 442.
McIntyre v. Pryor, 33 Fed., 632.

In the case at bar, the right of action to which the intervenor claims it succeeded, and which it now asserts accrued when the respondent, as trustee, delivered the bonds to the mortgagor, for if, as such trustee, it committed a breach of duty in so delivering the bonds to the mortgagor, then the right of action was complete at that time and the statute began to run.

Frismuth v. Trust Co., 95 Fed., 5; 107 Fed., 169.
Mills v. Vivian, 79 Fed., 848.

It is true that in the intervening petition, the statement occurs that "your intervenor was not advised of the foregoing acts of the Trust Company in diverting the proceeds of said bonds until the facts in relation thereto were developed recently in the taking of testimony in support of the ancillary bill in this case;" but it is contended by respondent's counsel that such statement is insufficient, because it does not disclose that any efforts were made to discover the alleged fraud at an earlier day, nor that any means were used by the Trust Company to prevent such discovery.

Woods v. Carpenter, 101 U. S., 135.
Bank v. Carpenter, 101 U. S., 567.
1025 Badger v. Badger, 2 Wall., 87, 95.
Brown v. Buena Vista County, 95 U. S., 157.
Bent v. Priest, 86 Mo., 475.

The chancery courts of the United States recognize the statutes of limitations of the State, in which the court is sitting and adopt them.

Miles v. Vivian, 79 Fed., 848, 852.
Harpending v. Dutch Church, 16 Pet., 455.

This action, being for breach of an implied trust, the doctrine as to the limitation statutes not applying to express trusts, has no bearing upon the claim of the intervenor.

Frismuth v. Trust Co., 95 Fed., 5.
Miles v. Vivian, 79 Fed., 848, 852.

Now, as to the disclosures by the proofs in this cause, it is not controverted that the Union Company was incoporated on December 29, 1891, (Vol. 15-7867), and on February 1, 1893, executed its mortgage to the Missouri, Kansas & Texas Trust Company, changed to Guardian Trust Company, and the Provident Company, as trustee, to secure bonds in the sum of two million dollars, nor that the Belt Company constructed and equipped the Union Railroad, built extensions established valuable connections, and guaranteed the Union Company's bonds, negotiating them through sales to the Trust Company and others from time to time, nor that the only and real consideration to the Belt Company for such services was the issuance to it by the Union Company, of all its bonds except, perhaps, one hundred and fifty of them, which were sold by the respondent, in order to pay interest on outstanding bonds. The contracts, under which the Belt Company acquired these bonds, are set out in Vol. 14, p. 7308, Vol. 15, p. 7874-7890 et seq. It is charged by the intervenor that the arrangement by which the Belt Company received the Union bonds, in consideration of having guaranteed them, and of having built and equipped the Union Company's road was of a fraudulent character. A very similar claim was made by the complainant in the case of Teller v. Tonopah & Goldfield R. R., 155 Fed., 482, where an arrangement very much like the one in controversy was sustained, and held to be beneficial to all concerned, and an attempt to set aside the transactions was said by the Court to be a "little better than an attempted financial holdup."

From the testimony of Mr. Johnson, one of the principal witnesses for the intervenor, it appears that the Belt books show that the Belt Company received the bonds of the Union Company at the
1026 times, for the considerations, and in amounts as follows:

Date and consideration.	Bonds, par val.	Vol. P. of Rec.
Sept. 1892, to Jan. 1893 under construction contract of Aug. 24 1892	$690,000.00	(15–7937)
Jan. 1893, issued to Trust Co. for services	60,000.00	(15–7939)
April, 1893, under contract of April 1893, for extending road to Turner, Kansas	250,000.00	(15–7938)
Nov. 1893, issued to Belt Co., and deposited with Trust Co., to pay interest on Union bonds as per mortgage	150,000.00	(15–7939–40)
May, 1894, issued to Belt Co to cover cost of building extension to stock yards	150,000.00	(15–7940)

Aug. 1895, securing valuable connections and locating industries, etc.	250,000.00	(15–7938)
July, 1898, under contract of July 26, 1898	100,000.00	(15–7939)
Nov. 1898, issued to Belt Co. for purposes of clearing up floating indebtedness of Northern	350,000.00	(15–7940)
Total	$2,000,000.00	

In compliance with said Article XII of the mortgage, providing that immediately upon its recording, the trustee shall certify the bonds and return them to the company, the proof shows that the mortgage was recorded in February, 1893, and the bonds delivered shortly thereafter, all of which was more than twelve years before the intervening petition was filed. If it should be held that the cause of action arose when the Union Company negotiated its bonds, then it appears from the above table that the Union Company had issued to the Belt Company the last of the Union bonds prior to November, 1898, whereas, the amended intervening petition in this cause, charging breach of duty, was not filed until more than seven years thereafter.

It also appears from witness Willey's exhibit of the Trust Company's transactions in Union securities (Vol. 1-188) that the last purchase of Union bonds made by the Trust Company was 100 bonds at 95 cts. on February 15, 1899, which was more than six years prior to the filing of the intervening petition; hence, if the action of the Trust Company, in buying Union bonds from the Belt, constituted a breach of duty, on its part as trustee, it would follow that such breach was barred by the five year statutory limitation.

As to Intervenor's Claim Being Barred by Laches.

1027 It is a well known principle of equity jurisprudence that, independently of any statute of limitations, courts of equity have a right to, and do, apply the law of laches, according to the peculiar conditions and surroundings of each individual case, and, that their uniform practice is to decline to assist any person who has slept upon his rights unreasonably long, unless a sufficiently good excuse is shown for the delay.

Miles v. Vivian, 79 Fed., 848-853.

It is shown by the proofs in the record (Vol. 15-7887-88), that the Belt Company kept in its own books a full account of all monies expended by it in the construction and equipment of the Union Terminal railroad, in extending its lines, etc., and showing in detail what the Union Company received for its bonds, and such other facts in connection with the various bond transactions between the Belt and Union companies, as would reasonably explain all such transactions.

It also appears from the record that, pursuant to the modified reorganization plan of November, 1899, promulgated by the Philadelphia Committee, sufficient bonds had been deposited with the Committee before the end of December, 1899, and, thereupon, the plan was declared operative. (Vol. 41-22200.)

The Gulf road was sold at foreclosure sale and purchased by the Committee, on March 19, 1900, and its bid was duly assigned to the Southern, which was incorporated on the same day, (Vol. 41-22224 et seq.,); and, on April 1, 1900, there followed, at the request of the Committee, resignations of the directors under the Stilwell management, the acceptance thereof, and the election of new directors for the Southern Company, all of whom were nominees of that Company and selected by Stuart R. Knott, holding proxies for substantially all the stock of the Belt Company, and the new directors at once took possession of all the books, papers, and property of the Belt and its constituent companies, including the Union Company, (Vol. 52-31433 et seq.). One of these new directors was the witness Johnson, then an auditor of the Southern, and he and witness McCarty, also an auditor of the Southern, have had possession of the Belt and Union Company books since April 1, 1900, (Rec. p. 7115). Both Johnson and McCarty state, however, that, prior to the year 1905, they did not know, nor had they heard, that the Union bonds, or their proceeds, had been misapplied or used contrary to the purposes set forth in the mortgage, (Rec. Vol. 49, p. 30243 and 30198 to 30201).

1028 In the spring of 1900, one Hill, audited the Belt books for the reorganization Committee (Rec. p. 6686).

The general mortgage of the Southern, dated April 2, 1900, recites that it then held and owned 1933 out of a total of 2000 bonds of the Union Company, all of which it had received from the reorganization Committee, (Rec. Vol. 53-35197).

The bill of the Provident Company, for the foreclosure of the Union Company mortgage, was filed on September 6, 1900, and, on December 31, 1900, the sale was made under the decree of foreclosure, and the Southern became the purchaser. It appears from the record that Johnson and McCarty, auditors of the Southern, had access to the Union and Belt books and records from April 1, 1900, and until the amended intervening petition was filed on May 1, 1905, and afterwards. It would seem, then, that, in view of the careful efforts of the reorganization Committee to ascertain the value of the railroads involved, as shown by their proceedings in the record, it is unreasonable to suppose that they were ignorant of the value of the Union Terminal railroad when they acquired the Union bonds; and, being the owner of large amount of Union bonds, deposited with the Committee, actively participated in promoting the reorganization plan, and was one of the depositaries under that plan; in other words, the Trust Company co-operated with the Committee in promoting and bringing about the [*consumption*] of the reorganization scheme, and, under such circumstances, it would be inequitable to permit the Southern Company, as the successor of the Committee, to

assert and maintain in a court of equity the claim of the intervenor in paragraph 13 of its petition.

There can be no question as to the Southern Company, being chargeable with all the knowledge possessed by the reorganization Committee, which promoted it and caused its incorporation.

The Master is of the opinion that, under the proofs in this cause, the Southern Company should have asserted its alleged claim against the Trust Company long before it did in its amended intervening petition; and, further that, in justice to the Trust Company, the intervenor should have asserted such claim before the railroad of the Union Company was foreclosed, so that the Trust Company could have protected itself by purchasing the road at the foreclosure sale, if it so elected, for, otherwise, the Southern Company could wait to know the result of a sale of the mortgaged property, as it did do, in fact, before calling upon the Trust Company, as trustee, to take up its Union bonds, or make good any deficiency in the pay-
1029 ment thereof. It is evident that such a course put the trustee in such position as to make it powerless to protect itself, if it had desired to do so.

As to the Southern Being a Bona Fide Holder of the Union Bonds.

4. As a part of the reorganization plan, the Southern Company, through the exchange of its own bonds, for those of the Union Company, acquired the Union bonds; and, for that reason, the Trust Company claims that the Southern does not stand in the attitude of an innocent purchaser of the Union bonds, and, further, that they have been paid and extinguished by the consummation of the reorganization plan, and, hence, that the Southern Company cannot assert any rights to such bonds as the holder thereof.

Central Trust Co. v. R. R., 58 Fed., 500.
Branch v. Jessup 106 U. S., 476, 484.
Vilas v. Page, 106 N. Y., 439.
The Key City, 14 Wallace, 673.

In Central Trust Co. v. R. R., 58 Fed. 500, Judge Taft said that when a reorganization agreement, to which all the bondholders and stockholders of the mortgagor company are parties, provides for an exchange of new securities, to be issued after the purchase of the road at judicial sale, for existing securities, the consummation of the plan operates as a payment of the old bonds, which are extinguished and no rights can be asserted by the holders thereof under them.

In the case at bar, it was provided in and by the reorganization plan, that the capital stock and bonds of the constituent companies, comprising the Belt system, should be purchased by the Southern Company and pledged under its new first mortgage, to be placed upon all its properties, as hereinbefore stated; but said plan also contained a provision to the effect that, after acquiring said stocks and bonds, in furtherance of the unification of the main line (Gulf) and its associated terminal companies (the Belt and Dock systems),

and, in that way, getting the control and possession of said companies, it was proposed to "thereafter adjust the bonded indebtedness, standing against the properties of the Belt and Dock companies, by retiring the present bonds and issuing, in lieu thereof, new 3½ per cent bonds to be based upon and restricted to the net earnings of said prospective properties, as they might appear on future operations."

The Southern Company was the owner, on December 31, 1901, of 1995 of the 2000 Union Terminal bonds, the same having
1030 been obtained in exchange for securities of the Southern Company. (Ingel's exhibit 6, Rec. 48-28820).

As shown by the foreclosure order and decree of the Union Terminal property, on November 6, 1901, there was then due, in principal and interest, the total sum of $2,273,246.43 (Rec. 48-28775 to 28810), and, for which the Union railroad property was sold by the Commissioner, on December 31, 1901, to the Kansas City Southern Railway Company for $1,500,000.00, thus leaving a deficiency of $773,246.43, being the amount due as of date November 6, 1901 (Rec. 57-34839 to 34847); but the additional interest, up to December 31, 1901 would swell the deficiency on that date to $790,528.13. (See Ingel's exhibit 6, Rec. 48-28820 to 28822.)

It is not disputed that the new bonds were issued pursuant to the terms of the reorganization scheme. The foreclosure sale of the Union railroad had, however, already been made, and the amount of said deficiency in the payment of the bonded indebtedness had been fixed thereby before the Union railroad property became legally subject to the lien of the new Southern mortgage.

In so far as concerned the mortgage lien securing the bonds it was extinguished by the foreclosure sale, regardless of said deficiency, and the holder of the unpaid bonds had the right to enforce the payment of the balance due thereon by all proper legal measures, unless the enforcement of such right was abridged or controlled in some way, by the reorganization plan.

The evident intention of said plan was to harmonize, unify and centralize all the interests involved in the Gulf and allied terminal companies, into one great corporation, the combined properties of which should be encumbered with the general mortgage securing the new 3½ per cent Southern bonds; and there is nothing in the reorganization scheme, which tends to show any intention to acquire or obtain any advantages from the ownership of the bonds of the constituent companies, other than required for the consummation and carrying out of the modified reorganization plan. Certain it is, that the Trust Company, when depositing its own Union bonds with the Committee, and otherwise co-operating with it in bringing about the reorganization, had no intimation that the Union bonds were to be used for the purpose of establishing a large liability against the respondent, as now attempted by intervenor, to the extent of said bond deficiency of $790,528.13, on December 31, 1901.

The Master is of the opinion that, under the facts and circumstances, shown in the record, and hereinbefore set forth, in
1031 respect to the reorganization scheme and the connection of the respondent therewith, the acquisition of the Union bonds

by the Committee did not carry with it the legal or equitable right to require the respondent to make good said bond reficiency, even though, under the circumstances, the respondent might be held liable therefor to other parties.

If, however, the findings of — Master, against the validity of the alleged claim on its merits, are correct, then it is immaterial whether or not the ownership of the Union bonds by the Committee and the intervenor imparted the right of action claimed by the intervenor herein.

General Findings and Recommendations of the Master Upon the Whole Cause.

First. It is the opinion of the Master, and he so recommends, that each and all of the paragraphs of the second ancillary bill, respecting the different items of complaints or charges therein contained, should be dismissed, as being without equity, excepting the following:

(*a*) Paragraph 13, in respect to the West Kansas City Land Company transaction, and as to which the complainants are entitled to a credit on the Trust Company's account with the Belt Company of $5,600.00, with six per cent interest thereon, from and after November 28th, 1892;

(*b*) The Zumwalt transaction, in paragraph 14, wherein $5,000.00 was deposited with the defendant Trust Company, to cover its liability as surety on an appeal bond, and for which, with six per cent interest from and after May 19, 1903, the complainants are entitled to have a credit on the Trust Company's statement of account with the Belt Company;

(*c*) Also as to the item of $11,250.00, mentioned in paragraph 21, being the amount received by Mark Hubbert, treasurer of the defendant Trust Company, from the reorganization Committee, in payment of 450 additional coupons (being other coupons than the 1,527 also mentioned in said paragraph, these 450 coupons belonging at that time to the Trust Company), and by reason of which payment to the Trust Company, the complainants are entitled to be credited on the Trust Company's account with the Belt Company, for said sum of $11,250.00, with six per cent interest thereon from and after July 14, 1900.

Second. That each and all of the paragraphs of the intervening petition should be dismissed, as being without either law or equity to maintain them, excepting paragraph 6, in respect to the Cen-
1032 tral Improvement Company lands; and that the Trust Company is entitled to hold, and subject to the payment of its indebtedness against the Belt Company, all the securities held in pledge by it, described in the intervening petition.

Third. That the Southern Company is not liable in any way for the floating indebtedness of the Belt Company.

Fourth. That there is no equity in the Cambria bill as against the Guardian Trust Company, and that the allegations in said bill, in respect to the domination and control by the Trust Company over the Belt, and also over the so-called allied or subsidiary companies,

all fail, for the reasons hereinbefore stated in respect to the issues upon the second ancillary bill; and hence, the injunction heretofore issued in this cause restraining the Trust Company from disposing of the stocks, bonds, accounts, and other properties held by it as collateral, should be dissolved, and the moneys on deposit in the National Bank of Commerce, or the securities which stand in place thereof, should be returned to the Trust Company, together with any interest or profits that may have accrued thereon; and the bill of complaint of the Cambria Company should be dismissed as to the Guardian Trust Company for want of equity.

Fifth. That the Guardian Trust Company now owns and holds the promissory notes described in paragraph 123 of its answer to the amended and supplemental ancillary bill of Knott and Swinney, receivers of the Belt Company, and it also holds an account against the Belt Company, being Exhibit "A", attached to its said answer, and on which the balance due the Trust Company is $31,809.49; and for the payment of the aggregate amount of said notes and balance of account, with interest thereon, less the amounts hereinbefore stated as being due to the Belt Company from the Trust Company, the Trust Company is entitled to subject all the collaterals pledged to it by the Belt Company as security for said indebtedness, and being the same collateral securities mentioned and described in paragraph 125 of defendant's said answer to the amended and supplemental ancillary bill of complaint.

Sixth. That the Trust Company is entitled to a judgment against the complainants for the sum of $34,061.46, paid by the Trust Company to the First National Bank of Kansas City, Missouri, on March 27, 1905, in satisfaction of a certain judgment rendered by the Circuit Court of Jackson County, Missouri, in cause No. 1604, entitled The First National Bank of Kansas City v. The Guardian Trust Company, and affirmed by the Supreme Court of Missouri on
March 16, 1905, which said judgment was entered against
1033 the defendant on a certain promissory note made by the Belt Company on March 26, 1900, in favor of said bank for $25,000.00, due sixty days after date, with interest after maturity at seven per cent per annum until paid, which said note was indorsed by the defendant Trust Company solely for the accommodation of the Belt Company, and the full proceeds of said note having been paid by said bank to the Belt Company, which derived the sole benefit thereof; and hence, the defendant Trust Company is entitled to be reimbursed by the Belt Company and its receiver for said sum of $34,061.46, with seven per cent interest thereon from and after March 27, 1907.

Seventh. During the argument before the Master in this cause, it was stated by counsel for complainants that a dismissal would be entered as to the Second Street Improvement Company, but, as this has not been done, the master recommends that this action, in all its parts, be dismissed as to said company.

Respectfully submitted,

SHANNON C. DOUGLASS,
Special Master.

Afterwards, to-wit, on the 22nd day of June, 1910, the Supplemental Report of Shannon C. Douglass, Special Master, was filed. Said Supplemental Report is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY

v.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al.

E. F. SWINNEY, Receiver,

v.

CAMBRIA STEEL COMPANY et al.

Ancillary Bill.

Additional Report of Special Master.

Now comes Shannon C. Douglass, Special Master, and in addition to the report heretofor filed, further reports:

On November 20, 1901, a stipulation was filed herein, a copy of which is hereto attached as Exhibit 1. All costs incurred by the Cambria Steel Company prior to that date have been paid excepting the Master's compensation. From that date the accounting and taking of the testimony has been as between parties other than the Cambria Steel Company, and pursuant to such stipulation. Coun-
1034 sel for the Cambria Steel Company contends that no costs after that date should be taxed to that company.

June 21, 1901.

SHANNON C. DOUGLASS,
Special Master.

EXHIBIT 1.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, Complainants,

vs.

GUARDIAN TRUST COMPANY and FRANCIS M. BLACK, Its Receiver; Missouri Elevator & Terminal Company and Wash Adams, Its Receiver; Central Improvement Company and Wash Adams, Its Receiver; Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Cross Bill.

Stipulation.

It is hereby stipulated and agreed by and between Stuart R. Knott and Edward F. Swinney, Receivers of the Kansas City Suburban Belt Railroad Company, complainants in the cross bill in the above entitled cause, and the defendants the Guardian Trust Company and Francis M. Black, Its Receiver, Second Street Improvement Company and Cambria Steel Company, as follows:

First. That the said complainants shall withdraw or dismiss their cross bill heretofore filed herein and shall file an amended cross-bill, in the nature of an ancillary bill in this cause, making the Kansas City Suburban Belt Railroad Company a co-plaintiff with them in said amended ancillary cross bill, and that said amended ancillary cross bill shall be filed on or before the 15th day of November, 1901,

1035 and that the defendants the Guardian Trust Company and its receiver, and the Second Street Improvement Company and the Cambria Steel Company, shall have leave to plead or answer to said amended ancillary cross bill on or before the first Monday in December, 1901.

Second. That the accounting between the Kansas City Suburban Belt Railroad Company and its receivers, and the Guardian Trust

Company and its receiver, sought by the said amended ancillary cross bill, shall be expedited by all of the parties hereto, and whatever balance, if any, that may be found due to the said Guardian Trust Company or its receiver, from the said Kansas City Suburban Belt Railroad Company or its receivers shall be entered up in this cause as a judgment in favor of the said Trust Company and its receiver and against the Suburban Belt Railroad Company and its receivers, without the necessity of presenting any claim therefor by way of cross bill; or other affirmative pleading; and whatever balance, if any, that may be found due to the said Suburban Belt Railroad Company or its receivers, from said Guardian Trust Company, or its receivers shall be entered up in this cause as a judgment in favor of the said Kansas City Suburban Belt Railroad Company and its receivers and against the Guardian Trust Company and its receiver.

Dated this 12th day of November, 1901.

STUART R. KNOTT AND
EDWARD F. SWINNEY,
Receivers of the Kansas City Suburban Belt Railroad Co.,

By THOMAS R. MORROW,
S. W. MOORE, *Their Solicitors.*
GUARDIAN TRUST COMPANY AND
FRANCIS M. BLACK, *Its Receiver.*
F. M. BLACK AND
TRIMBLE & BRALEY, *Its Solicitors.*
SECOND STREET IMPROVEMENT COMPANY,
By TRIMBLE & BRALEY, *Its Solicitors.*

The Cambria Steel Company consents and agrees to the foregoing stipulation with the understanding that it shall in no way prejudice the right, if any, which the Cambria Steel Company has, to subject any debt found to be due from the Guardian Trust Company or to subject any property or collateral or the proceeds thereof, heretofore or now in the hands of the Guardian Trust Company or its receiver, or his or its assigns, towards the satisfaction of the Cambria
1036 Steel Company's judgment against the Kansas City Suburban Belt Railroad Company, and that all testimony introduced by any party herein shall be with the understanding that the Cambria Steel Company or any party to the original cause can, if it or they so desire, use the same upon the final hearing of the issues joined in the original cause, and that the issues joined in the original cause and also the issues to be joined on the said ancillary cross bill referred to in the foregoing stipulation shall be heard together and tried and determined at the same time.

CAMBRIA STEEL COMPANY,
By FRANK HAGERMAN,
Its Solicitor.

I make no objection to the foregoing.

WASH ADAMS, *Deft.,*
Receiver Mo. Elevator & Term. Co. &
The Central Improvement Co.

Afterwards, to-wit, on the 17th day of June, 1910, the Exceptions of Guardian Trust Company to the Report of the Honorable Shannon C. Douglass, Special Master was filed. Said Exceptions are in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Raliroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

No. 2468.

EDWARD F. SWINNEY, as Receiver of the KANSAS CITY SUBURBAN Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver, Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.
Kansas City Southern Railway Company, Intervenor.

1037 *Exceptions of Guardian Trust Company to the Report of the Honorable Shannon C. Douglass, Special Master.*

And now comes Guardian Trust Company, defendant, and excepts to the report of the Honorable Shannon C. Douglass, Special Master, filed in this cause on the 21st day of May, 1910, and for cause for exception shows:

First. That the Master has in said report (pages 341 to 346), stated and certified that he finds that "the titles to the following tracts of land should be vested by decree in the Belt Company, to-wit: Real Estate Purchases No. 1, No. 2, No. 3, No. 4, No. 6, No. 9, No. 10, the unsold part of No. 11, Nos. 12 and 13, No. 20, an undivided half of No. 21, Nos. 22 and 23, No. 24, No. 27, No. 29, and real estate purchases "A" and "B", and also that the "Intervenor (mean-

ing thereby the Kansas City Southern Belt Railroad Company) is entitled to the judgment, order and decree of this Court requiring the Central Company and its receiver to convey to said Intervenor those portions of said real estate hereinbefore found to be appurtenant to said railroads and included within the after-acquired real estate clause of their mortgage (page 346), (meaning thereby the real estate purchases next hereinbefore described in the Master's said report, and which are more particularly described in the inventory of Wash Adams, Receiver for said Central Improvement Company, filed in this cause on April 15, 1901, which descriptions are, by reference, made a part of these exceptions as fully as if set forth herein at length) whereas the Master ought to have found:

(*a*) That by reason of the law and the evidence, as stated in the report of said Master, requiring the dismissal of the original bill of the Cambria Steel Company in this cause, said Intervenor is not entitled to relief under the intervening petitions filed herein by the Kansas City Southern Railway Company, and that said petitions as to each and all of the parts thereof should be dismissed.

(*b*) That the facts do not support the allegations of said intervening petitions of said Southern Railway Company, and that said real estate hereinbefore, and in the Master's report described, and each and every part and parcel of the same, was not appurtenant to the railroads described in said Master's report, was not necessary for railroad purposes at the time it was purchased, and was not included within the after-acquired property clause of the mortgages of the Gulf, Union Terminal and Belt Companies, and that said
1038 intervening petitions should in these respects and for these reasons [*should*] be dismissed as to each and all the parties thereof.

(*c*) That by reason of the fact and for the cause that said Real Estate Purchases No. 1, No. 2, No. 3, No. 4, and No. 11 are located within the State of Kansas it is beyond the jurisdiction of this Court to decree the divesting of the title to the same out of the said Central Improvement Company, or requiring it to convey the same.

(*d*) That by reason of the fact and for the cause that the Central Improvement Company, the Union Terminal Railroad Company, the Kansas City, Pittsburg & Gulf Railroad Company, and the Kansas City Suburban Belt Railroad Company were not made parties to the intervening petition of the Kansas City Southern Railway Company, did not consent to such intervention, were not served with process thereunder, and never appeared to the same, there is a defect of parties necessary for such decree as is recommended and this Court is without jurisdiction to render a decree divesting title to said property out of said Central Improvement Company, or requiring it to convey the same.

(*e*) That by reason of the laches of the Southern Company and the Statute of Limitations, the intervening petitions of the Kansas City Southern Railway should be dismissed in all their parts.

Second. The Master has in said report stated (on page 461 thereof) as follows: "That the Southern Company is not in any way liable for the floating indebtedness of the Belt Company", whereas

the Master in his report should have omitted reference to or recommendation concerning the question of the liability of the Southern for said floating indebtedness of the Belt for the following reasons:

(*a*) The Master having found and stated in his report that by reason of the laches of the Southern Company and the Statute of Limitations said intervening bill was not maintainable against this defendant, therefore the said bill should be dismissed as to each and all the parts thereof.

(*b*) That said finding is unnecessary for the determination of this cause upon the facts found by him, and its incorporation in a decree in this cause would be unnecessary and immaterial.

(*c*) That by reason of the fact and for the cause that no relief was asked by this defendant against said intervenor and because the Master found that the other defenses interposed by this defendant to the intervention of the Southern were valid, such
1039 finding is unnecessary and immaterial in the rendition of the decree in this cause.

(*d*) That in a cause determined on a supplemental petition in this cause exhibited by said intervenor and said Belt Company against this defendant which was finally decided by the United States Circuit Court of Appeals for the Eighth Circuit in a cause entitled Guardian Trust Company, Appellant, v. Kansas City Southern Railroad Company, et al., Appellees, numbered 2827, and reported in Federal Reporter Volume 171, page 43, the law of this case was enunciated by said United States Circuit Court of Appeals that the personal liability of said intervenor was not in issue in this cause and that said matter was for the determination of the Circuit Court of Jackson County, Missouri, in three causes then and now pending in said Circuit Court of Jackson County, Missouri, at Kansas City, and that said ruling and determination is binding upon all the parties to this cause, and upon this Court and upon the Master appointed by this Court. Said finding and decision of said Circuit Court of Appeals is as follows:

"The liability of the Southern Company to pay the debts which the Trust Company alleges in the actions at law it has promised to pay, is not in issue and cannot be determined in the suit in equity, and the state court has no jurisdiction over and cannot interfere in those actions in personam with the specific property which is the subject of the litigation in the federal court."

(*e*) That by reason of the law and the evidence, as stated in the report of said Master, requiring the dismissal of the original bill of the Cambria Steel Company in this cause, said Intervenor is not entitled to relief under the intervening petition filed herein by the Kansas City Southern Railway Company, and that said petitions as to each and all of the parts thereof should be dismissed.

GUARDIAN TRUST COMPANY,
EDWARD P. GATES,
Its Solicitor.

GEO. H. ENGLISH, JR.
Of Counsel.

June 17th, 1910. Filed and overruled by me.
SHANNON C. DOUGLASS,
Special Master.

Afterwards, to wit, on the 17th day of June, 1910, the Exceptions of Central Improvement Company to the Report of the
1040 Honorable Shannon C. Douglass, Special Master was filed. Said Exceptions *is* in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

No. 2468.

EDWARD F. SWINNEY, as Receiver of the KANSAS CITY SUBURBAN Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver, Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Kansas City Southern Railway Company, Intervenor.

Exceptions of Central Improvement Company to the Report of the Honorable Shannon C. Douglass, Special Master.

And now comes the Central Improvement Company by Huston Crittenden, its receiver, and excepts to the report of the Honorable Shannon C. Douglass, Special Master, filed in this cause on the 21st day of May, 1910, and for cause of exception shows:

First. That the Master in said report (on page 341 thereof) stated and certified that:

"he finds that the titles to the following tracts should be vested by a decree in the Southern Company, to-wit:

Real Estate Purchases No. 1, No. 2, No. 3, No. 4, No. 6, No. 9, No. 10, and the unsold part of No. 11, Nos. 12 and 13, No. 20, and undivided half of No. 21, Nos. 22 and 23, No. 24, No. 27, No. 29, and real estate purchases 'A' and 'B'."

and also (on page 346 thereof) that:

"The intervenor is entitled to the judgment order and decree of this Court, requiring the Central Company and its receiver, 1041 to convey to said intervenor those portions of said real estate hereinbefore found to be appurtenant to said railroads, and included within the after-acquired property clause of their mortgages."

and also (on page 346 thereof) that:

"Each and all of the paragraphs of the intervening petition should be dismissed, as being without either law or equity to support them, excepting paragraph 8, in respect to the Central Improvement Company lands."

This defendant says that instead of said findings the Master should have found as follows, namely:

(*a*) That by reason of the fact and for the cause that this defendant neither stipulated nor consented to the filing of the intervening petition of the Kansas City Southern in this cause, and that it never was served with process issued upon said intervening petition, and that it never filed answer to said petition, nor in any manner appeared thereto, this Court is without jurisdiction under said intervening petition to divest from this defendant the title to the properties in said intervening petition described, (which properties are more particularly described in the inventory of Wash Adams, Receiver of said Central Improvement Company, filed in this cause on April 15, 1901, which descriptions are by reference hereby made a part of these exceptions as fully as if herein set forth at length) and which properties are, as hereinbefore stated, referred to and described by the Master as real estate purchases No. 1, No. 2, No. 3, No. 4, No. 6, No. 9, No. 10, the unsold part of No. 11, Nos. 12 and 13, an undivided half of No. 21, Nos. 22 and 23, No. 24, No. 27, No. 29, and real estate purchases "A" and "B".

(*b*) The Master having found in his general findings and recommendations upon the whole cause (page 460) that each and all of the paragraphs specifically named on page 460 of said report, which do not relate to this defendant) has found that the prayer of the Belt for the transfer of the property of this defendant to the Belt should be denied and that the second ancillary bill of said Belt should be dismissed in respect to said matters. Therefore, the Master's statement on said page 341 of his said report stating in substance that said property hereinbefore described should be vested by decree in the Belt Company is in conflict with and inconsistent with his finding that the prayer of the intervenor the Kansas City Southern should be sustained as respects the above described properties of the Central.

1042 (c) The Master should have found in respect to real estate purchase Number 1 (page 327 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Union Terminal Company, that it did not pass under the after-acquired property clause of the Union Terminal Company's mortgage, and that by reason of the fact that said Union Terminal Company was not made a party either to the second (or any other) ancillary bill or to the amended or original intervening petition of the Kansas City Southern Railroad Company, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest said real estate purchase No. 1 out of this defendant and invest the title to the same in the Southern. And further, because said land described as real estate purchase No. 1 is located in the State of Kansas, it is not within the jurisdiction of this Court to divest the title of the same out of this defendant and invest it in either said Belt or said Southern Company.

(d) The Master should have found in respect to real estate purchase No. 2, (page 328 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Union Terminal Company, that it did not pass under the after-acquired property clause of the Union Terminal Company's mortgage, and that by reason of the fact that said Union Terminal Company was not made a party either to the second (or any other) ancillary bill or to the amended or original intervening petition of the Kansas City Southern Railroad Company, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest said real estate purchase No. 2 out of this defendant and invest the title to the same in the Southern. And further, because said land described as real estate purchase No. 2 is located in the State of Kansas, it is not within the jurisdiction of this Court to divest the title of the same out of this defendant and invest it in either said Belt or said Southern Company.

(e) The Master should have found in respect to real estate purchase No. 3 (page 329 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Union Terminal Company, that it did not pass under the after-acquired property clause of the Union Terminal Company's mortgage, and that by reason of the fact that said Union Terminal Company was not made a party either to the second (or any other) ancillary bill or to
1043 the amended or original intervening petition of the Kansas City Southern Railroad Company, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest said real estate purchase No. 3 out of this defendant and invest the title to the same in the Southern. And further, because said land described as real estate purchase No. 3 is located in the state of Kansas, it is not within the jurisdiction of this Court to divest the title of the same out of this defendant and invest it in either said Belt or said Southern Company.

(*f*) The Master should have found in respect to real estate purchase No. 4 (page 330 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Union Terminal Company, that it did not pass under the after-acquired property clause of the Union Terminal Company's mortgage, and that by reason of the fact that said Union Terminal Company was not made a party either to the second (or any other) ancillary bill or to the amended or original intervening petition of the Kansas City Southern Railroad Company, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest said real estate purchase No. 4 out of this defendant and invest the title to the same in the Southern. And further, because said land described as real estate purchase No. 4 is located in the state of Kansas, it is not within the jurisdiction of this court to divest the title of the same out of this defendant and invest it in either said Belt or said Southern Company.

(*g*) The Master should have found in respect to real estate purchase No. 6 (page 327 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Gulf Company, that it did not pass under the after-acquired property clause of the Gulf Company's mortgage, and that by reason of the fact and for the cause that said Gulf Company was not made a party to this suit or to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the said real estate purchase No. 6 out of this defendant and invest the title to the same in the Southern.

(*h*) The Master should have found in respect to real estate purchase No. 9 (page 332 of his report) that said real estate
1044 purchase was not necessary for railroad purchases at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the title to the said real estate purchase No. 9 out of this defendant and invest the title to the same in the Southern.

(*i*) The Master should have found in respect to real estate purchase No. 10, (Page 333 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and

for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the said real estate purchase No. 10 out of this defendant and invest the title to the same in the Southern.

(*j*) The Master should have found in respect to the unsold part of Real Estate Purchase No. 11 (page 334 of his report) that the said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Union Terminal Company, that it did not pass under the after-acquired property clause of the Union Terminal Company's mortgage, and that by reason of the fact that said Union Terminal Company was not made a party either to the second (or any other) ancillary bill or to the amended or original intervening petition of the Kansas City Southern Railroad Company, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest said real estate purchase No. 11 out of this defendant and invest the title to the same in the Southern. And further because said land described as the unsold part of real estate purchase No. 11 is located in the state of Kansas, it is not within the jurisdiction of this Court to divest the title of the same out of this defendant and invest it in either said Belt or said Southern

1045 Company.

(*k*) The Master should have found in respect to real estate purchase No. 12 (page 335 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the real estate purchase No. 12 out of this defendant and invest the title to the same in the Southern.

(*l*) The Master should have found in respect to real estate purchase No. 13 (page 335 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent *of* the filing of the same, was not served with process, nor appeared in said intervention, and that there was not relief prayed for against it, there was a lack of juris-

diction of the Court to divest the said real estate purchase No. 13 out of this defendant and invest the title to the same in the Southern.

(*m*) The Master should have found in respect to real estate purchase No. 20 (page 336 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the said real estate purchase No. 20 out of this defendant and invest the title to the same in the Southern.

(*n*) The Master should have found in respect to real estate purchase No. 21 (page 336 of his report) that said real estate
1046 purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the said real estate purchase No. 21 out of this defendant and invest the title to the same in the Southern.

(*o*) The Master should have found in respect to the unsold part of real estate purchase No. 22 (page 337 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the unsold part of real estate purchase No. 22 out of this defendant and invest the title to the same in the Southern.

(*p*) The Master should have found as respects the unsold part of real estate purchase No. 23 (page 337 of his report) that said real estate purchase was not necessary for railroad purposes, at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact that for the cause that said Belt Company was not made a party

to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the unsold part of said real estate purchase No. 23 out of this defendant and invest the title to the same in the Southern.

(*q*) That the Master should have found in respect to real estate purchase No. 24 (page 338 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the
1047 Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the real estate purchase No. 24 out of this defendant and invest the title to the same in the Southern.

(*r*) The Master should have found in respect to real estate purchase No. 27 (page 339 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the real estate purchase No. 27 out of this defendant and invest the title to the same in the Southern.

(*s*) The Master should have found in respect to real estate purchase No. 29 (page 339 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said inter-ention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the real estate purchase No. 29 out of this defendant and invest the title to the same in the Southern.

(*t*) The Master should have found in respect to real estate purchases "A" and "B" (page 340 of his report) that said real estate purchases were not necessary for railroad purposes at the time they

were purchased, that they were not appurtenant to the prop-
1048 erty of the Belt Company, that they did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the real estate purchases "A" and "B" out of this defendant and invest the title to the same in the Southern.

Second. The Master should have found that by reason of the want of equity in the original bill in this case, and his recommendation that said original complaint of the Cambria Steel Company should be dismissed, (page 461 of said report), that all the ancillary and intervening bills based thereon should also be dismissed and that this defendant should be discharged at the cost of said Cambria Company.

ED P. GATES & GEO. H. ENGLISH, JR.,
Solicitor for Huston Crittenden, Receiver for Central Improvement Company.

Of Counsel.

June 17, 1910. Filed and overruled by me.

SHANNON C. DOUGLASS,
Special Master.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

No. 2468.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Com-
1049 pany and T. T. Crittenden, Its Receiver, Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Complainant.

vs.

GUARDIAN TRUST COMPANY, KANSAS CITY SUBURBAN BELT RAILroad Company and Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company; Central Improvement Company and T. T. Crittenden, its Receiver; Cambria Steel Company, Northern Townsite Company and its Receiver, Fairmount Amusement Company, and Missouri Elevator & Terminal Company, Defendants.

Intervening Petition.

Final Decree.

This cause, coming on to be heard upon the original bill of complaint of the Cambria Steel Company, the original, first and second amended and supplemental ancillary bills of complaint of Kansas City Suburban Belt Railroad Company and its receivers, the original and amended intervening petitions of the Kansas City Southern Railway Company, and the answers of the defendants in said bills and petitions respectively, and all the papers and

proceedings filed and taken in this cause, including the evidence taken before the Special Master, Hon. Shannon C. Douglass, and the Master's report thereon, and all exceptions heretofore filed to said report, was thereupon argued by Frank Hagerman of counsel for the Cambria Steel Company, S. W. Moore and Thomas R. Marks of counsel for the Kansas City Suburban Belt Railroad Company and Edward F. Swinney, its Receiver, and S. W. Moore and Thomas R. Marks of counsel for The Kansas City Southern Railway Company and E. P. Gates and Geo. H. English, Jr., of counsel for the Guardian Trust Company and Central Improvement Company, and its Receiver, and Thomas B. Buckner, of counsel for Northern Townsite Company and its Receiver, Fairmount Amusement Company, Missouri Elevator & Terminal Company, The Union Terminal Railroad Company, Kansas City & Independence Air Line; and the court being fully advised in the premises doth thereupon upon consideration thereof order, adjudge and decree as follows, to-wit:

I. That all and singular the exceptions filed by each and all of the parties to this cause to the report of Shannon C. Douglass Special Master, filed herein on May 21st, 1910, be and the same are hereby overruled; and the said report of the Special Master is hereby in all things approved and confirmed.

1050 II. That there is no equity in the original bill of the Cambria Steel Company as against any of the parties to this cause and that said bill be and the same is hereby dismissed; and that the injunction heretofore issued in this cause restraining the defendant, Guardian Trust Company from disposing of the stocks, bonds, accounts and other properties held by it as collateral and described in said order of injunction, be and the same is hereby dissolved.

III. That all and singular the allegations of the ancillary bill of complaint of Kansas City Suburban Belt Railroad Company and Stuart R. Knott and Edward F. Swinney, its Receivers, filed herein November 20th, 1901, and of the first and second amended and supplemental ancillary bills of complaint of Kansas City Suburban Belt Railroad Company and E. F. Swinney, its sole Receiver, filed herein March 22nd, 1905, and July 2nd, 1906, respectively, are true in respect to the following complaints or charges therein contained:

(*a*) Paragraph 13 of said second amended and supplemental ancillary bill of complaint in respect to the West Kansas City Land Company transaction, as to which the complainants therein are entitled to a credit on the Guardian Trust Company's account with the Kansas City Suburban Belt Railroad Company of $5600.00 with 6% interest thereon from and after November 28th, 1892.

(*b*) Paragraph 14 of said second amended and supplemental ancillary bill of complaint in respect to the Zumwalt transaction, as to which the complainants therein are entitled to a credit, on the Guardian Trust Company's account with the Kansas City Suburban Belt Railroad Company, of $5,000 with 6% interest thereon from and after May 19th, 1903.

(*c*) Paragraph 21 (Item *c*) of said second amended and supplemental ancillary bill of complaint in respect to the amount re-

ceived by Mark Hubbert, Treasurer of the Guardian Trust Company, from the Reorganization Committee in payment of 450 additional coupons, as to which the complainants therein are entitled to a credit, on the Guardian Trust Company's account with the Kansas City Suburban Belt Railroad Company of $11,250 with 6% interest thereon from and after July 14th, 1900.

As to all and singular the other allegations in the original and first and second amended and supplemental, ancillary bills of complaint, the said bills are without equity and are hereby dismissed.

1051 IV. That all and singular the allegations contained in paragraphs 123 and 124 and the supplemental account of the Guardian Trust Company in connection with said paragraph 124 filed September 22nd, 1905, of the answer of the Guardian Trust Company, to the second amended and supplemental ancillary bill of complaint, except as stated in paragraph III hereof, are true, and that the Kansas City Suburban Belt Railroad Company is indebted to the Guardian Trust Company, upon the following promissory notes, open account, and judgment described in said paragraphs:

One note dated March 31, 1899, due July 2, 1899, for $50,000.00, with interest from date at the rate of six per cent per annum, on which there has been paid and credited on June 14, 1900, $12,500.00 and which note with interest at this date amounts to $65,848.67.

One note dated July 26, 1899, due on demand for $203,900.00 with interest at six per cent per annum from date, upon which there was paid and credited on June 11, 1900, $9,996.65, and which note with interest at this date amounts to $327,423.90.

One note dated October 23, 1899, due on demand, for $7,162.40, with interest at six per cent per annum from date, which with interest at this date amounts to $11,748.70.

One note dated November 7, 1899, due January 8, 1900, for $50,000.00 with interest after maturity at eight per cent per annum, upon which there was paid and credited June 14th, 1900, $12,500 00, and which note with interest at this date amounts to $70,715.87.

One note dated January 25, 1900, due May 25, 1900, for $25,000.00 with interest after maturity at six per cent per annum; interest paid to September 1, 1901, and which with interest at this date amounts to $38,225.00.

One note dated February 8, 1900, due May 13, 1900, for $109,500.00 with interest from maturity at eight per cent per annum, on which there was paid and credited October 23, 1900, as proceeds of sale of collateral made by the National Bank of Commerce, $110,250.00, leaving a balance due on October 23, 1900, of $3,240.66 and which with interest at this date amounts to $5,748.14.

One note dated September 21, 1899, for $23,056.48, wtih interest after date at eight per cent per annum, and which with interest at this date amounts to $42,905.50.

One note dated February 9, 1900, due June 11, 1900, for $10,400.00 with interest from maturity at six per cent per annum

1052 and which with interest at this date amounts to $16,664.26.

Also an item of $34,061.46 for and on account of a certain judgment paid by the Guardian Trust Company to the First National

Bank of Kansas City, Missouri, on March 27th, 1905, which with interest at seven per cent, from and after March 27th, 1905, aggregates at this date $46,565.76.

Also, upon an open account, on which the balance due said Guardian Trust Company on September 26, 1909, was $31,809.49, and which with interest at this date amounts to $50,412.62; and upon which account said Kansas City Suburban Belt Railroad Company is entitled to the credits mentioned and described in paragraph III of this decree.

That after allowing said credits on said account there is justly due and payable from said Kansas City Suburban Belt Railroad Company to Guardian Trust Company, at this date, the total sum of $639,658.86 of which sum $473,723.59 shall bear interest at six per cent per annum, $46,565.76 shall bear interest at seven per cent per annum, and $119,369.51 shall bear interest at eight per cent per annum; and for the collection and enforcement of said total sum due and owing by said Kansas City Suburban Belt Railroad Company to the Guardian Trust Company, the latter is entitled to have execution issued in the form used in the Circuit Courts in suits at common law in actions of assumpsit.

V. That as security for said indebtedness of said Kansas City Suburban Belt Railroad Company to said Guardian Trust Company, said Guardian Trust Company is entitled to subject all of the collateral pledged to it by Kansas City Suburban Belt Railroad Company as security for said indebtedness, or the proceeds thereof, namely:

10,000 shares of the capital stock of the Union Company.

4,997 shares of capital stock of the Union Company.

4,994 shares of capital stock of the Air Line.

1,120 shares of the capital stock of the Central Improvement Company.

439 shares of stock of the Northern Townsite Company.

425 shares of stock of the Missouri Elevator and Terminal Company.

25 shares of stock of the Fairmount Amusement Company.

13920 shares of stock of the Kansas City and Northern Connecting Railroad Company.

67 9/10 second mortgage bonds of the said Northern Connecting Company.

1053 23 First Mortgage Bonds of the Kansas City and Northern Connecting Railroad Company.

26 First Mortgage bonds of the Kansas City and Northern Connecting Railroad Company.

315 first mortgage bonds of the Kansas City and Northern Connecting Railroad Company; also,

A certain account and claim of the Belt Company against the Kansas City, Pittsburg & Gulf Railroad Company, consisting of charges for material furnished and labor performed, switching charges and terminal rentals, due from the said Gulf Railroad Company to the said Belt Company, and which account on its face amounts to approximately $132,805.44, but inasmuch as the Kan-

sas City, Pittsburg & Gulf Railroad Company is not a party to this proceeding, no finding is intended to be made as to the exact amount of this claim.

343 1940/2240 tons of steel rails, also,

16 1712/2000 tons of fastenings.

It is further ordered, adjudged and decreed that the act of Guardian Trust Company in heretofore selling certain of said collateral securities and applying the same upon the account of said Belt Company to said Guardian Trust Company as hereinbefore set forth, be and the same is hereby approved, and the Guardian Trust Company is hereby authorized to retain as its own the proceeds of ninety-nine first mortgage bonds and coupons of the Kansas City and Northern Connecting Railroad Company, together with the interest accrued thereon, which bonds were heretofore on November 1, 1901, sold for the sum of $40,001.25, under an order of this Court in the cause of Bierce v. Guardian Trust Company, et al., dated October 30, 1901, and which sum was under said order, by the Receiver of the Guardian Trust Company appointed in that case, placed in a separate fund to await the outcome of this litigation.

VI. It is further ordered, adjudged and decreed that all and singular the allegations in the intervening petition of The Kansas City Southern Railway Company filed herein February 27th, 1905, and in the amended intervening petition filed herein May 1st, 1905, are true in so far as they relate to the title, and ownership of the property of the Central Improvement Company, hereinafter specifically described.

That the Kansas City Suburban Belt Railroad Company, Kansas City and Independence Air Line, Kansas City, Pittsburg & Gulf Railroad Company and The Union Terminal Railroad Com-
1054 pany were railway companies and each owned and operated a standard gauge railroad in or about Kansas City, Missouri, and Kansas City, Kansas; and that between October 1892 and November 1898 each of said railway companies purchased certain lands in Jackson County, Missouri, and in Wyandotte County, Kansas, hereinafter specifically described, for the purposes of its railroad, and the said lands so purchased by each of said railway companies, respectively, constituted a part of its railroad and were reasonably necessary for the transaction of its business and the operation of its railroad; that the lands so purchased by each of said railway companies were paid for by the railway company so purchasing the same but the title to the said lands so purchased by each of said companies was for convenience taken in the name of defendant, Central Improvement Company, which last named corporation was organized for the purpose of holding such title and did in fact hold the same as trustee for the said railway companies, respectively; that after each of said railway companies purchased said lands, respectively, and paid for the same, the said Central Improvement Company, as a matter of convenience, issued its capital stock to the railway company making the payment in an amount approximately equal to the amount so paid.

That the railroad property and franchises of each of said railway

companies were encumbered with a mortgage or deed of trust duly executed, delivered and recorded prior to the date of the purchase or acquisition of the said lands, each of which mortgages or deeds of trust covered all the franchises and property of every name and description then owned or possessed by the railway company executing the same and also all property and assets, legal or equitable, which such company should acquire in the future as a part of its railroad; that each of said mortgages or deeds of trust was a valid and subsisting lien upon the property existing and to be acquired of the railway company executing the same at the time of the purchase and acquisition of the said lands by such company and the lien of the mortgage and of the after acquired property clause thereof of each of said railway companies attached to the lands purchased by the company executing the same and constituted a valid and subsisting mortgage lien thereon; that in the years 1899, 1900, 1901 and 1902 each of said mortgages was duly foreclosed in actions brought for that purpose in the Circuit Court of the United States for the Western District of Missouri and for the District of Kansas, and all of the property of each of said companies was, under the decree of foreclosure and sale rendered therein, duly sold, and the intervenor, The Kansas City Southern Railway Company, duly
1055 purchased the same at the foreclosure sales and became the lawful owner and holder of each and all of said properties and it now the lawful owner and entitled to the possession thereof, which said properties are more particularly described as follows, to-wit:

Real Estate Purchase #1 being all that part commencing at a point in the South line of Cheyenne Avenue, Kansas City, Kansas, 30 feet West of the North and South ½ Section line through the center of Section 22, Township 11, Range 25; thence west along said South line of Cheyenne avenue, 37.8 feet; thence in a Southwest direction on a straight line forming an angle of 56″ 9′ with said South line of Cheyenne Avenue, 680 feet more or less, to the Northerly boundary line of a tract of land owned by the Chicago, Milwaukee & St. Paul Railway Co.; thence in a northeasterly direction along said Northerly boundary line (the same being a curved line to the left) 575 feet, more or less, to a point in the West line of a 60 foot street, (the center line of which street is the North and South ½ Section line through the center of Section 22, Township 11, Range 25); thence along the West line of said street 197 feet to the place of beginning and containing an area of 1.65 acres.

All in Wyandotte County, Kansas.

Real state Purchase #2 being a certain strip or piece of land situated partly in the Southeast quarter of Section 21, and partly in the Southwest quarter of Section 22, Township 11, Range 25, in Wyandotte County, Kansas, and bounded and described as follows: Beginning at a point in the South line of the right of way of the Union Terminal Railroad, as said right of way is described in the deed to the Union Terminal Railroad Co., recorded in book 204 at page 418, and following, of the Real Estate Records of Wyandotte County, Kansas, where said South line would be intersected by the

prolongation or extension Southward of the East line of Tenth Street (formerly 20th Street), in Kansas City, Kansas; thence in an Easterly direction along said line of right of way 2178 feet; thence South 208.3 feet; thence in a Westerly direction on a line parallel to the South line of said right of way of the Union Terminal Railroad, and at the uniform distance of 200 feet from same, 2178 feet to a point in the East line extended Southward, of the aforesaid 10th Street, in Kansas City, Kansas; thence North along said line 200 feet to place of beginning, containing 10 acres.

All in Wyandotte County, Kansas.

1056 Real Estate Purchase #3 being a certain lot or piece of land situated in the Northeast quarter of Section 22, Township 11, Range 25, in Wyandotte County, Kansas, bounded and described as follows: Beginning at a point in the East line of Railroad Street, in Kansas City, Kansas, 1336.85 feet in a Southwesterly direction (Measured on the line of said street) from the South line of Osage Avenue; thence East along the South line of a tract of land formerly owned by the Western Dressed Beef Company, 270 feet, more or less, to a point in the West line of right of way of the Union Terminal Railroad; thence in a Southwesterly direction along said line of right of way, to a point where same intersects or coincides with the East line of Railroad Street; thence in a Northeasterly direction along the line of said street 390 feet, more or less, to place of beginning, and containing an area of 0.48 acres.

All in Wyandotte County, Kansas.

Real Estate Purchase #4 beginning at a point in the West line of the Northeast quarter of the Southwest quarter, Section 20, Township 11, Range 25, Wyandotte County, Kansas, 854 feet South of the Northwest corner of same, said point being also the Southwest corner of land of John O'Connor; thence North 414 feet to a point in the South line of right of way of the Union Terminal Railroad Company; thence South 71 degrees 40 minutes East along said line 603.5 feet to a point in the west line of land of Morris O'Connor; thence South along same 161.4 feet; thence South 63 degrees 37′ West 139.5 feet to a point in the South line of land of said John O'Connor; thence West along said South line 447.58 — to place of beginning, and containing 4.1 acres.

All in Wyandotte County, Kansas.

Real Estate Purchase #6 being all of lots 1, 2, 3, 4, 5, 6, 7, Block 14, West Kansas Addition No. 1, to City of Kansas (now Kansas City, Missouri); also commencing at the Northwest corner of said lot, thence running due North to the Missouri River; thence East following the meanderings of said River to a point due North of the N. E. Corner of said lot 5; thence due South to the N. E. corner of said lot 5, thence West to place of beginning; also commencing at the Southwest corner of Lot 11, in said Block 14, thence North along the East line of Santa Fe Street 86.67 feet to N. W. corner of lot 8, in said block 14; thence East along the North line of said lot 8, 98.2 feet; thence Southwest making an interior angle with the last described line of 50 degrees 35′ and running 112.2 feet to the South

line of Lot 11, being the North line of Eighth Street at a
1057 point on said line 26.2 feet East of the East line of Santa Fe Street; thence West along the South line of lot 11 and the North line of Eighth Street 26.2 feet to place of beginning, subject to right of way of the Kansas City Suburban Belt Railroad Company.

All in Jackson County, Missouri.

Real Estate Purchase #9 being all of lots numbered 1-45-46, in Block 2, in Modern Mutual Place, an addition to Kansas City, Missouri, as the same appears of record upon the Recorded Plat thereof, and so much of lots numbered 2 and 44 in Block 2, and so much of lots numbered 6, 7, and 8, in Block 1, in said addition as lie N. & N. W. of a line parallel to and 20 feet South and S. E. of the center line of the most Southerly tract of the K. C. S. B. R. R. Co. or K. C. & Independence Air Line, as the same is now located across said lots, which said center line is described as follows:

Beginning at a point in the West line of Lot 8, in Block 1, of said Addition, 65/100 feet S. of the N. W. corner of said lot; thence in a Northeasterly direction on a line of a curve to the right of 550.8 feet radius, 210 feet more or less to a point in the W. line of lot 44, in Block 2, of said Addition 3.3 feet S. of the N. W. Corner of said lot; thence continuing on said curve to the right having a radius of 550.8 feet 198.8 feet to appoint in the E. line of Lot 1, in Block 2 of said Addition 2 1/10 feet South of the N. E. corner of said lot.

All in Jackson County, Missouri.

Real Estate Purchase #10 being all of lots 31, 47 and 48 Hurck's Sub-division of Guinotte Farm, as the same are marked and designated on the recorded plat thereof, on file in the office of the Recorder of Deeds in and for the County of Jackson, State of Missouri.

All in Jackson County, Missouri.

Real Estate Purchase #11 being Lots 14, 15, 16, 17, and 18 Loomis' Riverside Addition, Lots 25, 27 and 28, Clifton Place Addition, to Kansas City, Kansas; Lots 2, 3, 5, 31 & 32 Block "D," F. J. Baird's Addition to Armourdale, now a part of Kansas City, Kansas.

All in Wyandotte County, Kansas; excepting that part of Lots 14, 15, 16, 17, and 18, of the said Loomis' Riverside Addition to Kansas City, Kansas, located South and West of the right of way of The Kansas City Southern Railway Company, formerly The Union Terminal Railroad Company and being that part of said lots heretofore sold and conveyed to August Uihlein on the 4th day of
1058 April, 1904, by Thomas T. Crittenden, Receiver of the Central Improvement Company, said deed being recorded in the office of the Register of Deeds of Wyandotte County, State of Kansas, in Volume 299 at page 80.

Real Estate Purchase #12 being Lot 4, Block 5 Lykins' Addition, Kansas City, Mo.

All in Jackson County, Missouri.

Real Estate Purchase #20 being Lot 21, Block 9 of Centropolis, Jackson County, Missouri.

Real Estate Purchase #21 being an undivided one half of Lot 124, Block 12, Old Town (now Kansas City) Missouri.

Real Estate Purchase #22 being a tract of land described by metes and bounds as follows: Beginning at the N. E. Corner of Lot 16, Block 16, in that part of Kansas City, Missouri, known as "Extension of West Kansas Addition No. 1"; thence West along the North line of said Block 16, 72 feet, to the Northwest corner of Lot 14 in said Block; thence in a Northerly direction, on the prolongation or extension of the West line of said Lot 14, 62.1 feet to a point 22 feet (Measured at right angles) North of the center line of the main track of the K. C. S. B. R. R., as located and constructed upon the ground; thence in an Easterly direction on a line parallel to the center line of said main track, and at the uniform distance of 22 feet from said center line, 184 feet to a point in the Northerly extension or prolongation of a line parallel to and 4 feet East of the East line of Lot 2 Block 15, in West Kansas Addition No. 1, thence South on said line 73.1 feet to a point in the North line of said Block No. 15, 4 feet East of the Northeast corner of said Lot 1, thence 52 feet to the N. W. corner of Lot 1 of said Block; thence South along the East line of Mulberry Street, 13 feet more or less, to a point 6 feet north of the center line of the most northerly switch track of the K. C. Ft. S. & M. Ry.; thence in a westerly direction on a line parallel to the center line of said switch track, and at the uniform distance of 6 feet from the North of said center line 60 feet to a point in the West line of said Street; thence North along said line 18 feet more or less, to place of beginning.

All in Kansas City, Jackson County, Missouri.

Real Estate Purchase #23 being a certain lot or piece of land situated in that part of Kansas City, Missouri, just North of and adjoining what is known as Extension of West Kansas Addition Number One, and bounded and described as follows, to-wit:

1059 Beginning at the Northwest corner of Lot one (1), in Block No. Fifteen (15) of said extension of West Kansas Addition No. One; thence North along the prolongation of the East line of Mulberry Street to the Missouri River; thence Easterly along the Missouri River to a point where the prolongation of the East line of Lot No. Eight (8) in said Block and Addition meets the Missouri River; thence Southerly along said prolongation of the East line of said Lot Eight (8) to the North line of Block No. Fifteen (15); thence Westerly on the North line of said Block Fifteen (15) to the place of beginning.

Also a certain lot or piece of land comprising parts of Lots One (1), Two (2), Three (3), Four (4), and Five (5), in Block No. Fifteen (15) in that part of Kansas City, Missouri, known as "Extension of West Kansas Addition No. One" and bounded and described as follows: Beginning at the Northwest corner of said block; thence East along the North line of same ninety-nine (99) feet more or less to a point Six (6) feet (measured at right angles) North of the center line of the most Northerly switch track of the Kansas City, Fort Scott & Memphis Railroad; thence in a Southwesterly direction on a line parallel to said center line and at the

uniform distance of six (6) feet from same One Hundred (100) feet, more or less, to a point in the East line of Mulberry Street; thence North along said line Thirteen (13) feet, more or less, to the place of beginning, in Jackson County, Missouri.

Real Estate Purchase #24 being a certain lot or piece of land situated North and West of that part of Kansas City, Missouri known as "Extension of West Kansas Addition No. One" and bounded and described as follows: Beginning at a point in the Northward extension of the East line of Hickory Street Eight feet South of the center line of the Consolidated Terminal Railroad (now The Kansas City Southern Railway) as said road is located and constructed upon the ground, and six hundred and thirteen and six-tenths (613.6 feet North of the North line of Ninth Street; thence in a Southwesterly direction on a line parallel to the center line of said Kansas City Southern Railway Company's Railroad and at the uniform distance of Eight (8) feet (at right angles) South of said line One Hundred and Ninty-two and Eight-tenths (192.8) feet to a point in the Northern extension of the East line of Lot number Eight (8) in Block number Sixteen (16) of said Extension of West Kansas Addition No. 1; thence South along said line-Fifty-five and nine-tenths (55.9) feet to a point six feet North of the center line of the Kansas City, Ft. Scott & Memphis Railroad Company's most Northerly main switch track; thence in a Southwesterly direction, on a line parallel to the center line of said Kansas City,
1060 Ft. Scott & Memphis switch track, and at the uniform distance of six (6) feet North of said center line, One Hundred and Ninety-two and Eight tenths (192.8) feet to a point in the Northward extension of the East line of Hickory Street, five hundred and twenty-six (526) feet North of the North line of Ninth Street; thence north along said line Eighty-seven and six-tenths (87.6) feet to place of beginning, and containing 0.308 acres, more or less.

All in Jackson County, Missouri.

Real Estate Purchase #27 being

First Parcel.—A triangular piece of ground in the Northwest corner of Block Three (3) Coats & Hopkins' Addition to the City of Kansas (now Kansas City) bounded as follows: Beginning at a point on the West side of said Block Three (3) which is Sixteen (16) feet from the Northwest corner thereof, and running thence Northerly along said West side Sixteen (16) feet to said corner; thence Easterly along the North side of Block three (3) Seventy (70) feet; thence Southwesterly to the place of beginning, containing about 560 square feet or 13/1000 of an acre.

Second parcel,—A part of Block seven (7) in said Coates & Hopkins Addition, which is bounded as follows: Beginning at a point on the East side of said Block seven (7), which is two hundred and Fifty-two and four-tenths (252.4) feet from the Northwest corner of Eighth & Henning Streets; thence Northerly Forty-six (46) feet along said East side to the Northeast corner of said Block seven (7); thence Northwesterly along the Northerly side of Block seven (7) One Hundred Forty-four and Seven-tenths (144.7) feet to the Northwest corner thereof; thence South along the West side of said

Block seven (7) 84 degrees and four minutes included angle Two Hundred Forty-four and Three tenths (244.3) feet; thence Northeasterly 35 degrees 20 minutes included angles One Hundred Eighteen and One Tenth (118.1) feet; thence Northeasterly 187 degrees 15 minutes, included angles Sixty-seven and Five Tenths (67.5) feet; thence Northeasterly 188 degrees, 28 minutes, included angle, Sixty-eight and seven tenths (68.7) feet to the point of beginning, Containing 21,215 square feet, or 487/1000 of an acre.

All in Jackson County, Missouri.

Real Estate Purchase #29 being all that part of Lot 32, Hurck's Sub-division of Guinotte Farm between right of way of the K. C. S. B. R. R., and the Missouri River, including all accretions, if any, to said lot, or any part thereof.

1061 All in Jackson County, Missouri.

Real Estate Purchase #13 being Lot 7 Block 4 Lykin's Addition, Kansas City, Mo.

All in Jackson County, Mo.

Wherefore and in consideration whereof it is hereby further ordered, adjudged and decreed that the defendant, Central Improvement Company, shall, after August 24, 1910, convey to The Kansas City Southern Railway Company all of the real estate and property above described, and that the Receiver of the said Central Improvement Company, join in said deed, if so requested by The Kansas City Southern Railway Company, and that the said receiver, upon execution of said deed, forthwith deliver possession of said properties to said Company.

It is further ordered, adjudged and decreed that *as to* all and singular the other allegations and charges and complaints in the intervening petition of The Kansas City Southern Railway Company, are without equity and that they be and are hereby dismissed.

VII. The Court finds the issues, made by paragraphs 15 to 20 inclusive of the answer of the Guardian Trust Company to the amended intervening petition of The Kansas City Southern Railway Company, against the Guardian Trust Company and in favor of The Kansas City Southern Railway Company, in that and it is so decreed, The Kansas City Southern Railway Company, did not assume, or degree to pay, or become liable for, the indebtedness or any part of it, owing by the Kansas City Suburban Belt Rail Road Company to the defendant, Guardian Trust Company, and that The Kansas City Southern Railway Company is in no wise liable or bound for the payment of the indebtedness of the Kansas City Suburban Belt Railroad Company to the defendant, Guardian Trust Company, the payment of which is decreed in paragraph IV of this decree.

VIII. It is further ordered and decreed that the exceptions filed herein by the Kansas City Suburban Belt Railroad Company and its receiver, and also by The Kansas City Southern Railway Company, the Cambria Steel Company, the Guardian Trust Company, and the Central Improvement Company, be and the same are hereby

overruled, except in the respects herein otherwise ordered and decreed.

IX. It is further ordered and decreed that, after the payment of all proper costs of the receiverships of the Central Improvement Company and the Northern Townsite Company in this cause, the balance of all the money, now in the hands of the receivers,
1062 respectively, of said companies, pending this litigation, shall be by said receivers paid into the registry of this Court, subject to the rights of the Guardian Trust Company, as the pledgee holder of part of the capital stock of said companies, as such rights shall be made to appear, inasmuch as it is not shown to the Court that there are any known officers of said Northern Townsite Company and said Central Improvement Company, to whom these payments can now be ordered to be made.

Upon any application made by the Guardian Trust Company for said moneys, so to be paid into the registry of the court, the same shall be referred to the Special Master herein, who shall forthwith ascertain the facts and report to the court, so that said moneys may be distributed without any unnecessary delay, and for such services the Special Master shall receive no other compensation than that hereinafter provided for.

X. It is further ordered and decreed that as to the Second Street Improvement Company, this cause shall be and is dismissed in all respects.

XI. It is further ordered, adjudged and decreed that the compensation of E. F. Swinney, as receiver of the Northern Townsite Company is hereby fixed at Fifteen Hundred Dollars ($1500.00), and that the compensation of S. W. Moore, as the counsel for the receiver, is hereby fixed at Fifteen Hundred Dollars ($1500.00), and that the said receiver be and he is hereby discharged and his bond canceled; that the compensation of H. H. Crittenden, receiver of the Central Improvement Company, is hereby fixed at Five Hundred Dollars ($500.00) and that the compensation of S. W. Moore, as the counsel of the receiver, is fixed at Two Thousand Dollars ($2000.00), and that said receiver be and he is hereby discharged and his bond canceled; that, it appearing to the court that all costs incurred by the Cambria Steel Company, prior to November 20, 1901, have been paid by it, it is ordered that no further costs in this proceeding be taxed against said Company, nor shall any costs heretofore paid by said Company be chargeable against any of the other parties to this action; and it is further ordered and decreed that, in addition to the allowances heretofore made to Shannon C. Douglass, Special Master, on account of his services as such Master in this cause, there is hereby allowed to him as further compensation the sum of Fifteen Thousand Dollars ($15,000.00), for and on account of his said services, which shall be taxed as costs in this case, and it appearing to the Court that the former allowances heretofore made to him were paid in the same proportion and by the same parties as herein provided, no further order will be made in re-
1063 spect to equalizing such payments, all said allowances to be taxed as costs herein.

XII. It is further ordered, adjudged and decreed that the costs of this action be paid as follows; one-third (1/3) thereof shall be paid by the Guardian Trust Company, and Two-thirds (2/3) thereof shall be paid by the Kansas City Suburban Belt Railroad Company, and its receiver, and The Kansas City Southern Railway Company.

XIII. It is further ordered and decreed that this Court retains jurisdiction of this cause in order to carry out the purposes and orders herein made in this decree.

(Signed) JNO. F. PHILIPS, *Judge.*

#2468. Decree-Comp.

Afterwards, to-wit, on the 10th day of August, 1910, the Assignment of Errors of the Guardian Trust Company was filed. Said Assignment of Errors is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company; and Fairmount Amusement Company; Defendants; The Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

Assignment of Errors by Guardian Trust Company.

Now on this 10th day of July, 1910, comes the Guardian Trust Company, defendant in the original bill of complaint in
1064 this cause and defendant in the ancillary bill of complaint of Edward F. Swinney Receiver of the Kansas City Suburban Belt Railroad Company, and The Kansas City Suburban Belt

Railroad Company, and defendant in the various intervening petitions of The Kansas City Southern Railway Company, and considering itself aggrieved by the order and decree entered in this court on the 25th day of June, 1910, whereby this court did enter a final decree in this cause, and did include in said decree a finding that The Kansas City Southern Railway Company was not liable for the indebtedness found in said decree and adjudged to be due to the Guardian Trust Company from The Kansas City Suburban Belt Railroad Company; and whereby the court ordered and decreed that the defendant Central Improvement Company, and its Receiver, should, after August 24, 1910, convey to the said The Kansas City Southern Railway Company the railroad property in said decree described, and did decree that the costs of this action be paid as follows: One-third thereof by the Guardian Trust Company, and two-thirds thereof by The Kansas City Suburban Belt Railroad Company and its Receiver, and The Kansas City Southern Railway Company, does now [*day*] that said decree is errneous and against the just rights of this defendant, for the following reasons:

First. The court erred in over-ruling the exceptions of the Guardian Trust Company to the report of the Honorable Shannon C. Douglass, Special Master, and in over-ruling each of said exceptions made and taken by this defendant.

Second. The court erred in including in said decree and finding that The Kansas City Southern Railway Company did not assume or agree to pay, or become liable for the indebtedness, or any part of it, owing by the Kansas City Suburban Belt Railroad Company to the Guardian Trust Company.

Third. The court erred in requiring the Central Improvement Company and its Receiver to convey to The Kansas City Southern Railway Company the properties and each of the properties in said decree specified.

Fourth. The court erred in refusing to hold that the claim of The Kansas City Southern Railway Company in respect to the properties of the Central Improvement Company, and each of the properties in said decree described, was barred by the statute of limitations and by laches.

Fifth. The court erred in ordering, adjudging and decreeing that the costs of this action be paid, one-third by the Guardian Trust Company and two-thirds by The Kansas City Suburban Belt Railroad Company and its Receiver, and The Kansas City Southern Railway Company.

1065 Sixth. The court erred in taxing any part of the costs of this proceeding against the defendant Guardian Trust Company.

Seventh. The court erred in adjudging and decreeing that the costs and expenses of the administration of the defendant, Central Improvement Company, and the defendant, Northern Townsite Company, including compensation for the Receivers of said Company, and compensation for the counsel of said Receivers, should be paid out of the assets of said Company, because said expenses, costs

and compensation should be paid by the Cambria Steel Company and the Kansas City Suburban Belt Railroad Company and its Receiver, and The Kansas City Southern Railway Company.

Wherefore, this defendant prays that said decree be reversed and that this court be directed to enter a decree which shall exclude from its findings the findings that The Kansas City Southern Railway Company is not liable for the intebtedness of The Kansas City Suburban Belt Railroad Company to this defendant, and that the decree be reversed as to the lands of the Central Improvement Company in said decree described, and that the said Central Improvement Company and its Receiver be not required to convey the said lands in said decree described to the Kansas City Southern Railway Company, and that all the costs of this proceeding and the costs and expenses of administration of the various companies, defendants in this cause, including compensation for Receivers of the same, and compensation for counsel for said Receivers, be taxed against the Cambria Steel Company, The Kansas City Suburban Belt Railroad Company, and The Kansas City Southern Railway Company, and for such other relief as to justice may pertain.

GUARDIAN TRUST COMPANY,
By EDWARD P. GATES,
Its Solicitors.

Afterwards, to-wit, on the 10th day of August, 1910, the Assignment of Errors of the Central Improvement Company was filed. Said Assignment of Errors is in words and figures as follows:

In the Circuit Court of the United States, for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Ter-
1066 minal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company and Fairmount Amusement Company, Defendants.

Ancillary Bill.

The Kansas City Southern Railway Company, Intervenor.

Assignment of Errors by Central Improvement Company.

Now on this 10th day of July, 1910, comes the Central Improvement Company, defendant in the original bill of complaint in this cause, and defendant in the ancillary bill of complaint of Edward F. Swinney, Receiver of The Kansas City Suburban Belt Railroad Company, and The Kansas City Suburban Belt Railroad Company, and defendant in the various intervening petitions of The Kansas City Southern Railway Company, and considering itself aggrieved by the order and decree entered in this court on the 25th day of June, 1910, whereby this court did enter a final decree in this cause, and did include in said decree a finding that the Kansas City Southern Railway Company was not liable for the indebtedness found in said decree and adjudged to be due to the Guardian Trust Company from The Kansas City Suburban Belt Railroad Company; and whereby the court entered and decreed that the defendant Central Improvement Company, and its Receiver, should, after August 24, 1910, convey to the said The Kansas City Southern Railway Company the railroad property in said decree described, and did decree that the costs of this action be paid as follows: One-third thereof by the Guardian Trust Company, and two-thirds thereof by The

Kansas City Suburban Belt Railroad Company and its Receiver, and The Kansas City Southern Railway Company, does now say that said decree is erroneous and against the just rights of this defendant, for the following reasons:

First. The court erred in over-ruling the exceptions of the Central Improvement Company to the report of the Honorable Shannon C. Douglass, Special Master, and in overruling each of said exceptions made and taken by this defendant.

1067 Second. The court erred in requiring the Central Improvement Company and its Receiver, to convey to The Kansas City Southern Railway Company the properties and each of the properties in said decree specified.

Third. The court erred in refusing to hold that the claim of the Kansas City Southern Railway Company in respect to the properties of the Central Improvement Company, in said decree described, was barred by the statute of limitations and by laches.

Fourth. The court erred in requiring this defendant, Central Improvement Company, and its Receiver, to pay the costs and expenses of said receivership, including the compensation of the Receiver and counsel for the Receiver, whereas said expense and compensation should have been taxed against and paid by Cambria Steel Company, complainant, The Kansas City Suburban Belt Railroad Company and its Receiver, and The Kansas City Southern Railway Company, Intervenor.

Wherefore, This defendant prays that said decree be reversed as to the lands of the Central Improvement Company, in said decree described, and that this defendant, Central Improvement Company, and its Receiver, be not required to convey the said lands to The Kansas City Southern Railway Company, and that all the costs of this proceeding be taxed against the Cambria Steel Company, The Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company, and for such other relief as to justice may pertain.

CENTRAL IMPROVEMENT COMPANY,
By H. H. CRITTENDEN, *Receiver;*
By EDWARD P. GATES &
GEORGE H. ENGLISH, JR., *Its Solicitors.*

Afterwards, to wit on the 10th day of August, 1910, the Petition of Guardian Trust Company for Appeal and Order allowing appeal were filed and entered of record. Said Petition and Order are in words and figures as follows:

In the Circuit Court of the United States, for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Ter-
1068 minal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company and Fairmount Amusement Company, Defendants.

Ancillary Bill.

The Kansas City Southern Railway Company, Intervenor.

Petition of Guardian Trust Company for Appeal.

The above-named defendant, Guardian Trust Company, conceiving itself aggrieved by the final order and decree made and entered in the above-entitled cause, on the 25th day of June, 1910, does hereby appeal from said order and decree, to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors, wrich is filed herewith; and said Guardian Trust Company prays that this appeal may be allowed and that citation issue as provided by law; that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Eighth Circuit, and your petitioner further prays that the proper order, touching the security to be required of it to perfect its appeal, be made.

GUARDIAN TRUST COMPANY,
By EDWARD P. GATES, *Its Solicitor.*

The foregoing petition for appeal is allowed and it is ordered that the cost bond to be filed by said appellant be and it is hereby fixed in the sum of Five thousand Dollars ($5,000.00).

Dated this 10th day of August, 1910.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to wit, on the 10th day of August, 1910, the Petition for Appeal of the Central Improvement Company and Order allowing appeal were filed and entered as record. Said Petition and Order are in words and figures as follows:

1069 In the Circuit Court of the United States, for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmont Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver, Northern Townsite Company and Fairmont Amusement Company, Defendants.

Ancillary Bill.

The Kansas City Southern Railway Company, Intervenor.

Petition of Central Improvement Company for Appeal.

The above-named defendant, Central Improvement Company, conceiving itself aggrieved by the final order and decree made and entered in this cause, the 25th day of June, 1910, requiring the Central Improvement Company and its Receiver, to convey to The Kansas City Southern Railway Company the properties and each of the properties in said decree specified; and refusing to hold that the claim of The Kansas City Southern Railway Company, in respect to the properties of the Central Improvement Company, in said decree described, was barred by the statute of limitations and by laches, and requiring this defendant, Central Improvement Company, and its Receiver, to pay the costs and expenses of said receivership, prays that this appeal may be allowed and that citation issue as provided by law; that a transcript of the record, proceedings and paper upon which said order and decree was made, duly authenticated, may be

sent to the said United States Circuit Court of Appeals for the Eighth Circuit.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal, be made and, desiring to supersede the execution of the decree, your peti-
1070 tioner here tenders bond in such amount as the court may require for such purpose and prays that, with the allowance of the appeal, a supersedeas be issued.

Dated this 10th day of August, 1910.

CENTRAL IMPROVEMENT COMPANY,
By H. H. CRITTENDEN, *Receiver;*
By EDWARD P. GATES &
GEORGE H. ENGLISH, JR., *His Solicitors.*

The foregoing petition for an appeal is allowed upon the petitioner giving bond, conditioned as the law directs, in the sum of Thirty thousand Dollars, ($30,000.00) which may operate as a supersedeas; and that a true copy of the record, assignment of errors and proceedings had in the case, shall be transmitted to the United States Circuit Court of Appeals, for the Eighth Circuit.

Dated this 10th day of August, 1910.

(Signed) SMITH McPHERSON, *Judge.*

The Bond for Appeal of the Guardian Trust Company, approved and filed herein on the 10th day of August, 1910, as in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Gurdian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amustment Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants; The Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

1071 *Bond of Guardian Trust Company on Appeal.*

Know All Men by These Presents:

That The Guardian Trust Company, as principal, and United States Fidelity & Guaranty Company of Baltimore, Md., as surety, acknowledge themselves to be jointly indebted unto The Kansas City Southern Railway Company, The Kansas City Suburban Railroad Company and Edward F. Swinney, its Receiver, and Cambria Steel Company, in the full and just sum of Five thousand and no/100 Dollars ($5,000.00) to be paid to them, their successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our respective seals.

Dated at Kansas City, Missouri, the 10th day of August, 1910.

The condition of the above obligation is that

Whereas, On the 25th day of June, 1910, in the above-entitled cause, a final order and decree was made and entered and the said Guardian Trust Company has obtained an order allowing an appeal from said final order and decree, and has obtained a citation directed to the complainants and defendants in said bill and supplemental bill, other than this defendant, Guardian Trust Company, citing and admonishing them to be and appear in the United States Circuit Court

of Appeals for the Eighth Circuit, sixty (60) days from and after the date of said citation.

Now, if the said Guardian Trust Company shall prosecute its appeal to effect, and answer to all costs if it fail to make its plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

In Witness Whereof, the said Guardian Trust Company and said United States Fidelity and Guaranty Company have caused these presents to be signed by their proper officers and their corporate seals to be hereunto affixed.

[SEAL.] GUARDIAN TRUST COMPANY,

Attest:
EDWARD C. WRIGHT,
Assistant Secretary,
By JOHN A. PRESCOTT,
Its Vice President.

[SEAL.] UNITED STATES FIDELITY & GUARANTY COMPANY,
By MERRITT M. LUCAS,
JEAN L. CROSS,
Its Attorneys in Fact.

1072 Approved:
SMITH McPHERSON, *Judge.*

The Bond for Appeal of the Central Improvement Company, approved and filed August 10th, 1910, is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amustment Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants; The Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

Bond of Central Improvement Company on Appeal.

Know All Men by These Presents:

That we, Central Improvement Company, as principal, and United States Fidelity & Guaranty Company of Baltimore, Md., as surety, are held and firmly bound unto The Kansas City Southern Railway Conpany, The Kansas City Suburban Belt Railroad Company, and Edward F. Swinney, its Receiver, and Cambria Steel Company, in the full and just sum of Thirty thousand and no/100 Dollars ($30,000) to be paid to them, their successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated at Kansas City, Missouri, this 10th day of August, 1910.

The condition of the above obligation is that

1073 Whereas, on the 25th day of June, 1910, in the above-entitled cause, a final order and decree was made, requiring the Central Improvement Company, and its Receiver, to convey certain properties in said decree described, to The Kansas City Southern Railway Company, and requiring the defendant, Central Improvement Company, and its Receiver, to pay the costs and expenses of the receivership, and the said Central Improvement Company has

obtained an order allowing an appeal from said final order and decree, and has obtained a citation directed to the complainants in said bills, and the defendants other than the Central Improvement Company, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, sixty days from and after the date of said citation;

Now, if the said Central Improvement Company shall prosecute its appeal to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

CENTRAL IMPROVEMENT COMPANY,
By H. H. CRITTENDEN, *Receiver*,
By EDWARD P. GATES,
GEO. H. ENGLISH, JR.,
His Solicitors.

Company, Central Improvement Company, Second Street Im-
UNITED STATES FIDELITY & GUARANTY COMPANY,
[SEAL.] By MERITT M. LUCAS,
JEAN L. CROSS,
Its Attorneys-in-Fact.

Approved:
SMITH McPHERSON, *Judge.* [SEAL.]

Afterwards, to-wit, on the 10th day of August, 1910, the Præcipe for Appeal of the Guardian Trust Company was filed. Said Præcipe is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2468.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street
1074 Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants; The Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

Præcipe for Record on Appeal.

To the Clerk of said Court:

For use in the appeal of the Guardian Trust Company from the order and decree of this court filed June 25, 1910, entering and rendering a final decree in the above-entitled cause, you will please prepare the transcript for the appellant court and include therein the following parts of the record:

1. The original bill of complaint of Cambria Steel Company, filed September 6, 1900, with exhibits attached.
2. Entry of appearance of the railroad companies and defendants in said bill, filed September 6, 1900.
3. Order granting restraining order, appointing receivers, etc., filed September 6, 1900.
4. Entry of appearance of Guardian Trust Company, filed October 1, 1900.
5. Entry of appearance filed October 1, 1900, for Central Improvement Company, et al.
6. Answer of Guardian Trust Company to original bill of complaint, filed November 5, 1900, with exhibit attached.

7. Answer of Central Improvement Company to original bill of complaint, filed November 5, 1900.

8. Order as to hearing of application for temporary injunction, filed November 7, 1900.

9. Replication of Cambria Steel Company to answer of Guardian Trust Company, filed December 3, 1900.

1075 10. Replication of Cambria Steel Company to answer of Central Improvement Company, et al. filed December 3, 1900.

11. Ancillary bill filed by The Kansas City Suburban Belt Railroad Company and its Receivers vs. Cambria Steel Company, Guardian Trust Company, et als., filed November 20, 1901.

12. Stipulation in cause No. 2616 extending time for filing answers.

13. Separate answer of Guardian Trust Company to ancillary bill filed in cause No. 2616 December 9, 1901.

14. Separate answer of Cambria Steel Company to ancillary bill, filed December 16, 1901, to cause No. 2616.

15. Exceptions by complainants to answer of Guardian Trust Company, filed December 31, 1901.

16. Replication to answer of Guardian Trust Company, filed April 9, 1902, in cause No. 2616.

17. Order sustaining exceptions and referring cause to Honorable Shannon C. Douglass, Special Master, filed April 1, 1902, in cause No. 2616.

18. Resignation of Wash Adams, Receiver Central Improvement Company, filed May 29, 1902, and order of same date accepting same.

19. Order appointing Honorable Thomas T. Crittenden Receiver of Central Improvement Company, filed June 27, 1902.

20. Stipulation making The Kansas City Southern Railway Company a party, filed February 7, 1905.

21. Stipulation extending the time for the Kansas City Southern Railway Company to intervene, filed February 27, 1905.

22. Order granting leave to The Kansas City Southern Railway Company to file intervening petition and referring the issues to Honorable Shannon C. Douglass, as Special Master, filed February 27, 1905.

23. Intervening petition of The Kansas City Southern Railway Company, filed February 27, 1905.

24. Answer of Guardian Trust Company to intervening petition of the Kansas City Southern Railway Company, filed March 7, 1905.

1076 25. Answer of Central Improvement Company to intervening petition of the Kansas City Southern Railway Company filed.

26. Amended and supplemental ancillary bill of Knott and Swinney, Receivers, filed March 22, 1905, omitting exhibits.

27. Order referring issues upon same to Honorable Shannon C. Douglass, filed April 7, 1905.

28. Stipulation that The Kansas City Southern Railway Company may file amended intervening petition to be referred to Honorable Shannon C. Douglass, Special Master, filed May 1, 1905, and order

made thereon, of same date, that issues stand referred to Honorable Shannon C. Douglass to take the testimony and report his findings of fact and conclusions of law.

29. Amended intervening petition of The Kansas City Southern Railway Company, filed May 1, 1905, omitting exhibits.

30. Order enlarging time of Guardian Trust Company to plead to amended intervening petition, filed May 15, 1905.

31. Answer of Guardian Trust Company to amended intervening petition of The Kansas City Southern Railway Company, filed May 20, 1905, and order of reference of same date.

32. Answer of Guardian Trust Company to amended and Supplemental bill of complaint of Knott and Swinney, filed June 1, 1905.

33. Answer of Central Improvement Company, T. T. Crittenden Receiver, to amended intervening petition of The Kansas City Southern Railway Company, filed August 7, 1905.

34. Answer of Central Improvement Company to amended and supplemental bill of complaint of Knott and Swinney, Receivers, filed June 9, 1905.

35. Replication to answers of Guardian Trust Company and Central Improvement Company, filed June 26, 1905.

36. Order granting leave to file second amended ancillary bill, filed July 2, 1906.

37. Second amended and supplemental ancillary bill of complaint, filed July 2, 1906, omitting exhibits.

38. Answers and pleas of Guardian Trust Company, filed July 2, 1906.

39. Stipulation making up the issues, filed July 2, 1906.

1077 40. Answer of Central Improvement Company, filed October 19, 1906.

41. Replication of Swinney, Receiver, to answer of Guardian Trust Company to second amended ancillary bill, filed July 2, 1906.

42. Replication of The Kansas City Southern Railway Company to answer of Guardian Trust Company to amended intervening petition filed July 2, 1906.

43. Answer of Central Improvement Company and T. T. Crittenden Receiver, to second amended bill of Swinney Receiver, filed October 19, 1907.

44. Application of Swinney, et al., for leave to file supplemental bill, filed November 16, 1907, and order of same date granting leave to file.

45. Supplemental bill of complaint against Guardian Trust Company and exhibits attached, filed November 16, 1907.

46. Restraining order filed November 16, 1907.

47. Answer of Guardian Trust Company to rule to show cause, filed December 16, 1907.

48. Order granting temporary injunction against Guardian Trust Company, filed February 22, 1908.

49. Injunction bond filed, February 24, 1908.

50. Motion of Guardian Trust Company to dissolve restraining order, filed February 29, 1908, and order of same date denying said motion.

51. Petition for appeal from injunction order of February 22, 1908, and order allowing appeal.

52. Appeal bond Guardian Trust Company filed March 10, 1908.

53. Letter of S. W. Moore and affidavit of Thomas J. Bales, filed March 14, 1908.

54. Mandate and opinion of Circuit Court of Appeals of the United States for the Eighth Judicial Circuit, on appeal of Guardian Trust Company vs. The Kansas City Southern Railway Company et al., in cause No. 2827, filed June 21, 1909.

55. Order appointing H. H. Crittenden Receiver of Central Improvement Company, filed June 19, 1908.

1078 56. Report of Honorable Shannon C. Douglass, Special Master, filed May 21, 1910.

57. Supplemental report of Special Master, filed June 22, 1910.

58. Exceptions of Guardian Trust Company to the report of Honorable Shannon C. Douglass, Special Master, filed June 17, 1910.

59. Exceptions of Central Improvement Company by H. H. Crittenden, its Receiver, to report of Honorable Shannon C. Douglass, Special Master, filed June 17, 1910.

60. Final decree rendered in this cause on June 25, 1910.

61. Petition of Guardian Trust Company for appeal from said final decree, and order allowing appeal, filed August 10, 1910.

62. Petition for appeal of Central Improvement Company from said final decree, and order allowing appeal, filed August 10, 1910.

63. Assignment of errors of Guardian Trust Company, in connection with petition for appeal, filed August 10, 1910.

64. Assignment of errors by Central Improvement Company, filed in connection with petition for appeal, filed August 10, 1910.

65. Bond on appeal by Guardian Trust Company, and order approving same, filed August 10, 1910.

66. Bond on appeal of Central Improvement Company and order approving same, filed August 10, 1910.

66*a*. Præcipe of Central Improvement Company for record on appeal filed August 10, 1910.

67. Citation in connection with said appeal of Guardian Trust Company, and return of service endorsed thereon.

68. Citation in connection with said appeal of Central Improvement Company and return of service endorsed thereon.

Other portions of the record, i. e. interlocutory orders, directions to and reports by the various receivers, evidence taken by the Special Master, and other papers and documents in the case not being deemed necessary on the hearing of the appeal, may be omitted by you in preparing said transcript.

Respectfully,

EDWARD P. GATES,
Solicitor for Guardian Trust Company.

1079 Afterwards, to-wit, on the 10th day of August, 1910, the Præcipe of the Central Improvement Company was filed. Said Præcipe is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, CENTRAL IMPROVEMENT COMPANY et al., Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company et al. Complainants,
vs.
CAMBRIA STEEL COMPANY, CENTRAL IMPROVEMENT COMPANY et al., Defendants; The Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

Præcipe for Record on Appeal by Central Improvement Company.

To the Clerk of said Court:

For use in the appeal of the Central Improvement Company from the order and decree of this Court filed June 25th, 1910, entering and rendering a final decree in the above entitled cause, the Central Improvement Company adopts as its own the transcript for the Appellate court prepared in accordance with the præcipe for record on appeal of Guardian Trust Company, which præcipe and record it deems sufficient.

Respectfully,

EDWARD P. GATES,
GEO. H. ENGLISH, JR.,
Solicitors for Central Improvement Company and H. H. Crittenden, Its Receiver.

UNITED STATES OF AMERICA, *sct*:

I, Adelaide Utter, Clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true and complete copy of the record, assignment of errors and all proceedings in cause #2468, Cambria Steel Company, complainant, vs. Kansas City Suburban Belt Railroad Company, et al., defendants, in accordance with the præcipes filed by the Guardian Trust Company and the Central Improvement Company upon their appeal from the decree made and entered herein on the 25th day of June, A. D.
1080 1910, as fully as the same remains on file and of record in my office. Copies of said præcipes are hereto attached.

I further certify that the documents numbered as follows in said

præcipes, to-wit: No. 25, Answer of Central Improvement Company to intervening petition of Kansas City Southern Railway Company; No. 35, replication to answer of Central Improvement Company; No. 43 Answer of Central Improvement Company and T. T. Crittenden, Receiver to 2nd amended bill of Swinney, Receiver, and the opinion of the United States Circuit Court of Appeals (No. 54) have never been filed in this court.

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 27th day of September, A. D. 1910.

[Seal U. S. Circuit Court, Western Division, Western District, Missouri.]

ADELAIDE UTTER, *Clerk.*

Filed Oct. 6, 1910. John D. Jordan, Clerk.

1081 (*Appearance of Messrs. Gates & English as Counsel for Appellants in Cause No.* 3489.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 3489.

CENTRAL IMPROVEMENT COMPANY et al., Appellants,
vs.
CAMBRIA STEEL COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellants.

EDWARD P. GATES,
GEO. H. ENGLISH, JR.,
1003 *Scarritt Bldg., Kansas City, Mo.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Oct. 10, 1910.

(*Appearance of Messrs. Gates & English as Counsel for Appellee Guardian Trust Co. in Cause No.* 3489.)

The Clerk will enter my appearance as Counsel for the Appellee, Guardian Trust Co.

EDWARD P. GATES,
GEO H. ENGLISH,
1003 *Scarritt Bldg., Kansas City, Mo.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Dec. 17, 1910.

(Appearance of Mr. Frank Hagerman as Counsel for Appellee Cambria Steel Co. in Cause No. 3489.)

The Clerk will enter my appearance as Counsel for the Appellee, Cambria Steel Co.

FRANK HAGERMAN.

(Endorsed): Filed in U. S. Circuit Court of Appeals on Dec. 17, 1910.

(Motion of Appellant Central Improvement Co. to Dismiss Appeal in Cause No. 3489.)

Comes now the Central Improvement Company and moves to dismiss the appeal heretofore taken in its name and to strike the cause from the docket of this Court for the following reasons:

1082 The decree herein was rendered on June 25th, 1910. On August 10th, 1910, counsel purporting to represent the Central Improvement Company made application to the Circuit Court at Kansas City, Missouri, for an appeal in its behalf. An order was signed by Judge Smith McPherson on August 10th, 1910, allowing the appeal, and approving a supersedeas bond.

Afterwards and on October 8th, 1910, the Central Improvement Company presented an application to the Circuit Court at Kansas City, Missouri, to vacate the allowance of the said appeal, upon the ground that counsel, asking for the appeal in behalf of the said Central Improvement Company, had no authority to represent it. A hearing was accordingly had and the Court found that the said appeal, allowed on August 10th, 1910, was improperly allowed, in that the counsel, purporting to represent the Central Improvement Company, were not in fact authorized to represent it, or appear for it. The orders, allowing the appeal and approving the supersedeas bond, were set aside and vacated. This order was made on October 8th, 1910, at the same term at which said decree of June 25th, 1910, was rendered, and at the same term at which the order allowing the appeal of August 10th, 1910, was entered. A copy of the order, signed by the Honorable Smith McPherson, setting aside and vacating the orders allowing the appeal and approving the supersedeas bond, is herewith attached, marked Exhibit "A". A certified copy of said order of October 8th, 1910, was filed in this Court in December, 1910.

The Central Improvement Company further states that it did not desire to appeal from the said decree of June 25th, 1910, and that it did not authorize any one to take an appeal for it or in its behalf.

CENTRAL IMPROVEMENT COMPANY,
By T. B. BUCKNER, *Its Solicitor.*

STATE OF MISSOURI,
County of Jackson, ss:

J. A. Edson, of lawful age, being duly sworn, upon his oath states that he is President of the Central Improvement Company and makes this affidavit in its behalf; that he has read the foregoing motion and knows the contents thereof, and that the matters and facts therein stated are true.

1083 J. A. EDSON.

Subscribed and sworn to before me this 14th day of April, 1911. My commission will expire October 15th, 1912.
[SEAL.] CLARENCE R. HALL,
Notary Public in and for said State and County.

EXHIBIT "A".

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants.
vs.
CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants; The Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

Order.

The Central Improvement Company has presented an application to vacate the allowance of an appeal made on the application
1084 of the said Central Improvement Company on August 10th, 1910. In support of the application the affidavits of J. A.

Edson, President of the Central Improvement Company and of H. H. Crittenden are offered which affidavits are ordered to be filed and made a part of the record herein. Said Central Improvement Company also offers the minute book of said Company of the said Central Improvement Company and the record thereof, which book is ordered to be filed and made a part of the record herein.

In resistance to said motion is offered the affidavit of H. H. Crittenden with the exhibit therein set out, namely, the letter of June 10th, 1910, from him the said Crittenden to Messrs. Gates & English.

Mr. E. P. Gates and Mr. George H. English specially appear to said motion claiming to be authorized to represent the receiver of the Central Improvement Company under the letter set forth in the affidavit of H. H. Crittenden, for the purpose of objection to the jurisdiction of this Court to pass upon said application and for the purpose of objection to the sufficiency of said application to confer jurisdiction on the court or to authorize the vacating of the order allowing the appeal referred to therein.

The said George H. English in open court professionally states to the court that the authority of said Gates & English to take the said appeal on behalf of said Central Improvement Company and said receiver Crittenden or either of them is as found in the decree of June 25th, 1910, and the said letter of June 10th, 1910, and not otherwise or by other authority. The decree herein was entered and ordered of record June 25th, 1910, the same being a day of the regular April term, 1910, of this court, and the said April term is still in session, the court not having yet adjourned for the said term.

There is no charge of bad faith on the part of said attorneys or solicitors in taking said appeal, and there is and has been no bad faith on the part of any one, but the court finds, and does hold that it has full power and jurisdiction to pass upon the application to vacate the order allowing such appeal of the Central Improvement Company, and the court further finds from the inspection of the petition for appeal, and of the assignment of errors, and of
1085 the supersedeas bond, that the attempt was made to appeal from the decree for and on behalf of the Central Improvement Company, only, and the court further finds the fact to be that neither the said Central Improvement Company nor the said H. H. Crittenden granted authority to any attorney or solicitor or other person to take said appeal and the order of this court by Smith McPherson, Judge, of August 10, 1910, allowing the said appeal of said Central Improvement Company or Receiver or either and in approving said bond and directing that said appeal, and bond should act as a supersedeas, were each and all done through inadvertence and without authority and by reason of a mistake of fact by acting upon such petition for appeal, when in truth and in fact neither the said Central Improvement Company, nor H. H. Crittenden had asked for an appeal and had not conferred authority upon anyone to ask for an appeal.

In view of the foregoing the order of August 10, 1910, allowing an appeal to said Central Improvement Company and the whole thereof is hereby vacated and declared for naught.

To each, all and every of which the said E. P. Gates and George H. English claiming to act under the authority of the documents heretofore referred to except on behalf of the receiver of the Central Improvement Company.

(Signed) SMITH McPHERSON, *Judge.*

(Filed October 8th, 1910.)

[Endorsed:] Filed in U. S. Circuit Court of Appeals on Apr. 18, 1911.

(*Proof of Service of Motion to Dismiss Appeal in Cause No.* 3489.)

To Frank Hagerman, Solicitor for Cambria Steel Company:
Messrs. Gates & English, Solicitors for Guardian Trust Company:

You and each of you are hereby notified that the Central Improvement Company has filed in this cause the attached motion to dismiss and strike from the docket the appeal allowed in the name of the Central Improvement Company.

CENTRAL IMPROVEMENT COMPANY,
By T. B. BUCKNER, *Its Solicitor.*

1086 Service of a copy of this notice and motion acknowledged this 17th day of April, A. D. 1911.

FRANK HAGERMAN,
Solicitor for Cambria Steel Co.
EDWARD P. GATES &
GEO. H. ENGLISH, JR.,
Solicitors for Guardian Trust Co.

[Endorsed:] Filed in U. S. Circuit Court of Appeals on Apr. 19, 1911.

(*Counter Motion of Guardian Trust Co. to Motion of Central Improvement Co. to Dismiss Appeal in Cause No.* 3489.)

Comes now the Guardian Trust Company, one of the Appellees in the above entitled cause, and shows to the Court, that the affidavit of H. H. Crittenden, the Receiver of the Central Improvement Company referred to in the order of the Honorable Smith McPherson, Judge, filed October 8th, 1910, which order is attached to the motion of the Central Improvement Company filed herein, is in words and figures as follows, to-wit:

"H. H. Crittenden, of lawful age, being duly sworn, on his oath states, that on June 10th, 1910, he addressed to Messrs. Gates & English, Kansas City, Missouri, a letter of which the following is a copy:—

KANSAS CITY, Mo., June 10", 1910.

Messrs. Gates & English, Kansas City, Mo., Scarritt Bldg.

GENTLEMEN: In response to your letter of June 8", 1910, I beg to say that I took up with Judge Phillips, in company with your Mr. English, the matters referred to therein and under his instructions at said interview, you were authorized by Judge Phillips in my name, as Receiver of the Central Improvement Company, to file and present to the Court such exceptions to the report of the
1087 Special Master and such other matters in connection therewith as in your judgment will best conserve the interests of the Central Improvement Co.

It is understood that the Receivership is to be put to no expense for attorney's fees in the matter.

Very respectfully,

H. H. CRITTENDEN, *Receiver.*"

No revocation of authority conferred in this letter has ever been made by me.

Duly subscribed and sworn to on the 8th day of October, before a Notary Public."

This Appellee further shows to the Court that it is interested in the appeal of said Central Improvement Company by reason of the following facts, namely:

The said Central Improvement Company is a corporation organized under the laws of the State of Missouri, and having an authorized capital stock of Two Hundred Thousand ($200,000.00) Dollars, of which capital stock, 1,407 shares have been issued and are outstanding. Of said outstanding stock, 1,120 shares were pledged by the Kansas City Suburban Belt Railroad Company, the former owner thereof, to said Guardian Trust Company, as collateral security for an indebtedness owing by said Belt Company to said Trust Company.

In the final decree in the cause from which said appeal is taken, the validity of the indebtedness from said Belt Company to said Trust Company, is affirmed, and the right of the Trust Company to subject said shares of stock to the satisfaction thereof is likewise affirmed. But as a part of said decree, all the property of said Central Improvement Company described in said decree, was ordered to be conveyed to the Kansas City Southern Railway Company, thus rendering said shares of stock so pledged as aforesaid, worthless to said Trust Company.

The legal title to said 1,407 shares, or substantially all of them which were formerly owned by said Belt Company, was acquired by said Kansas City Southern Railway Company in connection with the foreclosure of the mortgages upon the property of said Belt Company, and all of said shares, or substantially all of them, are now held and voted by said Kansas City Southern Railway Company, or its employees or in its interest, subject however to the pledge of said
1088 1,120 shares as found in the final decree herein.

Said final decree having directed the conveyance of the

property of said Central Improvement Company described in said decree, to said Southern Company, it is impossible for said Trust Company to obtain the consent of said Central Company to except to or appeal from, said final decree. Said Trust Company therefore, believing said decree was erroneous and prejudicial to its interests, sought to have said decree reviewed as respects said Central Improvement Company lands, through the Receiver of said Central Improvement Company.

Said Trust Company, through its solicitors, requested said Receiver to except to the Master's report filed herein, and requested said Receiver to authorize the solicitors of said Trust Company to appear for him in said matter and in such other matters as in their judgment would be deemed best for the interest of said company, and said Receiver did give them the authority so to do, as shown in said affidavit and letter of said Receiver hereinbefore set forth.

Your petitioner further shows to the Court, that it is of the opinion, that said decree, as respects the properties of said Central Improvement Company, is erroneous for the reasons heretofore stated in the brief of your petitioner and of said Central Company heretofore filed in this Court.

Your petitioner therefore prays the Court, that if the Court is of the opinion that said letter of said Receiver was insufficient to constitute authority for taking said appeal, that it direct said Receiver to ratify and confirm all the acts of said solicitors of said Guardian Trust Company in taking the appeal for said Central Improvement Company, to the end that a full hearing of said matters may be had upon the appeal of said Central Improvement Company.

GUARDIAN TRUST COMPANY,
By EDWARD P. GATES &
GEO. H. ENGLISH, JR.,
Its Solicitors.

STATE OF MISSOURI,
County of Jackson, ss:

George H. English, Jr. of lawful age, being duly sworn, states on his oath, that he is solicitor and agent for said Guardian Trust Company, Appellee, and makes this affidavit in its behalf, and
1089 that the matters and things in the foregoing counter motion are true.

GEORGE H. ENGLISH, JR.

Subscribed and sworn to before me this 22nd day of April, 1911.
[SEAL.] SILAS EMMET SKELLEY,
Notary Public.

My commission expires Feb. 28, 1914.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Apr. 24, 1911.

(*Notice of Counter Motion Filed by Guardian Trust Co. and Acceptance of Service in Cause No.* 3489.)

You, the above named Appellants and Appellees, will take notice, that the Guardian Trust Company, Appellee herein, has filed in the above entitled matter, a counter motion to the motion of the Central Improvement Company to dismiss the appeal, a copy of which is herewith furnished you.

GUARDIAN TRUST COMPANY,
By EDWARD P. GATES &
GEO. H. ENGLISH, JR.,
Its Solicitors.

Service of the above notice and receipt of a copy of the motion referred to therein is hereby accepted, this 21st day of April, 1911.

CENTRAL IMPROVEMENT COMPANY,
By T. B. BUCKNER, *Its Solicitors.*
FRANK HAGERMAN,
Solicitors for the Parties Represented by Them.
S. W. MOORE,
Solicitors for the Parties Represented by Them.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Apr. 24, 1911.

1090 *Suggestion of Diminution of Record and Motion of Cambria Steel Co. for Writ of Certiorari.*)

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3489.

CENTRAL IMPROVEMENT COMPANY et al., Appellants,

v.

CAMBRIA STEEL COMPANY et al., Appellees.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,

v.

CAMBRIA STEEL COMPANY et al., Appellees.

Suggestion of Diminution of Record.

Now comes the Cambria Steel Company, an appellee, and respectfully shows:

1. Upon the hearing before the master, as shown by his transcript of the evidence returned with his report contained in the record

herein, the following, found on pages 8315 and 8316 of volume 16, appears as part of the proceedings in the cause:

"Monday, January 30th, 1905,—10 A. M. On Monday, the 30th day of January, 1905, at 10:00 o'clock A. M., the master re-
1091 sumed the hearing of this cause, at the offices of the Kansas City Southern Railway Company, Thayer Building, northwest corner 9th and Broadway, and the following proceedings were had, to-wit:

'The MASTER: I will announce, gentlemen, that I make an order fixing the time for the taking of testimony in this cause, commencing each day at 10 o'clock A. M., and running until 1 o'clock P. M., and commencing again at 3 o'clock P. M. and running until 6 o'clock P. M.'

"Whereupon, and at the request of Mr. S. W. Moore, on account of his enforced absence from the city, the master adjourned the further hearing in this cause until Thursday, the 2nd day of February, 1905, at 10 o'clock A. M., then to be resumed at the same place.

THURSDAY, February 2nd, 1905, 10 A. M.

On Thursday, the 2nd day of February, 1905, at 10 o'clock A. M., at the same place, the master resumed the hearing of this cause, and the following further proceedings were had, to-wit:

'Mr. HAGERMAN: Before you proceed with this matter, I want to make this statement. So far as the Kansas City Suburban Belt Railroad Company, or the Receivers of the Kansas City Suburban Belt Railroad Company are concerned, in this accounting, I have no longer any connection with it; but, something has been said in the course of conversation, by Mr. Rosenberger, in regard to serving notices, which made me think it would probably be better for me to come here at this hearing, so that Your Honor and these gentlemen will have no misunderstanding in regard to the Cambria case. As I understand it, this accounting is between the Kansas City Suburban Belt Railroad Company and the Trust Company. The notices served, have all been entitled in the Cambria case; and, there is a stipulation on file in the case, which practically leaves the Cambria Company out of it until this accounting is all ended. I apprehend—the stipulation, in effect, so provides, that if upon the accounting it is shown or found there is a balance due the Suburban Belt Company or its Receivers, then the question is open,—it is open for us then to try the question whether that balance should not be subjected to the creditor's bill of the Cambria Company. Another question which will then arise, is, suppose a lot of this collateral on hand ought to be released, that is, released or freed from the particular pledge under which it is held; then, the question will arise whether it is not subject to the creditor's bill,—or, whether it can be held under the mortgage, or under the pledge. But, so far as this particular
1092 accounting is concerned, those questions between the Cambria Company and those parties cannot arise until after the testimony is taken. I simply wanted to come here and state my position, so that there would be no misunderstanding as to my not appearing in the future.

None of the counsel made any objection or reply to the statement. Whereupon, the master stated—'that is my understanding of the matter.'"

2. The said proceedings above set out are material parts of the record herein upon the question whether the court below was right in adjudging that this appellee pay no further costs, yet they do not appear in the transcript filed herein. The solicitor for the other parties hereto, except the Guardian Trust Company, prior to this term, signed a stipulation that the record should be amended in this respect. Said stipulation was submitted to counsel for the Guardian Trust Company, who promised to look into the matter, but upon April 28, 1911, they notified appellee that they would not so stipulate. Wherefore, the suggestion of diminution of record is made accompanied by the certificate of the clerk of the court, below, and a writ of *certiorari* asked to perfect the record in this respect.

FRANK HAGERMAN,
Solicitor for Cambria Steel Company, Appellee.

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, ss:

Adelaide Utter, Clerk of the Circuit Court of the United States in and for said division and district, hereby certifies that the foregoing matter quoted from pages 8315 and 8316 of volume 16 of the evidence returned by the special master with his report in these cases in the court below, is correct as same appears of record in my office.

[SEAL] ADELAIDE UTTER, *Clerk.*

1093 Received copy this May 1st, 1911.

S. W. MOORE,
Solicitor for parties represented by him.
EDWARD P. GATES,
GEO. H. ENGLISH, JR.,
Solicitors for Guardian Trust Company.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on May 4, 1911.

1094 In the United States Circuit Court of Appeals, Eighth Circuit.

Number 3489.

CENTRAL IMPROVEMENT COMPANY et al., Appellants,

vs.

CAMBRIA STEEL COMPANY et al., Appellees.

Number 3490.

GUARDIAN TRUST COMPANY, Appellant,

vs.

CAMBRIA STEEL COMPANY et al., Appellees.

Suggestions of Guardian Trust Company in Opposition to Application for Writ of Certiorari of Cambria Steel Company, Appellee.

Now comes Guardian Trust Company, a party to the above entitled causes, and respectfully shows to the court, that the writ of certiorari asked by the Cambria Steel Company herein should not be granted for the following reasons, to-wit:

1095 I.

None of the matters and things set forth in said portion of the record embraced in said application are material to this hearing or necessary for the hearing on appeal.

II.

Said portion of the record is incomplete, in that it fails to set forth the entire transaction therein referred to. Said transaction was as follows, namely:

MONDAY, January 30th, 1905—10 a. m.

On Monday, the 30th day of January, 1905, at 10 o'clock a. m., the master resumed the hearing of this cause, at the office of the Kansas City Southern Railway Company, Thayer Building, northwest corner Ninth and Broadway, and the following proceedings were had, to-wit:

The MASTER: I will announce, gentlemen, that I make an order fixing the time for the taking of testimony in this cause, commencing each day at 10 o'clock a. m. and running until 1 o'clock p. m., and commencing again at 3 o'clock p. m., and running until 6 o'clock p. m.

Whereupon, and at the request of Mr. S. W. Moore, on account of his enforced absence from the city, the master adjourned the further hearing of this cause until Thursday, the 2nd day of February, 1905, at 10 o'clock a. m., then to be resumed at the same place.

1096 "THURSDAY, February 2nd, 1905—10 a. m.

On Thursday, the 2nd day of February, 1905 at 10 o'clock a. m. at the same place, the master resumed the hearing of this cause, and the following further proceedings were had, to-wit:

Mr. HAGERMAN: Before you proceed with this matter, I want to make this statement. So far as the Kansas City Suburban Belt Railroad Company, or the receivers of the Kansas City Suburban Belt Railroad Company are concerned, in this accounting, I have no longer any connection with it; but, something has been said in the course of conversation, by Mr. Rosenberger, in regard to serving notices, which made me think it would probably be better for me to come here at this hearing, so that Your Honor and these gentlemen will have no misunderstanding in regard to the Cambria case. As I understand it, this accounting is between the Kansas City Suburban Belt Railroad Company and the Trust Company. The notices served have all been entitled in the Cambria case; and, there is a stipulation on file in the case, which practically leaves the Cambria Company out of it until this accounting is all ended. I apprehend—the stipulation, in effect, so provides, that if upon the accounting it is shown or found there is a balance due the Suburban Belt Company or its receivers, then the question is open—it is open for us to then try the question whether that balance should not be subjected to the creditor's bill of the Cambria Company. Another question which will then arise, is, suppose a lot of this collateral on hand
1097 ought to be released, that is, released, or freed from the particular pledge under which it is held; then the question will arise whether it is not subject to the creditor's bill, or, whether it can be held under the mortgage, or under the pledge. But so far as this particular accounting is concerned, those questions between the Cambria Company and those parties can not arise until after the testimony is taken. I simply wanted to come here and state my position, so that there would be no misunderstanding as to my not appearing in the future.

None of the counsel made any objection or reply to the statement. Whereupon, the master stated, "that is my understanding of the matter."

Mr. ROSENBERGER: I understand that you still desire that all notices of motions be served on you.

Mr. HAGERMAN: I think you had better do that. I have no objection to signing any notices you may have and any acceptance of notices that affect the general merits of the case.

Mr. ROSENBERGER: I want to know whether you want to be served with all notices?

Mr. HAGERMAN: Yes, I think that would be the better way. You will have no trouble—they will all be accepted. But sometimes, in order to serve the Cambria Company, I might want to be present. It will be no more trouble in sending out the notices. Mine will only be a carbon copy of the one to Mr. Moore."

The following stipulation, which is the only one bearing on the subject mentioned by Mr. Hagerman, is on file in said cause:

1098 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Bill.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Cross Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, Complainants,

vs.

GUARDIAN TRUST COMPANY and FRANCIS M. BLACK, Its Receiver; Missouri Elevator and Terminal Company and Wash Adams, Its Receiver; Central Improvement Company and Wash Adams, Its Receiver; Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Stipulation.

It is hereby stipulated and agreed by and between Stuart R. Knott and Edward F. Swinney, receivers of the Kansas City Suburban Belt Railroad Company, complainants in the cross bill in the above
1099 entitled cause, and the defendants, the Guardian Trust Company and Francis M. Black, its receiver, Second Street Improvement Company and Cambria Steel Company, as follows:

First. That the said complainants shall withdraw or dismiss their cross bill heretofore filed herein, and shall file an amended cross bill, in the nature of an ancillary bill in this cause, making the Kansas City Suburban Belt Railroad Company a co-plaintiff with them in said amended ancillary cross bill, and also making the Cambria Steel Company, the complainant in the original bill herein, a defendant in said amended ancillary cross bill, and that said amended ancillary cross bill shall be filed on or before the 15th day of November, 1901, and that the defendants, the Guardian Trust Company and its receiver and the Second Street Improvement Company and the Cambria Steel Company, shall have leave to plead or answer to said amended ancillary cross bill, on or before the first Monday in December, 1901.

Second. That the accounting between the Kansas City Suburban Belt Railroad Company and its receivers and the Guardian Trust Company and its receiver, sought by the said amended ancillary

cross bill, shall be expended by all of the parties hereto, and whatever balance, if any, that may be found due to the said Guardian Trust Company or its receiver, from the said Kansas City Suburban Belt Railroad Company or its receivers shall be entered up in this cause as a judgment in favor of the said Trust Company and its receiver and against the Suburban Belt Railroad Company and its receivers without the necessity of presenting any claim therefor by way of cross bill; or other affirmative pleading; and whatever balance, if any that may be found due to the said Suburban Belt Railroad Company, or its receivers, from said Guardian Trust
1100 Company or its receivers, shall be entered up in this cause as a judgment in favor of the said Kansas City Suburban Belt Railroad Company and its receivers, and against the Guardian Trust Company and its receiver.

Dated this — day of November, 1901.

STUART R. KNOTT AND
EDWARD F. SWINNEY,
Receivers of the Kansas City Suburban Belt Railroad Co.,
By THOMAS R. MORROW,
S. W. MOORE,
Their Solicitors.
GUARDIAN TRUST COMPANY AND
FRANCIS M. BLACK,
Its Receiver.
F. M. BLACK AND
TRIMBLE & BRALEY,
Its Solicitors.
SECOND STREET IMPROVEMENT COMPANY,
By TRIMBLE & BRALEY,
Its Solicitors.
CAMBRIA STEEL COMPANY,
By —— ——, *Its Solicitors.*

I consent and agree to the foregoing stipulation with the understanding that it shall in no wise prejudice the right, if any, which the Cambria Steel Company has to subject any debt found to be due from the Guardian Trust Company, or to subject any property or collateral or the proceeds thereof, heretofore or now in the
1101 hands of the Guardian Trust Company or its receiver, or its or his assigns, and all the testimony introduced by any party herein shall be with the understanding that the Cambria Steel Company can, if it so desires, use the same upon final hearing of its bill in the case above entitled.

FRANK HAGERMAN,
Solicitor for Cambria Steel Co.

III.

Wherefore, your petitioner prays the court that the application of the said Cambria Steel Company for a writ of certiorari be not

granted, or that if the same be granted, that the same be granted only upon condition that the entire portion of the record hereinbefore set forth be certified by the clerk of the court.

(Signed) EDWARD P. GATES &
GEO. H. ENGLISH, JR.,
Solicitors for Guardian Trust Company.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Missouri:

I, Adelaide Utter, clerk of the Circuit Court of the United States in and for said division and district, do hereby certify that the foregoing matter quoted from pages 8315, 8316, 8317 and pages 8322, 8323 and 8324 of Volume 16 of the evidence returned by the Special Master with his report in these causes in the court below, is correct as the same appears of record in my office.

[SEAL.] (Signed) ADELAIDE UTTER, *Clerk.*

1102 STATE OF MISSOURI,
County of Jackson, ss:

George H. English, Jr., of lawful age, being duly sworn, upon his oath states that he is agent and attorney for Guardian Trust Company, and makes this affidavit in its itself, and that the matters and things set forth in the foregoing instrument are true as therein stated.

(Signed) GEO. H. ENGLISH, JR.

Subscribed and sworn to before me this 4th day of May, 1911.

(Signed) SILAS EMMETT SKELLEY, [SEAL.]
Notary Public.

My term expires the 28th day of Feb., 1911.

Received copy this May 4th, 1911.

(Signed) S. W. MOORE,
Solicitor for Parties Represented by Him.

(Signed) FRANK HAGERMAN,
Solicitor for Cambria Steel Co.

(Signed) T. B. BUCKNER,
Solicitor for Central Improvement Co.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on May 6, 1911.

1103 (*Appearance of Mr. Samuel Untermyer for Certain Appellees, in Cause No.* 3489.)

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellees (except Cambria Steel Co.).

SAM UNTERMYER.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on May 26, 1911.

(*Motion to Dismiss Submitted in Cause No.* 3489, *to Be Considered with Cause on Merits.*)

May Term, 1911.

FRIDAY, May 26, 1911.

In this cause the motion of appellees to dismiss the appeal herein having been called to the attention of the Court, it is now here ordered by the Court that said motion to dismiss be taken as submitted to be argued and considered with the cause on the merits.

(*Order that Portions of Record of Circuit Court Printed in Suggestions of Guardian Trust Co., Filed May* 6, 1911, *Be Taken as Part of Record in Circuit Court of Appeals.*)

May Term, 1911.

FRIDAY, May 26, 1911.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

and

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

The above entitled causes came on to be heard upon the suggestion of a diminution of record and motion of the Cambria Steel Company for a writ of certiorari.

On consideration whereof, and in pursuance of the agreement of counsel in open Court, it is now here ordered by this Court that the portion of the record of the said Circuit Court, as set out and
1104 printed in the suggestions of the Guardian Trust Company in opposition to the application for a writ of certiorari filed herein, shall be taken and considered by the Court as a part of the transcript of the record in this cause.

(Order of Argument of Question of Taxation of Costs Against Cambria Steel Co.)

May Term, 1911.

FRIDAY, May 26, 1911.

In the above entitled causes the question as to the liability of the Cambria Steel Company for costs was argued by Mr. Frank Hagerman, in behalf of the Cambria Steel Company by permission of the Court, in advance of the arguments on the merits.

(Order of Argument on Merits.)

May Term, 1911.

FRIDAY, May 26, 1911.

The above entitled causes having been called for hearing on the merits, argument was commenced by Mr. George H. English, Jr., for the appellants, and the hour for adjournment having arrived further argument is postponed until tomorrow.

(Order of Submission on Merits.)

May Term, 1911.

SATURDAY, May 27, 1911.

The above entitled causes having been called for further hearing, argument was continued by Mr. George H. English, Jr. for appellants, by Mr. Samuel Untermyer and Mr. Samuel W. Moore for appellees and concluded by Mr. Edward P. Gates for appellants.

Thereupon, these causes were submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Appearance of Messrs. Gates & English as Counsel for Appellant in Cause No.* 3490.)

No. 3490.

1105 GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY *et al.*

The Clerk will enter my appearance as Counsel for the Appellant.

EDWARD P. GATES,
GEO. H. ENGLISH, JR.,
1003 *Scarritt B'ld'g, Kansas City, Mo.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Oct. 10, 1910.

(*Appearance of Mr. S. W. Moore as Counsel for Appellees K. C. Sub. Belt Ry. Co. et al. in Cause No.* 3490.)

The Clerk will enter my appearance as Counsel for the Appellees, K. C. Sub. Belt Ry. Co. et al.

S. W. MOORE.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Dec. 13, 1910.

(*Appearance of Mr. Frank Hagerman as Counsel for Appellee Cambria Steel Co. in Cause No.* 3490.)

The Clerk will enter my appearance as Counsel for the Appellee, Cambria Steel Co.

FRANK HAGERMAN.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Dec. 17, 1910.

(*Appearance of Mr. Samuel Untermyer as Counsel for Certain Appellees in Cause No.* 3490.)

The Clerk will enter my appearance as Counsel for Appellees (except Cambria Steel Company).

SAM. UNTERMYER.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on May 26, 1911.

1106 *(Petition of Edward A. Shedd et al. for Leave to File Additional Briefs.)*

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Petition for Leave, etc.

And now come Edward A. and Charles B. Shedd and Robert H. Law and show to the court that they are residents of the City of Chicago, Illinois; that they are stockholders in the Guardian Trust Company, said Shedd and Shedd having $66,700 par value and said Law $15,000 par value of said stock, the total outstanding stock of said Trust Company being about $2,200,000, and they petition for leave to file additional briefs herein in support of the appeal of the Guardian Trust Company.

1107 Said petition is based upon the following grounds:

1. The decree of the court below, entered in June, 1910, awarded the said Trust Company a judgment against the Kansas City Suburban Belt Railroad Company of $639,658.86, which with interest and the costs involved now amounts to over $700,000.

It appears from the record that said Belt Company is a defunct company, the assets of which were acquired by the Kansas City Southern Railway Company over ten years ago under a reorganization or consolidation plan, the essential provisions of which (including the depositors' agreement annexed thereto) are set out in the master's report herein (Pr. Rec., 942-955).

The lower court found in its decree that the said Southern Company was not liable for the Belt Company debts.

The first assignment of error herein is the only one bearing upon this issue, viz.:

"1st. That the court erred in including in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness owing by the Belt Company to the Trust Company."

The briefs filed on behalf of the Trust Company do not fully argue said first assignment of error:

In that said briefs present only the question of the right or propriety of the Circuit Court making a finding upon the question of

the liability of the said Southern Company; whereas it is not argued in the alternative that said finding or ruling is in fact erroneous and wrong on the merits.

1108 2. That said ruling is wrong, and that the said Southern Company is so liable upon each of two separate and independent grounds, viz.:

1st. By virtue of the fact that said Southern Company is a consolidation of said Belt Company, as shown by the plan of reorganization and the provisions therein for the exchange of stock;

2d. By virtue of an express promise in said plan to pay the floating debt of the reorganized companies; in that it is announced in said plan inviting the deposits of stocks and bonds of the old companies that one of the "results to be attained" by the plan would be

"(*b*) The payment of the floating debt and the existing car trust company obligations;"

thus showing an election on the part of the reorganizers to recognize the floating debt of the old companies in reorganizing them into the new one.

3. That there will be occasioned by the allowance of this application no substantial surprise to the counsel for said Southern Company, nor will any new burden be placed upon them because:

Elaborate and thoroughly prepared briefs bearing upon this question were prepared in 1905 and 1907 by a former counsel of the Trust Company, Harry S. Mecartney, Esq., of Chicago, while he had charge of the present case in the court below, the first having been filed before the master in June, 1905, and the second, a complete revised brief, having been filed before him in June, 1907.

That there was also prepared at the expense of the Trust Company an opinion on said reorganization plan by C. O. Tichenor,

1109 Esq., of Kansas City, Mo., in November, 1905.

That the said counsel for the Southern Company, Samuel W. Moore, Esq., filed a printed brief on said issue before the master in the fall of 1906, and also in the fall of 1907, a second printed brief in answer to the second or revised brief of Mr. Mecartney.

That it is proposed to file herein only the said opinion of Mr. Tichenor and the said second or revised brief of said counsel, Mr. Mccartney, with a short abstract of the master's rulings on said issue.

4. If, therefore, as the case at present stands this court should hold that since the issue of the liability of said Southern Company was expressly raised in the answer of the Guardian Trust Company to the intervening petition of said Southern Company; since it was an issue so germane and so vital that, if decided in favor of the Trust Company, it would of itself alone have disposed of the entire case of the Southern; and since evidence was introduced on said issue by both parties, etc., etc., the master had a right to make a finding in respect thereto, and that the lower court had, therefore, a right to make a finding in respect thereto—as the counsel for the Southern Company contends herein—it will then of necessity follow, if the

merits of said ruling be not gone into, that the Trust Company will lose its right to a decree against the Southern Company for over $700,000.

It appears from the briefs as well as from the record, that the Guardian Trust Company commenced three suits against the
1110 Southern in the Jackson County (State) Court at Kansas City to recover of the Southern as successor of the Belt the notes originally issued by the Belt. These are still pending. If the finding of no liability remains in this record the Southern will of course plead res judicata to these pending claims.

It is true that there is a claim on the part of the Trust Company to some collateral which the decree of the Circuit Court denies to it; and by which if it reverses—and only in case it reverses—such decree it will be apt to realize a portion of this claim—stated on the oral argument to be $300,000 to $400,000; but even as to such collateral and in such case said Trust Company is liable to be put to great delay, expense and complications in collecting or realizing upon the same.

Wherefore, petitioners submit affidavits and suggestions in support hereof, and pray for leave to file the opinion, brief and abstract of the master's ruling presented herewith, as well as a complete copy from the record in this case of the said reorganization plan.

Respectfully submitted,

NEWELL H. CLAPP,
ENOCH J. PRICE,
Counsel for Edward A. and Charles B. Shedd and Robert H. Law.

1111 *Affidavit of Charles B. Shedd.*

STATE OF ILLINOIS,
County of Cook, ss:

Charles B. Shedd, being duly sworn, deposes and says that he and his brother, Edward A. Shedd, have been for more than seven years last past stockholders in the Guardian Trust Company of Kansas City, Missouri, and holding therein in common a total of 667 shares, or $66,700 par value of the stock of said company, the total par issue of which is about $2,200,000. That Robert H. Law is the owner of 150 shares of said stock.

Affiant further says that the present suit, represented in the appeal of the Guardian Trust Company, involves a claim against the Kansas City Southern Railway Company, including interest and costs of over $700,000, or nearly one-third of the capital stock, and being equal to or exceeding the value of all of the assets of said company other than said claim.

Affiant further says that if the said decree of the Circuit Court in this case is sustained it will make a difference to the applicants as stockholders in the Guardian Trust Company of about $25,000.

Affiants further say and show to the court that, as they are advised by counsel, the said claim against the Kansas City Southern

Company is a good and valid claim and is clearly sustainable in law and equity. That the decree of the court below following the report of the special master has awarded the Guardian Trust Com-
1112 pany judgment for all its claims (less a few small conceded off-sets) amounting to $639,658.86, against the Kansas City Suburban Belt Railway Company, but the assets of which company were absorbed about ten years ago by the Kansas City Southern Company under its reorganization plan. Hence, the said judgment, outside of the collateral securing the claims, is worthless.

Affiant further states that from the beginning of said cause until about December 6, 1904, or thereabouts, the Guardian Trust Company was represented in the litigation in the court below in this case by J. McD. Trimble, Esq., who was then succeeded by one Harry S. Mecartney, Esq., a counselor at law of Chicago, Illinois, who continued in charge of said litigation with Jules C. Rosenberg, Esq., of Kansas City as his local assistant counsel. Said Mecartney was succeeded on or about March 27, 1908, by Messrs. Gates and English, the present counsel.

That in the course of his said employment said Mecartney obtained an opinion of C. O. Tichenor, Esq., of Kansas City, upon the merits of the question of the liability of the Southern Company for said Belt Company debt, printed copies of which were furnished the directors (of which affiant was one) and the executive committee of said Trust Company in the fall of 1905, and presents herewith a printed copy of said opinion, which sustains the said claim of liability.

That said Mecartney also prepared a brief upon said issue and a later revised brief thereon.

That affiant is informed and believes that copies of said opinion of Mr. Tichenor and of said briefs are in possession of said
1113 Guardian Trust Company's counsel, who have presented the present appeals to this court, but they have declined to either present a brief of their own or to use said opinion or brief upon said issue.

Affiant further says that he only learned on or about May 14th or 15th, 1911, of the situation in respect to said appeal of said Trust Company in the Court of Appeals, and that the attention of the said counsel, Messrs. Gates and English, had been called to the same by said Mecartney and suggestion made that the briefs be filed upon said liability issue. That affiant immediately thereafter, and on May 20th, ult., retained counsel on behalf of himself and brother and said Law to look into said matter and present briefs and arguments thereon; but was advised that it was impossible to prepare the proper papers and application before the oral argument in said cause, which was set for four days later, the 24th of May.

Affiant further says that this litigation was instituted by and in the name of the Kansas City Suburban Belt Railroad Company at a time when practically all of its stocks and bonds had been deposited in pursuance of the reorganization plan which involved said company and its constituent companies, along with the Kansas City, Pittsburgh & Gulf Company; and that at the time thereof, as the

record shows herein, the said Southern Company and the reorganization committee,—which was practically identical in interest and in power with the said Southern Company,—had control of said Belt Company and all of its assets, and instigated this litigation.

1114 That shortly after the said suit had been commenced, John W. Gates and others who were minority stockholders in the Guardian Trust Company and of dominating influence with said Kansas City Southern and reorganization committee,—said Gates and his counsel, Max Pam, being members of said committee,—commenced a stockholders' suit in the name of one Bierce against said Trust Company, and a receiver for said company was appointed in said Bierce case, which affiant is informed was mentioned in the oral arguments in this case. Said receiver was discharged in 1902.

That after said receiver had been appointed the Guardian Trust Company ceased doing business as an active concern, and has not done business since, except to liquidate its assets.

That after a long factional contest and in October, 1905, one John A. Prescott,—who had represented said Gates and others as to their stock interests in the Guardian Trust Company,—got control of said Trust Company by virtue of a liquidating contract, and that said Prescott has been in control of said company since, and liquidating its assets under the formal direction of an executive committee.

Affiant further says that the stockholders of said Trust Company are widely scattered, there being at last accounts received by him about 400 in number; and it would be impossible to assemble a large number of them to join in the application now made without great effort and expense, especially since most of them have become discouraged on account of the long and oppressive

1115 Belt litigation and the court conditions under which it has been carried on; and that since, as he is advised, this application must be made quite early and as promptly as possible, there is not the time requisite to enlist them in any new movement to protect their interests herein by joining in this application.

That said Messrs. Gates and English (who are the regular counsel for said Trust Company), with said Prescott and Mr. E. C. Wright, his personal counsel and business associate,—all located at Kansas City—constitute four of the five members of the executive committee of the Guardian Trust Company. That the fifth member of said executive committee, Mr. A. E. Stilwell (who is a resident of New York City), is and has been for many years engrossed as the chief promoter and manager of the Kansas City, Mexican & Orient Railway and has been able to give but little time to the affairs of said Trust Company, and affiant believes is not advised of the precarious situation in respect to said appeal. That, therefore, any further application by affiant to the officers of said Guardian Trust Company to cause said briefs to be filed would be useless, even were there time allowed therefor.

CHARLES B. SHEDD.

Subscribed and sworn to before me this 12th day of June, 1911.
N. R. WAKEFIELD, Jr.,
Notary Public.

1116 STATE OF ILLINOIS,
County of Cook, ss:

Harry S. Mecartney, being duly sworn according to law, doth depose and say that he is and has been for nearly thirty years last past a practicing lawyer, with headquarters in Chicago, Illinois.

That on December 6, 1904, affiant was retained in the litigation pending in the United States Circuit Court at Kansas City, between the Kansas City Suburban Belt Railroad Company as complainant and Guardian Trust Company, defendant, and the Kansas City Southern Railway Company, intervenor therein, affiant succeeding the Honorable J. McD. Trimble as counsel for said Guardian Trust Company.

That affiant continued in charge of said litigation until March 27, 1908, when he was succeeded therein by Messrs. Gates & English, who represent said Guardian Trust Company in the present and pending appeal in the United States Circuit Court of Appeals of the Eighth Circuit.

Affiant further states that in the summer and early fall of 1905 he prepared and printed a brief and argument on the question of the liability of said Southern Company for the floating debt of the Belt Company and other companies which had been merged by the reorganization agreement of 1899 into the Kansas City Southern Railway Company. That he obtained for the benefit and at the expense of said Guardian Trust Company an opinion from Honorable C. O. Tichenor, a leading lawyer of Kansas City and Missouri, the effect of which was to sustain said claim
1117 of liability upon two independent grounds, namely (1), that said Southern Company was a consolidation of said Belt Company and other companies, and also (2), that the plan of reorganization contained an express election or promise to pay such debts; which conclusions were also the contentions asserted in affiant's said brief.

That affiant in due course had said opinion printed and copies mailed to each of the directors of the Guardian Trust Company early in November, 1905.

Affiant further says that said cause referred to above, was argued before the special master, Shannon C. Douglas, in July, 1906, and that said Southern Company through its counsel, S. W. Moore, Esq., of Kansas City, presented a long printed brief upon said issue of consolidation and liability to pay the Belt Company's debts, exceeding 100 pages.

That after said arguments had been closed and while the cause was pending before said Master Douglas in June, 1907, affiant prepared an additional and revised brief on said issue, labeled "Supplemental Argument on Intervention Issues and on Cross Bill to be Filed," in which the conclusions were again reached that said

Southern Company was liable for the debts of said Belt Company, as outlined in the prior brief of affiant and in said Tichenor's opinion. Affiant had intended to file a cross-bill in said cause upon said issue.

That after this brief had been filed before said master in the spring of 1907, said S. W. Moore, Esq., presented a printed brief in reply thereto exceeding some 50 pages, to which affiant made no further reply.

1118 Affiant further states that subsequent to his leaving the case in March, 1908, he has had nothing whatever to do with this litigation, and did not keep track of the same; but that about May 1st last he learned in consultation with said Trimble that the present counsel had not argued the merits of said question of liability upon the present appeal, and later obtained from said Trimble a copy of the brief of the Guardian Trust Company, appellant in said cause.

That he later examined the record at Kansas City and had various copies made of some extracts thereof, and finally reported to Messrs. Shedd and Law, petitions herein, on or about May 16, 1911, the situation in respect to said appeal, and also the jeopardy in which, according to affiant's judgment, the said cause had been placed by the manner of its presentation; and that on May 18, 1911, he had a further consultation with them, immediately after which they retained counsel for the purpose of presenting further briefs to said Court of Appeals.

Affiant further states that their request and instance he attended the oral argument lately had in St. Paul in said case and took full notes thereof, and had the same written up and presented to the counsel herein for said Shedd and Law. That he has attempted to the extent of his ability to assist said counsel in understanding said record and in preparing said motion.

Affiant further states that on or about May 4, 1911, he fully explained to Messrs. Gates & English what he considered the danger in the way said appeal had been presented, and about

1119 that time furnished them with additional printed copies of the said opinion of Mr. Tichenor and of the said briefs prepared by him in 1905 and 1907, as hereinabove stated. That he also suggested that said briefs be filed in time for the coming argument, unless said counsel chose to file briefs of their own upon said issue. That the cause has been presented without any attempt on the part of said counsel to present such briefs of their own or to file the said briefs and opinion which had been prepared at great labor at the expense of the Guardian Trust Company.

Further affiant saith not.

HARRY S. MECARTNEY.

Subscribed and sworn to before me this 12th day of June, A. D. 1911.

N. R. WAKEFIELD, JR.,
Notary Public.

1120 *Suggestions in Support of Above Petition.*

This record presents a case where, as it is believed, some $700,000 has been put in jeopardy by the manner of the presentation of the present appeal lately heard on oral agreement.

The stockholders applying for leave have done nothing to bring about this state of affairs and failed in no duty which would have obviated it.

It is, therefore, a question of a clear loss to them alone of quite a snug fortune.

The application has two alternative bases, viz.:

I. That its equity appears alone upon the face of the issues of the pending appeal proper and of the briefs lately filed.

II. That if this be not sufficient in itself—and to aid the court only in case of doubt—the issue now pending is a branch or adjunct of a long litigation abnormally oppressive to the Trust Company, and is apt to result in an unjust ending of the same; and hence indulgence of the application is doubly warranted by the briefest survey of the entire record.

As this court has learned from the briefs filed and the late oral arguments, the original bill was filed in September, 1900, by the Cambria Company as a creditor of the Belt Company, against the latter and the Guardian Trust Company and other companies, praying for a receiver for the Belt Company, who, as it
1121 was prayed, should file a bill for an accounting on behalf of the Belt against the Guardian.

Receivers were promptly appointed and they filed a bill for an accounting, which has been called herein an "ancillary bill," and which became of course the main accounting bill.

The master and the court below have found after a ten years' litigation that there was no right to such accounting, and that the notes and claims held by the Guardian Trust Company against the Belt were all valid and due as per their terms. (Three conceded off-sets aggregating some twenty-odd thousand dollars were allowed.)

It also appears that in February, 1905, the Kansas City Southern Railway Company filed an intervening petition in the lower court, in which it claimed that various stocks and bonds and other personal and intangible property theretofore pledged by the Belt Company to the Guardian Trust Company as collateral to its debt and then held by the latter had been acquired by the Southern as purchaser under a foreclosure sale of the assets of said Belt Company. It also made a claim to the lands held by the Central Improvement Company, as shown in paragraph 6 of its printed petition filed therein.

In the year 1905 the Guardian Trust Company filed its printed answer to said intervening petition, in which, after denying the right of said intervenor to said collateral, it set forth in paragraphs Nos. 14 to 20 thereof that the Kansas City Southern Railway

was a consolidation of the Suburban Belt and the Kansas
1122 City, Pittsburgh & Gulf and various other constituent railroad companies, and that thereby under the statutes of Missouri it was liable to pay the debt of the Belt Company.

It was also set forth that in the reorganization plan there was an express undertaking to pay said debts, as in said plan inviting the deposit of stocks and bonds it was expressly stated that one of the "results" to be "attained" by the said plan—i. e., one of its objects—was:

"(*b*) The payment of the floating debt and existing car trust obligations." (P. Rec., 944.)

In the decree entered in the court below, following the special master's report, the following finding is made:

"VII. The court finds the issues, made by paragraphs 15 (14) to 20, inclusive, of the answer of the Guardian Trust Company to the amended intervening petition of The Kansas City Southern Railway Company, against the Guardian Trust Company, and in favor of The Kansas City Southern Railway Company, in that and it is so decreed, The Kansas City Southern Railway Company, did not assume, or agree to pay, or become liable for, the indebtedness, or any part of it, owing by the Kansas City Suburban Belt Railroad Company to the defendant, Guardian Trust Company, and that The Kansas City Southern Railway Company is in no wise liable or bound for the payment of the indebtedness of the Kansas City Suburban Belt Railroad Company to the defendant, Guardian Trust Company, the payment of which is decreed in paragraph IV of this decree." (Printed Rec., 1061.)

The Guardian Trust Company in the appeal herein has
1123 made but three assignments of error, of which the first is the only one relating to said issue:

"1st. That the court erred in including in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness by the Belt Company to the Trust Company." (Appellant's Brief.)

Counsel for appellants have not argued the merits of said claims set forth in paragraphs 14 to 20.

If the court should hold,—as we certainly are afraid it may hold,—that the court below had jurisdiction to pass upon this issue, it can and will be claimed by the Southern Company that there has been a final adjudication upon this issue of ultimate fact. So that when the pending cases against the Southern Company shall be brought on in the state courts of Jackson County, Missouri, the Southern will be enabled to defeat this large claim of over $700,000. (In fact, the Southern's counsel frankly say that this is their intention.) Thereby the Guardian Trust Company's stockholders are apt to lose said amount of money—unless the finding of the lower court is attacked herein upon its merits.

There is needed no new evidence nor any additional portion of the record below, as the master's report sets forth all the essentials of

the reorganization plan and the prior depositors' agreement, and he expressly so states. (Print. Rec., 944.)

To save any question, however, as to an ultimate disposition of this liability issue in toto, we have concluded to present
1124 herewith a certified copy of the printed reorganization plan and the prior depositors' agreement annexed to the same as shown in the record, and ask leave to have it filed.

The assignment of error—the first—is sufficient, for our purposes here, as we believe. It is averred that the court erred "in including in its decree" the finding of non-liability of the Southern. This is in effect an averment that the court erred in decreeing that there was no liability.

Besides, this court under Rule 11 can at its option take notice of a plain error not assigned.

But to save any question upon this technical and formal point, we petition—in the alternative that the court should deem the assignment too narrow—to assign the following:

"IV. The said finding of non-liability on the part of said Kansas City Southern Railway Company to pay the debts of the said Belt Company was and is erroneous."

I.

The cases where stockholders of a corporation are allowed to intervene in behalf of the company and either conduct or control the administration of its affairs on the ground of waste or mismanagement, etc., etc., are well known to this court.

The present application does not go this far. It does not even ask the court to control this litigation—but is simply an attempt to save the case and the resultant loss. It is in substance a request to be enabled to aid the court in administering justice—the justice involved in the present appeal.

1125 It has for its equity that embodied in the following:

1. Applicants are stockholders in the appealing company.

2. A large financial interest of said company, making, in fact, the major quantum of its assets, some $700,000, is put in jeopardy by the manner in which the appeal has been presented, or at least argued. (It involves $25,000 of applicants' money alone.)

3. Applicants, learning of this fact or situation, make seasonable application to aid the company and the court—and, hence, the cause of justice—by presenting simply further argument upon the record. It will take the court but a few hours to read the briefs presented, and probably save an erroneous award of a sum of money huge in itself.

4. The faithful and prudent administration of corporate affairs and the protection of stockholders' interests thereby are of universal interest and concern. And

5. The protection of creditors of a large public enterprise such as a railroad—and especially where a reorganization plan contains a broad express provision for the payment of its obligations—is also a matter of universal concern.

Hence applicants suggest that the court should allow the additional argument upon the face of the appeal alone, and that portion of the record most strictly involved thereby.

1126 II.

As a second consideration or as a broader basis for the application, and particularly as emphasizing the eminent propriety in granting it, applicants desire to briefly point out the abnormal character of this litigation instigated and prosecuted by the Belt-Southern interests. If the decree of the Circuit Court is affirmed, it will all have resulted in success to them; and this success probably the sheer result of the oppressive dimensions of the case itself and its tendency to baffle the efforts of the ablest counsel in comprehending all its vital questions and effectually presenting arguments thereon. Much—in fact, all—of the subject-matter referred to on this head was referred to in the briefs filed and in the oral arguments, complete notes of which lie before the writer hereof.

36,000 pages of evidence!

The longest record ever made!

But this is not all.

This "longest record ever made" was made upon a hopelessly bad bill—upon a legally meaningless theory or complaint!

Can your Honors calmly conceive of such a thing?

Or that there existed court conditions at Kansas City or anywhere else in this country which permitted it?

1. In the briefs filed and in the oral arguments lately made it was calmly stated to the court that the Cambria bill and the An-
1127 cillary bill and also the intervening petition all charged that the Guardian Trust Company had "dominated" the Belt and its constituent companies, and also the subsidiary companies allied in interest to it; that the master had found as a fact that the Trust Company had "not dominated" the said company.

No word was said by counsel on either side to the effect that there was no real intelligent charge of domination in the bills or petition, i. e., any domination such as could be exercised in inter-corporate affairs or relationships.

The chief and most explicit charge of domination or rather the nearest approach to one is set out in the ancillary bill. (Print. Rec., p. 236, 244.)

The judges will wonder when told that it was not claimed in the ancillary bill in any of these "domination" pleadings, either (1) that the Trust Company at any time ever held a majority of stock in the Belt, or even a respectable minority thereof, or (2) that any ring or set of men caused the Trust Company to dominate the Belt to their financial interest, or (3) caused the Trust Company to cause the Belt to enter into unfair or fraudulent "promoting" contracts with them, or (4) that they, by reason of having a much larger interest in one corporation than the other, caused such unfair contracts to be made in consequence of which they would receive an undue financial benefit, etc. (These are the only four classes of

so-called domination cases which we have heard of.) But that the entire charge of "domination" and resultant fraud and unfairness is based solely upon the averment that during the entire
1128 period of eleven years covered by the accounting, the stockholders of each corporation—presumably adult and not under duress—happened to "elect" largely—and not wholly—identical directors (P. R., 244); that therefore and thereby the entire transactions between the two companies, all open and unconcealed, all spread at large and in duplicate on the books of each company (they "tallied to a cent"; P. R., 745, "(*j*)")—were constructively "fraudulent," no matter whether approved by the officers of each company, balances settled for by note, no matter whether older than the statute of limitations, etc., etc.

Of course, the court will see that it would be just as easy and just as logical to say that thereby the Belt Company "dominated" the Trust Company, and there would be just as much excuse for a bill by the latter and just as much excuse for a $23,000 reporters' bill and a $25,000 master fee or for total costs of nearly $100,000,—Judge Gates' estimate made on the oral argument. The strange thing about the master's report is that he finds the fatal insufficiency of the averments of the bill, but devotes some several hundred printed pages to finding from the evidence that there was "no domination"—and the bill is based on nothing else!

He mentions (P. R., 742) the four classes of "domination" cases mentioned above. He then "distinguishes" this case therefrom, by setting out (pages 743-745) some thirteen "Controlling Facts" "which appear on the face of the bill, or are practically undisputed in the proofs" numbered "(*a*)" to "(*m*)", most all, if not each of which, would have been a complete defense if a good or prima facie cause of action had been stated in the first instance!

1129 (Of what use such an elaborate report could be can not be imagined—although the labor involved in its preparation probably justified the unusually large fee allowed.)

In other words, the bill is at war with a well-known condition long common to the entire country. And if it were good, almost every large corporation in the country would be held liable to "account" to every other corporation with whom it had done business and whose directors were largely common to both and no matter how many, how old or how open or often settled the transactions had been. Such a ruling if generally enforced would, as it is easily perceived, overwhelm and paralyze the courts and throw them into a state of anarchy.

The "Stipulation" to Account.

The excuse for allowing the collossal record to be made—independently of the question whether the bill could sustain any decree rendered in pursuant of any such "accounting"—has been the stipulation so often and triumphantly referred to by counsel for the Belt and Southern. (Stip. shown in Print. Rec., 570, also 1034, and in Appellee's brief, p. 2.)

We can do no better than refer to Mr. Mecartney's printed argument on the subject filed before the master, copies of which have been in the possession of the Trust Company and Messrs. Gates and English as well, and here merely quote a few extracts from his analysis of this stipulation.

As a preliminary, we observe that any agreement between parties to take the time and use the functionaries of the public
1130 courts to re-account for 10,000 to 12,000 items of business (the master's estimate, Printed Rec., 662), all of which had been settled and shown on the books of the parties years before, and this upon a legally meaningless pleading, ought certainly not bind the courts, and hence not the parties.

The following are the extracts referred to:

"(1) Since the defendant expressly reserved the right to plead to the bill, it was clear that there was not meant to be a consent to a general accounting.

"(2) 'The accounting' to be expedited was, hence, an accounting subject to all pleas in bar or defenses to the right to an account.

"(3) The 'accounting' prayed for or 'sought' in the bill showed the scope of and merely identified the case itself. The accounting case was to be expedited.

"(4) The Trust Company did not waive any defenses to the bill as a whole or any part thereof; and where the right to plead or object to any accounting is expressly reserved, no other construction than the one stated is possible.

"(5) The bill had not been filed at the time the stipulation was made, and it is not to be supposed that a defendant would consent to go into evidence upon any transaction that might be attached, or to waive all legal defenses thereto. Hence,

"(6) As the accounting, after pleas and answers should have been filed, was to be expedited, the parties must have intended that
1131 the 'accounting sought,' subject to the pleas or answers to be filed, was to be expedited.

"(7) Even if the matter were otherwise in doubt, and even if defendant had not expressly reserved the right to plead—to object—the answer subsequently filed containing pleas in bar and denying complainant's right to an accounting would control, and on two grounds, viz.:

(*a*) As revealing the construction which the parties themselves had placed upon said stipulation.

(*b*) As superseding the stipulation. The case was to be tried upon pleadings to be filed, and not upon the stipulation.

(*c*) The fact that complainant later filed exceptions to the answer containing no objection that it was broader than the stipulation or was in violation of it, etc., etc., is also strong and controlling evidence as to how the parties construed the stipulation.

"To the above may be added:

"(8) The bill to be filed was later amended, and the answer to that again denied the right of complainant to any accounting, and set up various pleas in bar thereto. And the case has been tried upon the pleadings as filed.

"(9) The court would incline to adopt a construction against accounting for such stale transactions, especially where no secret fraud was alleged; and

"(10) Would probably decline on its own account to be used for such an investigation.

"(11) There is no intelligent statement in the bill of a right of or a basis for account. The bill is not capable of having any such stipulation applied to it,—otherwise than as an agreement to speed the cause.

1132 "There is no basis for 'an account' until some legal right or claim can be scraped up somehow and somewhere on the face of the bill."

In opposing the issuance of Judge McPherson's injunction (reversed here in Guardian Trust Co. v. Kas. Cy. Southern Ry. Co., 171 Fed. 43), and in the answer to the rule to show cause, Mr. Mecartney, former counsel for the Trust Company, set up the fatal insufficiency of the ancillary bill and the intervening petition (Secs. 13 and 14; P. R., 642), and argued the same in a short printed brief.

It seems somewhat strange that Messrs. Gates and English did not, in the argument on the former appeal, insist upon the insufficiency of the basal pleadings—the original support of the supplemental bill for injunction.

In fact, the last paragraph but one of this court's opinion fully justifies the point that the court should consider the basal pleadings, and the belief that it would have done so there had their apparent lack of merit been urged upon its attention.

We have quoted this brief analysis to show the court here the significance of this record and a purpose that has evidently lain back of this abnormal and oppressive suit.

For we cannot believe that the able and astute counsel for the Belt and Southern have not long since discerned the fallacy of their complaint.

It is hard for a fresh reader of these bills to believe that a counsel of Mr. Hagerman's standing and ability could either per-

1133 sonally or in connection with Mr. Max Pam have filed a bill with no more legal or intelligent a charge than a mere cry of "domination and constructive fraud" and to tender such a basis to Judge Phillips for throwing a number of corporations into receiver's hands and joining all together in one suit.

On this record showing, therefore, we say that the entire case upon the face of the proceedings is an abnormal wrong upon the Trust Company; and that its very scope and dimensions alone are apt to have caused the present counsel for the Trust Company to have overlooked the great danger in the present appeal as presented, and possibly to be unconscious of the plain merits of the Trust Company's case and claim against the Southern.

Therefore, we say the counsel or party causing such a record and such a wrong have no basis of complaint against an attempt to save the situation and the cause of justice by the simple act of filing additional arguments.

And we of course assume that Messrs. Gates and English will

not oppose it. For the merits of the question of the Southern's liability need only be considered in case the judges are of opinion that such issue was properly made the subject of a finding by the court below.

2. But a very marked and significant addition to the record showing just referred to is revealed in the record of the two dependent suits filed by the Southern's counsel, Mr. Moore, to enjoin
1134 the state court suits.

And with these this court is familiar.

The first is reported in 146 Fed. 337 (Guardian Trust Co. v. Kas. Cy. Southern Ry. Co.).

Now, in the case brought in 1900 to foreclose the Belt mortgage, the Guardian had been made a party by reason of its having been a co-trustee with the Provident Life in the mortgage. In addition to its formal answer as trustee, it asked leave to file "an amended and supplemental answer," in which it set up that the foreclosure was simply a part of a reorganization scheme and of a probable intent on the part of the reorganizers to use the prospective decree to embarras the Trust Company and other Belt creditors in asserting their claims against the prospective purchaser—the Southern. The application for leave to file was denied with the following stipulation inserted in the decree to protect and insure the company's clear right to sue the Southern and without question, viz:

"This decree is entered on the express condition to which the complainant has assented, that it shall be without prejudice to and shall not bar the right of the Guardian Trust Company, or its receiver to plead and insist in any litigation now pending, or hereafter brought, that the Kansas City Southern Railway Company, by virtue of the manner in which it was organized, or for any other reason, is legally or equitably liable for and bound to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company," etc.

Now, Mr. Moore, in July, 1905, filed a supplemental bill based upon the Southern's purchase of Belt assets upon fore-
1135 closure to enjoin the prosecution of the Guardian's state court cases brought to recover of the Southern upon the Belt notes which it held.

In the face of this plainly worded stipulation the injunction was deliberately issued by Judge Phillips and the same deliberately accepted by Mr. Moore for the Southern!

It appears from page 16 of the briefs filed by Mr. Mecartney in this court upon the appeal from said order, that said stipulation had been quoted at large in the answer or printed brief which had been filed before Judge Phillips, but the same was not even referred to in his opinion in said cause.

Also, that in said brief in this court said counsel of course simply printed the stipulation without argument.

This court held the injunction without merit, (1) upon the face of the record, and also (2) by reason of the stipulation, which it held controlled in any event, and this, of course, without argument

or analysis. It evidently was one of those instances where a thing was too plain to admit of analysis or argument.

3. What next was done to keep the issue and all of them in the United States Court under the direction or control of Judge Phillips and before Master Douglass or involved—or buried beneath—the awful pile of evidence, or, as Mr. Mecartney calls it, "dust"?

It seems that when the state court cases were nearly reached for trial after all manner of dilatory pleas and motions had
1136 been made in the state court and the case had been finally set for trial on a specific date, Mr. Moore filed a supplemental bill by the Belt and Southern jointly (claimed by him to be independent companies) to again enjoin the state court suits.

It was sought not only to enjoin the two suits in which the Belt notes held by the Guardian were involved, but a third suit based upon the notes of the Pittsburg and Gulf Company which notes were not involved and not even mentioned in the accounting case in the Federal Court was sought to be stayed. Judge McPherson enjoined all three suits!

It is no wonder that this court held that the injunctionary order lacked not only a legal basis but also involved an abuse of discretion on the part of the hearing judge. (See G. T. Co. v. K. Cy. South. Ry. Co., 171 Fed., 43.)

It therefore apparently, if not conclusively, appears from the record alone that an abnormal wrong has been committed here—invited and the results deliberately accepted by counsel for the Belt-Southern interests.

The Trust Company was represented until Dec. 1904, by Messrs. Trimble and Braley. They were then succeeded by Mr. Harry S. Mecartney of Chicago with Mr. Jules C. Rosenberger of Kansas City as local assistant counsel. Messrs. Gates and English succeeded him in March, 1908.

They now present the case here on the present appeal
1137 and risk the entire case against the Southern upon a mere technical point of pleading whose merit is in the gravest doubt to say the least. And they decline to submit the careful and thorough opinion of the able Mr. Tichenor, a leading giant of the profession in Missouri, as well as the carefully revised and finished brief of Mr. Mecartney prepared in the service and at the expense of the Trust Company. They do not argue even in the alternative that the Southern clearly is liable for Belt debts. They not only lose the opportunity to end the old and oppressive case, but needlessly risk the entire case and the $700,000 upon two or three sentences in this court's opinion in the second injunction case!

Can this be calmly tolerated?

(To explain: The court—in the case in 171 Fed.—evidently speaking of the pleadings upon which the injunctionary order had been based, remarked that the suit in the national court did not "involve" the personal liability of the Southern. This alone is the "sheet anchor," as Mr. English remarked, of the Guardian by which it seeks to escape the plea of res adjudicata to be offered by the Southern in the coming state court trials.)

Will the court not permit the case to be saved? Incidentally it may be better for Messrs. Gates and English that the case be saved. For if there be not actionable negligence involved in the presentation of the present appeal, there is something closely approaching it.

This precarious situation the court will observe (See affidavit of Shedd) was only known to applicant stockholders some ten
1138 days or less before the case was set for argument here.

It is apparent from the volume of the record here that due diligence has been used to prepare this application. In fact, without Mr. Mecartney's aid—volunteered without compensation—it would scarcely have been possible to present it thus early.

It will also be observed that the present counsel had their danger pointed out to them some three weeks before the argument here by Mr. Mecartney; but they do not seem to have appreciated the situation and the danger.

To fully present the liability issue we have prepared a schedule analysis of the master's lengthy conclusions or report on said issue and annexed the same to the briefs presented.

It is significant that the clause in the reorganization plan upon which is based one of the two independent grounds of liability sustained in Mr. Tichenor's opinion as well as in Mr. Mecartney's brief (Point IX, pages 59 to 68) while set out in the quotations of the master from the plan (Print. Rec. 944) is not even referred to by him in his opinion, and is wholly ignored therein.

It is therefore hoped and prayed that this application for leave to file may be granted.

It is therefore clear that this entire question of liability can be presented by the consideration of one document, the essentials of which are recited in the master's report, and disposed of by making a ruling on a point purely of law.

While as shown on pages 18-20 of the "Analysis of the
1139 Master's Rulings" presented herewith, there are two grounds of liability alleged other than the two above suggested, it seems clear to us that they are untenable, for reasons stated in said analysis. Secondly, they relate to or are based upon questions of fact, as to which exceptions have not been preserved.

To anticipate all possible technical objections to this application, we call attention in advance to the exceptions filed by the Guardian to the master's report. (Printed Record 1036-9.)

After stating generally that the Trust Company "excepts to the report," etc., and that "by reason of the laches of the Southern Company," etc., the intervening petitions "should be dismissed in all their parts," etc., it excepts.

"Second: The master has in such report stated (on p. 461 thereof) as follows:

'That the Southern Company is not in any way liable for the floating indebtedness of the Belt Company.' "

This was the finding upon which Paragraph VII of the decree, quoted in our petition above, was based, and relates to the same subject matter.

It is true that the exception goes on to say:

"Whereas, said finding was unnecessary and should have been omitted," etc.

The "whereases" or suggestions as to what the master should have found are properly no part of the exception.

1140 So that we say:

1. The point here urged is plainly covered by the exceptions.

2. As the master in his report recites the essentials or the "basis" of the reorganization plan, his error—as we allege it herein to have been—was a pure error of law.

And to such error, as is well known law, no exceptions are necessary.

2 Daniel Chy. Pl. & Pr., Sec. 1310.
17 Enc. Pl. & Pr., 1048.
Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. 476.
Hurd v. Goodrich, 59 Ill. 450.
Van Tobel v. Ostrander, 158 Ill. 499.
Hayes v. Hammond, 162 Ill. 133.
Von Platen v. Winterbotham, 203 Ill. 202.

It is, of course, scarcely necessary to suggest that if the court should desire, in addition to the briefs presented here, an oral argument upon the issue, the petitioners would gladly respond, and present an oral argument thereon, either separately or in conjunction with Messrs. Gates & English, as the court might direct.

We have endeavored to place this issue before the court within the narrowest possible limits.

Point I of the petition is based primarily on the narrowest issues of the appeal, all of record, with which the court has been made familiar.

Point II is likewise based upon the record and only such outside facts as are not subject to dispute; and the latter are mentioned only in order to explain the situation and to excuse the lack

1141 of earlier action on the part of the petitioning stockholders.

Respectfully submitted,

NEWELL H. CLAPP,
ENOCH J. PRICE,
For Petitioners Shedd & Law.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on June 16, 1911.

1142 (*Motion of Edward A. Shedd et al. for Order upon Kansas City Southern Ry. Co. et al. to Show Cause, etc.*)

And now come Edward A. and Charles B. Shedd and Robert H. Law, by Newell H. Clapp and Enoch J. Price, their counsel, and move the court to grant a rule on appellees, The Kansas City Southern Railway Company and Cambria Steel Company, as well as upon appellant, Guardian Trust Company, to show cause why they should not be allowed to file additional briefs herein on behalf of the ap-

pellant, Guardian Trust Company, as is prayed for in their petition this day presented.

NEWELL H. CLAPP,
ENOCH J. PRICE,
Counsel for Edward A. and Charles B. Shedd and Robert H. Law.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on June 16, 1911.

(*Order to Show Cause Why Motion to File Additional Briefs Should Not Be Granted, etc.*)

May Term, 1911.

FRIDAY, June 16, 1911.

Edward A. Shedd, Charles B. Shedd and Robert H. Law having this day filed their petition in writing for leave to file additional arguments on behalf of the appellant Guardian Trust Company in the above entitled cause and their written motion to the same effect, it is hereby

Ordered that the appellees, Kansas City Southern Railway Company and Cambria Steel Company, and appellant Guardian Trust Company show cause before this Court at its chambers in the City of St. Paul on the 21st day of June A. D. 1911 at ten o'clock in the forenoon of that day why the prayer of said petitioners and their said motion should not be granted and said petitioners be given leave to file and have considered the additional brief, arguments and other documents in said petition referred to.

Let a copy of this order and of said petition and motion be served upon the solicitors for appellant Guardian Trust Company and for appellees Kansas City Southern Railway Company and Cambria Steel Company on or before the 17th day of June A. D. 1911.

Dated June 16th, 1911.

(Signed) WALTER H. SANBORN,
Circuit Judge.

1143 (*Proof of Service of Notice of Hearing on Petition of Shedd et al. for Leave to File Additional Briefs.*)

Notice.

To Frank Hagerman, Esq., Counsel for Cambria Steel Company;
To Samuel W. Moore and Samuel Untermyer, Esquires, Counsel for Kansas City Southern Railway Company et al., Appellees; and
To George H. English and Edward P. Gates, Esquires, Counsel for Guardian Trust Company:

You and each of you are hereby notified that on Friday the 16th day of June A. D. 1911, the said Court of Appeals in and for the

Eighth Circuit entered a rule in the above entitled cause upon the Cambria Steel Company, the Kansas City Southern Railway Company and the Guardian Trust Company, to show cause on or before the 21st day of June A. D. 1911, at ten o'clock A. M. why Edward A. and Charles B. Shedd and Robert H. Law should not have leave to file additional briefs in said cause upon the part of the appellant, Guardian Trust Company, as prayed for in their petition presented to the court on said day; with a copy of which rule and petition and affidavits and suggestions in support thereof, as well as with a copy of the said briefs proposed to be filed, you are herewith served.

Dated, June 16, 1911.

NEWELL H. CLAPP,
406 *National German American*
Bank Bldg., St. Paul, Minn.
ENOCH J. PRICE,
No. 9 South La Salle St., Chicago, Illinois,
Counsel for said Petitioners Shedd and Law.

1144 (MEMO. OF CLERK—Here follows a copy of the Motion of Edward A. Shedd, et al. for an Order upon the Kansas City Southern Railway Company, et al. to show cause, etc., filed June 16, 1911, and a copy of the order of said Circuit Court of Appeals of June 16, 1911, to show Cause why the Motion of Shedd, et al. to file Additional Briefs should not be granted, which said motion and order are omitted for the reason that copies thereof have heretofore been included in this transcript.)

Proof of Service.

STATE OF MISSOURI,
County of Jackson, ss:

On this 17th day of June A. D. 1911, personally appeared before the undersigned David A. Murphy a Notary Public in and for said county and state, Charles M. Bush, Esq., who being by me first duly sworn on his oath deposeth and saith:

That on the 17th day of June A. D. 1911, at the city of Kansas City in the state of Missouri, he served a duplicate copy of the petition of Edward A. and Charles B. Shedd and Robert H. Law, motion, notice of entry of rule to show cause, and rule to show cause, copies of each of which are hereto annexed as well as a copy of the additional briefs proposed to be filed which are mentioned in said notice, upon the following named persons and in the manner following, that is to say:

Upon Frank Hagerman, counsel for the above named appellee Cambria Steel Co. by handing a copy of said petition, motion, notice of entry of rule to show cause and rule to show cause and additional briefs to said Frank Hagerman in Kansas City, Jackson County, Missouri.

Upon Samuel W. Moore, counsel for appellees Kansas City Southern Railway Company, et al. by handing a copy of said petition,

motion, notice of entry of rule to show cause, additional
1145 briefs and rule to show cause to said Samuel W. Moore in Kansas City, Jackson County, Missouri.

And upon George H. English and Edward P. Gates of counsel for appellant Guardian Trust Company by delivering a copy of said petition, motion, notice of entry of rule to show cause, additional briefs and rule to show cause to S. E. Skelley, he being in charge of the office of said English and Gates at 1003 Scarritt Building, Kansas City, Missouri; they being absent from Kansas City, Jackson County, Missouri.

Further deponent saith not.

[SEAL.] CHAS. M. BUSH.

Subscribed and sworn to before me this 17th day of June A. D. 1911.

DAVID A. MURPHY,
Notary Public, Jackson County, Missouri.

My commission expires June 5th, 1915.

(MEMO. OF CLERK.—Attached to this Proof of Service of Notice of Hearing on Petition of Shedd, et al. for Leave to File Additional Briefs is a copy of the Petition of Shedd, et al. for Leave to File Additional Briefs, Filed June 16, 1911, which is omitted here for the reason that a copy of same has heretofore been included in this transcript.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals on June 20, 1911.

(*Return of Guardian Trust Co. upon Rule to Show Cause, etc.*)

Comes now Guardian Trust Company, Appellant above named, and for its return and answer to the rule and order heretofore made upon the 16th day of June, 1911, by the Honorable Walter H. Sanborn, Judge of this Court, says:

I.

That by reason of the former decision of this Court, and by reason of the state of the pleadings and record in the cause from which this appeal is taken, the question of the personal liability of the Kansas City Southern Railway Company for the debt of the Belt Company, is not in issue and can not be determined upon this ap-
1146 peal. Since said issue is the only subject discussed in said briefs proposed to be filed by said petitioners, this appellant is of the opinion, that neither said briefs, nor any argument upon said issue, would be a proper matter to be sumitted to this Court.

II.

Said petitioners are not parties to the record of this cause.

EDWARD P. GATES &
GEO. H. ENGLISH, JR.,
Solicitors for Guardian Trust Company.

(Endorsed:) Filed in U S. Circuit Court of Appeals on June 21, 1911.

(Order of Submission of Petition of Shedd et al. for Leave to File Additional Briefs in Cause No. 3490.)

May Term, 1911.

WEDNESDAY, June 21, 1911.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

This cause came on to be heard upon the petition of Edward A. Shedd, et al., for leave to file additional briefs in this cause, with affidavits and suggestions in support thereof, and upon the return by the Guardian Trust Company to the rule to show cause heretofore issued and served upon it.

Thereupon, the said petition of Edward A. Shedd, et al., for leave to file additional briefs in this cause, was argued by Mr. Newel H. Clapp in behalf of petitioners in support of said petition, and by Mr. Edward P. Gates and Mr. George H. English, Jr., in behalf of the Guardian Trust Company, and by Mr. Samuel W. Moore, in behalf of the Kansas City Southern Railway Company, in opposition thereto.

Whereupon, the said petition of Shedd, et al., was submitted to the Court and by the Court taken under advisement.

1147 (*Order That Cases Stand for Further Hearing upon Additional Briefs of Parties to be Filed.*)

May Term, 1911.

WEDNESDAY, June 21, 1911.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

and

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

In the above entitled cases upon the motion of the Guardian Trust Company for leave to file additional briefs, it is now here ordered by the Court that these cases be set down for further hearing before this Court, upon additional briefs of the parties to be filed herein, on or before the first day of December, 1911.

(*Motion of Guardian Trust Co. for Leave to File Additional Briefs, etc.*)

Comes now the Guardian Trust Company, and shows to the Court, that heretofore, to-wit, on the 21st day of June, 1911, oral application was made by this appellant to the Judges of this Court in Chambers, for leave to file additional briefs in the above entitled causes, particularly upon two points, namely:

1. Whether or not this Court could, upon the record, consider the question of the correctness of the findings of the Master and the Circuit Court, in respect to the liability of the Kansas City Southern Railway Company for the debts of the Belt; and

2. Upon the merits of said issue, if the Court should be of the opinion that the merits of said issue is a matter properly cognizable by this Court.

That by the agreement of the parties hereto, made in Chambers in the presence of said Judges of this Court on said day, such
1148 application or the filing of said briefs should not be deemed to conclude or affect this Appellant in respect to its contention that the ruling of this Court in these causes could not be readjudicated upon the State Court causes mentioned and described in the record herein, and further, that this application and the filing of said briefs should have no effect upon said State Court causes,

save and except that appellant agreed to consent that said Court Causes might be passed from term to term during the pendency of this matter, and until this Court should have reached a decision thereon.

Said oral application was by said Judges granted upon the consent of the parties and under the agreements aforesaid, with the understanding that this Appellant should, within ten days, file formal written application for said leave, setting forth the above facts.

Now therefore, for the reasons and upon the agreements above mentioned, this Appellant, Guardian Trust Company, prays leave of Court to prepare and submit to the Court, additional briefs in these causes, on or before the 1st day of November, 1911, and to prepare and submit to this Court, reply briefs to any briefs which may be filed herein by the Appellees, on or before the 1st day of December, 1911.

GUARDIAN TRUST COMPANY,
By EDWARD P. GATES &
GEO. H. ENGLISH, JR.,
Its Solicitors.

Copy of above application received this June 30, 1911.
FRANK HAGERMAN.

Copy of the above application received this June 30, 1911. Appellee by this acceptance of service does not admit the alleged agreement set forth in the application.

S. W. MOORE,
For the Kansas City So. Ry. Co.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on July 1, 1911.

1149 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Petition of Edward A. and Charles B. Shedd and Robert H. Law for Leave to File Suggestions as to Final Judgment Herein.

And now come Edward A. and Charles B. Shedd and Robert H. Law and show to the court that they are stockholders in the Guar-

dian Trust Company, said Shedd and Shedd having $66,700 par value and said Law having $15,000 par value of said stock, the total outstanding stock of the trust company being about $2,200,000, the stockholders being over 300 in number and widely scattered. Said company has been in liquidation for over eight years last past.

1150 They hereby petition for leave to file:

1. Additional assignments of error herein on behalf of the Trust Company, as follows:

"IV. The said finding of non-liability on the part of said Kansas City Southern Railway Company to pay the debts of the said Belt Company was and is erroneous."

2. Certified copy of the reorganization plan and depositors' agreement of the Kansas City Southern Railway Company; and,

3. Suggestions in support of this petition to the effect that, in case this court finds said Southern Company liable to the Trust Company for the claims which the latter has established against the Belt Company, this court embody in its judgment herein a direction for a final judgment in the Circuit Court against said Southern Company.

Their petition is based upon the following grounds:

1. The appeal of the Guardian Trust Company from said decree contained—Par. "VII" thereof—a finding that the Southern Company was not liable for Belt Company debts.

At the instance of these petitioning stockholders and upon their representation that the claim of the Trust Company against the Southern Company was apt to be lost by failure of its counsel, Messrs. Gates and English, to argue the merits of this finding, this court granted the latter counsel leave to file additional briefs upon such issue.

Nevertheless, while they have filed such briefs, said counsel

1151 for the Trust Company—notwithstanding this court's announcement that such issue was properly in the cause—have declined to ask this court for a final judgment in case the Guardian's claim shall be sustained. This course can only result in prolonging a litigation already abnormally long and oppressive, with no benefit to any one so far as can be perceived.

2. This matter involves a claim now amounting to well above $725,000, independently of the Guardian's claim to the Central Improvement Company collateral; and such collateral may also be saved solely by having a favorable adjudication upon such liability issue. It represents a loss or gain to these stockholders alone of above $25,000.

3. This record—by far the longest ever made in the history of the known world—was made at the real instance of and supported only by the means of the Southern Company—and furthermore, has been made upon a thoroughly bad bill of complaint.

(See master's report, P. R. 742, where thirteen "controlling facts" are found "to appear on the face of the bill or are practically undisputed in the proofs.")

The Trust Company has been held out of its large debt by being forced into court and kept in court by a colossal yet useless "ac-

counting" with the defunct Belt Company, the predecessor of the Southern. And this great wrong has been largely perpetuated by means of several injunctions issued against the prosecution of the state court cases (common law cases based upon such claim
1152 of liability), and both of which were held by this court to be absolutely without merit.

146 Fed. 337.
171 Fed. 43.

It would be painfully wrong to the stockholders of the Trust Company, to the court as an instrument of justice, and to the cause of justice itself, that the object of the Southern Company or its counsel should be further served by the determination of the Trust Company's counsel not to ask for a final judgment herein so as to end what has been practically found to have been scarcely less than a farce.

A photo of this huge record may aid in taking in the significance of the situation and one taken several years ago is annexed to this pamphlet.

4. There can be no good object in having this court find merely that the decree of the court below was erroneous on this issue, and still having it withhold a final judgment in the cause, after eleven and a half years of useless litigation.

The court granted leave to the counsel to reopen their case upon the very ground that they had allowed themselves to be foreclosed on this liability issue, and in effect that if the finding in the decree should not be attacked it would be res adjudicata of the issue, and this large claim would thus be lost to the stockholders. The counsel seem now to persist in their attitude that such issue is not in the case. They decline to file the additional assignment of errors, and merely invite the court to "notice a plain error" in their behalf—the correction of which they even refuse to formally ask for,
1153 to say nothing of their not accepting the wide-open opportunity to end the oppressive case.

5. While the master has recited the essential provisions of the complete reorganization plan, it is thought best to have it presented in its entirety. As this issue has been ordered to be argued it is probably the place of the Southern's counsel to bring up any omitted parts which he thinks material. Nevertheless to save any quibbling upon the question we think the plan complete should be filed.

(Messrs. Gates and English have printed a complete copy of this plan as an appendix to their Reply lately filed but have declined to file the original certified copy.

In support of this application petitioners present brief affidavits of Harry S. Mecartney and Enoch J. Price, Esqs., and also printed copies of their former petition filed in June, 1911, which resulted in the reopening of the case for the purpose of argument upon this vital issue.

6. Petitioners suggest that the application here made is only in aid of the court's doing ultimate and complete justice in the case,

and as to what should be the form of the final order herein. Hence it is believed that the same are properly presented at any time before the final order has been entered; and that the court would not decline sincere and appropriate suggestions to that end. Nevertheless they present herewith such affidavits to show that this application and brief have been reasonably early and seasonably made under the circumstances.

Wherefore, petitioners pray that leave be given them to file
1154 (1) additional assignment of error as above; (2), a certified copy of the reorganization plan and the agreement prefixed thereto, and (3) the suggestions hereto annexed; and that in case this court finds that the Southern Company is liable for the Belt Company debts, a final judgment may be entered herein directing the lower court, upon the application of the Trust Company, to enter a decree against the Southern Company for the total amount of the decree formally entered against the Belt Company, with interest and costs.

And petitioners will ever pray, etc.

EDWARD A. SHEDD,
CHARLES B. SHEDD,
ROBERT H. LAW,
By NEWEL H. CLAPP AND
ENOCH J. PRICE,
Their Counsel.

STATE OF ILLINOIS,
County of Cook, ss:

HARRY S. MECARTNEY, being duly sworn, deposes and says that he was formerly counsel for the Guardian Trust Company, as appears from the records herein. That during last November he learned that counsel for the Trust Company were hesitating about insisting in this cause that this court, in case it should sustain the claims of the Trust Company against the Southern Company, direct a judgment in the lower court, in substance as set forth in the petition prefixed hereto. That thereupon at considerable labor, covering a total of several weeks of time, he corresponded with D. J. Haff, Esq.,
of Kansas City, Missouri—retained last fall as special counsel
1155 to aid Messrs. Gates and English in the matter of this appeal and as affiant understood the leading counsel in the case and made several brief for his consideration with a view to persuading him of the feasibility and propriety of having such judgment or final direction for a judgment entered herein.

That early in December affiant learned that such counsel had finally concluded to make no such formal request until the oral argument in the case or until this court might indicate of its own accord that it might give such relief to the Trust Company. That affiant about the middle of December last learned that there was to be no oral argument in the case. He thereupon reported the same to Messrs. Clapp and Price, attorneys for the petitioners herein; and said Clapp thereupon and about December 15th last, wrote Messrs. Gates and English to send him the certified copy of the reorganiza-

tion plan and agreement of the Southern Company (which said Clapp had sent them for the purpose of having the same filed herein); but such copy was not received by him until about December 26th last. Affiant received the same from said Clapp on December 27th last. That since said time he has been in consultation with E. J. Price, Esq., one of said counsel, with a view to aiding him in preparing suggestions in support of the petition herewith filed; but affiant has been for four weeks since said date almost continuously in court attending upon two long jury trials, and has only within the last three weeks been able to aid such counsel in the preparation of the same.

HARRY S. MECARTNEY.

1156 Subscribed and sworn to before me this 17th day of February, A. D. 1912.

[Notarial Seal, Cook Co., Ills.]

EVERETT M. SWAIN,
Notary Public.

STATE OF ILLINOIS,
County of Cook, ss:

Enoch J. Price, being duly sworn according to law, doth depose and say: That he is one of the two counsel for the petitioners Messrs. Shedd and Law in this cause who are stockholders in the Guardian Trust Company as set forth in the above petition; that several days before the first of January, 1912, when he was apprised of the final determination of the counsel in this case not to file the certified copy of the reorganization plan which had been furnished them for that purpose or to make an application for a final judgment against the Southern Company in this cause he conferred with Harry S. Mecartney, Esq., former counsel for the Trust Company, with a view to having him aid in preparing this petition and suggestions in support thereof.

That on account of the fact that the record herein is immense in proportions and that said Mecartney was entirely familiar with it and all the complex issues in the case and had also assisted in preparing the former petition of the stockholders herein, and on account of the fact that said Mecartney was perfectly willing to do all in his power to further the cause of the Trust Company herein affiant deemed it both wise and economical to rely largely upon the
1157 aid of said Mecartney in preparing such application and brief. That by reason thereof such work of preparation was delayed several weeks on account of the inexorable court engagements of said Mecartney. That it was further delayed for about one week's time by the fact that Mr. A. E. Macartney, Esq., the partner of Mr. Clapp, died suddenly about the 6th inst. and his said colleague Mr. Clapp was unable to consider and revise the papers on account thereof and the same were only received back from said Clapp upon the 15th instant.

Affiant says that had he and his said colleague alone prepared

these papers independently of and without the aid of Mr. Mecartney they could have been prepared and presented to this court but little sooner than they have actually been.

ENOCH J. PRICE.

Subscribed and sworn to before me this 16th day of February, A. D. 1912.

[Notarial Seal, Cook Co., Ills.]

B. H. MONTGOMERY,
Notary Public.

1158 *Suggestions in Support of Foregoing Application.*

The undersigned counsel on behalf of the above named stockholders of the Guardian Trust Company again feel constrained to make application to this court touching the disposition of the appeal of said company in this case.

For failure of counsel for the Trust Company to argue the real merits of the main controversy between it and the Southern Company, viz: the liability of the Southern for Belt debts, these stockholders filed a petition last June for leave to file additional briefs. Their only claim in such behalf had been that such issue—raised by the Trust Company itself in its answer to the intervening petition—was not properly in the case and that the special finding of master and lower court of non-liability on the part of the Southern was unnecessary to a decision of the case and for this reason alone, erroneous.

While agreeing that the decision upon the merits was wrong, we disagreed with the counsel that it was not germane to the issues; and fearing a judgment here against the Trust Company which would be pleaded as res judicata in the state court suits, we filed a petition for leave to assign additional errors upon such issue, and to submit the briefs therein prepared by Mr. Mecartney, former counsel for the Trust Company, and one prepared by C. O. Tichenor, Esq., of Kansas City.

1159 A rule was issued upon counsel for both the Southern and Trust Companies to show cause why leave should not be granted.

Upon the hearing of the rule, Messrs. Gates and English—as well as Mr. Moore—opposed the same and announced their confidence in their position, and that they preferred to reserve the issue of the Southern's liability for trial in the three state court cases.

This court—through Mr. Justice Sanborn—then announced that the justices had unanimously reached the tentative conclusion that that issue had been necessarily involved in the case below and therefore had been properly—though not necessarily correctly—passed upon by master and court. That although it was rare for the court to make such an announcement prior to filing its written opinion, nevertheless in the peculiar circumstances the justices "felt it their

duty" to make it, "because if we withheld it from you" (Messrs. Gates and English) "it may be that we would deprive you of some opportunities that you may desire to take advantage of."

Immediately upon such announcement Messrs. Gates and English made application for leave to argue the merits of the liability issue. Said Judge Gates on behalf of the Guardian Trust Company, "We should be glad if we could present a brief upon that point."

Thereupon the counsel for Shedd and Law did not press their appeal for leave to file their own briefs, but stated that in view of such application they had no desire to inject their own briefs
1160 into the case; and that "all we are asking is that all that can be said upon the proposition and all the authorities that there are to sustain the position of the Trust Company may be presented to the court. We would just as lief it should be presented under the signature of Gates and English and anybody else."

Messrs Gates and English then courteously said they would willingly submit their draft of brief to the undersigned counsel for petitioners for suggestions.

It was agreed that briefs would be exchanged by counsel for the Trust and Southern Companies November 1st, and any replies by December 1st last.

The court thereupon entered an order that the cause be re-taken upon briefs to be filed by December 1st last.

The briefs were exchanged and a reply submitted by Messrs. Gates and English, and an additional reply by D. J. Haff, Esquire, of Kansas City.

Messrs. Gates and English did, as per their agreement, submit to the undersigned counsel their first or typewritten draft of brief upon such additional issue of liability of the Southern and the latter made certain suggestions which were in part adopted by them.

We also sent them the original documents presented with our application last June, to which was attached the certified copy of the plan upon the assumption that they would desire to file the same and ask for a final judgment herein. On November 19th one of
1161 the undersigned counsel received a letter from them that they were yet undecided as to whether they would use the certified copy of the reorganization plan and desired to retain it a little longer. Learning about December 15th that they did not intend to use the same, we wrote requesting its return, and it was returned to us several days before the first of the year.

In the former application of these petitioners leave was asked (p. 19) to formally assign additional error as follows:

"IV. The said finding of non-liability on the part of said Kansas City Southern Railway Company to pay the debts of the said Belt Company was and is erroneous."

Leave was also asked to file a certified copy of the reorganization plan.

In the "Supplemental Brief" of Messrs. Untermyer and Moore upon this liability issue it was assumed that Messrs. Gates and English would argue for leave to file additional and specific assignments

of error upon such issue in substance like the one presented with the petition of Shedd and Law. (Supplt. Brief, p. 5.)

In the "Reply" of Messrs. Gates and English, pp. 1 and 2, it is said that they had not made such application and in substance that they meant to rely upon the court to "consider the question"—of liability, etc.—"in the present state of the record without additional assignment of error"—as it was claimed the court had power to do, and correctly, as we agree.

A complete copy of the reorganization plan was printed as an appendix to the reply.

1162 It was then perceived that apparently Messrs. Gates and English did not mean to entirely yield to the new situation and that they were merely going to invite this court to notice upon their behalf, a $700,000 error, and also refrain from asking for a final judgment for the money—or a final direction for one; although this court had before it the one document from which the issue of liability sprung, and had entire jurisdiction of the issue.

In other words, the court's proffer of mercy or amnesty to the Trust Company is being thrown back into its face, with the suggestion that all that counsel care to accept from the court upon its own invitation is an order setting aside the objectionable finding and without the resultant judgment in their favor!

The court is formally invited to give its opinion upon an issue which evidently counsel still claim is not properly in the case; but they desire the finding of the lower court set aside in order that they "may not be embarrassed"—as they asserted upon the oral argument—by the claim of Mr. Moore that it is res judicata.

This presents to us a situation which is unique in the history of court practice and almost impossible of explanation.

The only suggestions that occur to us as rational are, first, that possibly the ruling of this court and the ultimate disposal of the case here would involve a confession of error upon the part of Messrs. Gates and English as to their having omitted in the first instance an attack upon the merit of this finding—which they are not yet ready to make.

1163 Second, the only other explanation possible is suggested by the fact that upon resisting the application of these petitioners last June, Messrs. Gates and English (as per stenographic report) announced to your Honors that before electing to omit any challenge of Judge Phillips' finding upon this liability issue they had submitted the question to the executive committee of the Trust Company and had obtained its approval of their plan of briefing the case. They also stated that after they had received notice of the application of these petitioners for leave to file additional briefs upon this liability issue, they had re-submitted the matter to that portion of such executive committee resident in Kansas City (Mr. Prescott, the liquidator of the Trust Company, and two others), and they had ordered that the application be resisted.

Although this fact might well serve to transfer the responsibility of the case from Messrs. Gates and English to the executive committee, or such portion of it as had given directions to them as to the

argument of the case, and might thus well excuse their neglect to argue the real merits of the case, it does not explain their present declination to ask this court to end the matter, nor their insistence upon having the issue drag its course through the state court and possibly through the State Supreme Court—three years behind its call—and this at the cost of imperiling the issue in this cause by inviting the court to force upon them a final ruling or decree in their favor, for which they decline to ask!

For our part, we can see no benefit in such a course to anybody, except such as would ordinarily flow from keeping the Trust
1164 Company in further and prolonged liquidation.

In view of the facts shown in the affidavits presented in our former petition and the references to the record in the latter, we do submit that the stockholders of this Trust Company should not have this final issue held open longer. That if the Southern Company—whose resources have sustained its counsel in making this colossal record upon a bill found by the master to be bad upon its face for a half dozen reasons, and also further barred by a half dozen conceded and undeniable or "undisputed" facts—is liable for this big Belt debt, it is time for it to be finally adjudged so to be in a case where that specific issue has been brought into the case by the Trust Company itself and rests upon the construction of but one document.

It seems needless to add that if we had had any intimation at the hearing in chambers at St. Paul last June that Messrs. Gates and English had not meant to apply for leave to file the additional assignments of error and to ask for the fullest judgment they could get herein, or to temporize with the situation and with the court's leniency, we would not have so promptly waived insistence upon our application for leave to do so.

And as it was through our efforts that the issue has been saved it would seem that it is not inappropriate for us to insist that it be now disposed of.

We gather that the chief objections of Messrs. Gates & English to making formal assignments of error on this issue and presenting an application for a final judgment herein are two
1165 (which we try to anticipate in advance):

1st. That because no cross-bill was filed by the Trust Company based upon this issue, or because no affirmative relief was prayed by it in respect thereto, therefore such issue is not res judicata on this record and hence any adjudication of this issue in favor of the Trust Company would merely be "persuasive" evidence in the State Court Cases and not conclusive.

2nd. That if this court should hold that for lack of proper exceptions it could not review this finding, such action of the Trust Company in formally assigning error might tend to preclude it from claiming in the State Court Cases that the present finding of the master and court is not res judicata.

The idea that an issue set up merely in defense can never be held to be adjudicated even when a special finding thereon has been made, will certainly strike this court as novel indeed. And if this

court should overrule this finding and award a judgment in favor of the Trust Company against the Southern, it certainly will satisfy the stockholders of the Trust Company and it ought to satisfy their counsel. It is what they have been fighting for—and we know of nothing else.

As to the second point, it would seem that counsel made their election as to this point last June. The counsel had submitted their case upon the risk that the liability issue was not in the case.

The court graciously warned them that it thought it was. They then elected to proceed upon the basis that it was.

1166 They certainly are not doing so by asking the court to elect whether it will treat each issue as in or out of the case.

This temporizing with the situation is not fair to the court or the Trust Company and its stockholders.

While it would be perfectly just for this court to rebuke them with directing a judgment in favor of the Trust Company, stockholders of the latter accurately advised of the situation naturally feel that there should be some one to make the formal request or to stand as sponsor for the judgment if granted.

We assume, too, that counsel are well advised of the uniform rule that where jurisdiction is invoked of a court and denied by the court, the action has no force whatever as res judicata of the subject matter.

The annexed brief is here submitted to meet all possible objections to the course proposed and to prove:

1. That the issue of the Southern's liabilitiy being in the case, it is of course competent for the court upon reversing to direct a decree against the Southern upon a formal amendment of the answer of the Trust Company to its intervening petition praying for such decree.

2. There is no rule of "laches" barring the Trust Company from such relief.

3. No further pleadings or amendments of the Southern Company should be allowed in such case.

4. The finding herein as to the liability of the Southern will be res judicata of such issue; and hence there is no reason why an end should not be made of the entire issue and final relief awarded herein.

* * * * * * *

1167 (Here follows a brief in support of the foregoing Petition for leave to file Suggestions as to Final Decree.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals on February 19, 1912.

1168 (*Order for Notice to Counsel and Fixing Time for Filing Briefs, etc., on Petition of Shedd et al.*)

December Term, 1911.

MONDAY, February 19, 1912.

On reading the petition of Edward A. Shedd, and others presented this day,

It is hereby ordered, that copies of this petition and accompanying papers be served upon other counsel in the case as soon as convenient, that any other counsel in the case may, if they so desire, answer the petition and present affidavits concerning the same in writing or in print at any time within fifteen (15) days, and that the petitioners may reply in the same manner within ten (10) days thereafter when the matter will be submitted to the Court.

St. Louis, Missouri, February 19, 1912.

(Signed) WALTER H. SANBORN,
Circuit Judge.

(*Proof of Service of Order of February* 19, 1912, *as to Filing of Briefs, etc.*)

Affidavit of Mailing.

STATE OF ILLINOIS,
County of Cook, ss:

B. H. Montgomery being duly sworn deposes and says that he is an office associate with Enoch J. Price, and at the instance of said Enoch J. Price mailed to Samuel Untermyer, 37 Wall St., New York, attorney for the Kansas City Southern Railway Company, on February 21, 1912, postage prepaid, a copy of the Petition of Edward A. and Charles B. Shedd and Robert H. Law for leave to file Suggestions, which petition was filed at the office of the clerk of said Court of Appeals at St. Louis on February 19, 1912.

B. H. MONTGOMERY.

Subscribed and sworn to before me this 23rd day of February A. D. 1912.

[SEAL.] EVERETT M. SWAIN,
Notary Public.

Notice.

To Frank Hagerman, Esq., Counsel for Cambria Steel Company:
To Samuel W. Moore and Samuel Untermeyer, Esquires, Counsel for Kansas City Southern Railway Company et al., Appellees; and
To D. J. Haff, George H. English and Edward P. Gates, Esquires, Counsel for Guardian Trust Company:

1169 You and each of you are hereby notified that on Monday, the 19th day of February A. D. 1912, the said Circuit Court

of Appeals in and for the Eighth Circuit, sitting at St. Louis, entered a rule in the above entitled cause upon the petition of Edward A. Shedd and others that day presented, with a copy of which rule you are herewith served.

There is also served on you herewith a copy of said petition referred to in said rule. You are also served with a copy of the petition of said Shedd and others which was filed in said cause at St. Paul on June 16, 1911, and upon which a hearing was heretofore had; copies of said last mentioned document having been presented to said court along with the first mentioned petition.

Dated, February 20, 1912.

NEWEL H. CLAPP,
406 *German American Bank Bldg., St. Paul, Minnesota.*
ENOCH J. PRICE,
No. 9 South La Salle Street, Chicago, Illinois,
Counsel for said Petitioners Shedd and Law.

Proof of Service.

STATE OF MISSOURI,
County of Jackson, ss:

Charles M. Bush being duly sworn deposes and says that he is by occupation an attorney at law resident in and practicing law at Kansas City, in Jackson County, Missouri.

Affiant further states that on the 21st day of February A. D. 1912, he served true copies of the above and foregoing notice and of the annexed rule or order of court entered in said cause on February 19, 1912, and also true copies of the two printed petitions hereto annexed, upon the following counsel in said cause, viz.:

On Frank Hagerman, Esq., by leaving true copies of said documents with him personally in said county;

On Samuel W. Moore, Esq., by leaving true copies of said documents with F. H. Moore, Assistant General Solicitor of Kansas City Southern Railway Co., Assistant to Samuel W. Moore and in charge of his office, said Moore being absent from Kansas City, Mo.;

1170 On D. J. Haff, Esq., by leaving true copies of said documents with W. C. Michaels, Office partner of D. J. Haff and in charge of his office, said Haff being absent from Kansas City, Mo.;

On George H. English and Edward P. Gates, Esquires, by leaving true copies of said documents with said Edward P. Gates personally in said county.

And further affiant saith not.

CHAS. M. BUSH.

Subscribed and sworn to before me this 21st day of February A. D. 1912.

[SEAL.] MABEL C. TRUSSLER,
Notary Public.

My commission expires August 11, 1915.

(MEMO. OF CLERK.—Attached to the foregoing Proof of Service is a copy of the order of said Circuit Court of Appeals of February

19, 1912, for notice to counsel and fixing time for filing briefs, etc., and also a copy of the petition of Shedd, et al., for leave to file Suggestions as to Final Decree, filed February 19, 1912, and also a copy of the petition of Shedd, et al., for leave to file additional Briefs, filed June 16, 1911, which said copies so attached are omitted here for the reason that copies of same have heretofore been included in this transcript.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Feb. 22, 1912.

Order of Submission of Petition of Shedd et al., for Leave to File Suggestions as to Decree.)

December Term, 1911.

SATURDAY, March 16, 1912.

An order having been entered on the 19th day of February, 1912, in the above entitled causes, granting counsel for appellants and appellees fifteen days within which to answer the Petition of Edward A. Shedd, et al., for leave to file suggestions as to the final decree herein, and permitting the filing of briefs thereon within the same period, and allowing petitioners to reply within ten days thereafter, and it now being made to appear to this Court that neither an answer nor briefs have been filed, It is now here ordered that said petition of Edward A. Shedd, et al., for leave to file suggestions as to the final decree, be, and the same is hereby, submitted to Judges Sanborn, Marshall and Wm. H. Munger before whom the original appeals were argued and submitted.

March 16, 1912.

1171 (*Opinion, Filed October* 22, 1912.)

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1912.

No. 3489.

CENTRAL IMPROVEMENT COMPANY et al., Appellants,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Appeals from the Circuit Court of the United States for the Western District of Missouri.

Mr. George H. English, Jr., and Mr. Edward P. Gates (Mr. D. J. Haff and Mr. E. C. Meservey on brief), for appellants.
Mr. Frank Hagerman, for Cambria Steel Company.
Mr. Samuel Untermyer and Mr. Samuel W. Moore, for Kansas City Southern Railway Company.

Before Sanborn, Circuit Judge, and Marshall and Wm. H. Munger, District Judges.

WM. H. MUNGER, *District Judge,* delivered the opinion of the court.

While the parties to these controversies are numerous, the questions involved upon the appeal require consideration only of acts of the following named companies, to-wit: The Cambria Steel Company, which, for convenience, will herein be designated Cambria Company; Kansas City, Pittsburg & Gulf Railroad Company, herein called Gulf Company; Port Arthur Channel & Dock Com-
1172 pany, herein called the Dock Company; Kansas City Suburban Belt Railroad Company, herein called the Belt Company; Kansas City Southern Railway Company, herein called the Southern Company; Guardian Trust Company, herein called the Trust Company; The Provident Life & Trust Company, herein called Provident Company.

The Gulf Company was a railroad extending from Kansas City to Port Arthur on the Gulf of Mexico; the Dock Company was a local company having terminal facilities at Port Arthur; the Belt Company was a belt line railroad having terminal facilities at Kansas City, Missouri. Each of these companies had outstanding bonds secured by mortgages upon its properties. The Cambria Company was a judgment creditor of the Belt Company. The Trust Company

owned a large amount of the stock and bonds of both the Gulf Company and the Belt Company and was also a creditor of the Belt Company. The Gulf Company, having defaulted in the payment of interest upon its mortgage, a suit for foreclosure was instituted, and a committee of bondholders was selected to originate and propose a reorganization plan. This committee proposed a plan of reorganization by which the properties of the Gulf Company, the Dock Company and the Belt Company should be acquired and organized into or operated as a single new company. This committee formulated a plan of reorganization, by the terms of which it was proposed that a new company be organized to acquire the properties of the three mentioned companies. Their plan was published and submitted to the bond and stockholders of each of the companies, the committee declaring that it had formulated and adopted said plan as the basis of the reorganization of the railroad system, having for its ultimate purpose the unification of the main line and terminals into one ownership and under one management; that such object was sought to be accomplished by having the Gulf Company, when reorganized, acquire the capital stock of the other two companies, namely, the Dock Company and the Belt Company, and having thus acquired the control and possession, to thereafter adjust the bonded indebtedness standing against the properties of the Belt Company and Dock Company by retiring the existing bonds, and issuing therefor new bonds, the basis of the plan being that the property of the existing Gulf Company should be sold in the foreclosure proceeding, purchased by the committee, and a successor company organized, to which the property so purchased should be conveyed, together with the stock and bonds of the Dock Company and the Belt Company. If sufficient of the stock and bonds of those companies should be deposited with the committee, in exchange for bonds and stock of the new company to be organized, then those properties to be acquired. By that plan it was said the following results would be obtained: the new company to be organized would own the property of the Gulf Company and also the bonds
1173 and capital stock of the Belt and Dock Companies, and thereby all three properties would be under one corporate ownership, management and control. Said stock and bonds so purchased of the Belt and Dock Companies to be pledged under the mortgage to be given by the company to be organized for the payment of (1) floating debts and existing car trust obligations; (2) adequate provision for working capital for future acquirements. It was also stated that it was contemplated that said reorganized or new company should issue $30,000,000 fifty-year three per cent gold bonds, $18,000,000 of the bonds to be used for the conversion of the bonds of the Gulf Company, $1,330,000 for the conversion of the old or existing bonds of the Belt Company, $817,500 new bonds for the old or existing bonds of the Dock Company, $3,000,000 of the new bonds to be sold for the necessary cash requirements of the new company, $3,802,500 to be reserved for the future requirements of the new company, $3,050,000 of new bonds to be used in acquir-

ing existing outstanding bonds of some other companies that were subsidiary companies of the Belt Company.

It was proposed in the plan that the holders of securities of the Gulf Company were to receive for their bonds seventy-five per cent in new bonds and fifty per cent in new preferred stock; the stockholders of the Gulf Company, upon paying $10.00 per share, were to receive one share of new common stock for each share of the old stock.

The bondholders of the Dock Company were to receive for their to receive 133 per cent of new bonds and 25 per cent in new preferred stock; the stockholders of the Belt Company were to receive for each share one-quarter of a share of new preferred stock and three-quarters of a share of new common stock.

The bondholders of the Dock Company were to receive for their old bonds fifty per cent in new bonds, fifty per cent in new preferred stock, and fifty per cent in new common stock; the stockholders of the Dock Company, for each share of their stock, were to receive three-quarters of one share of new common stock.

The stock and securities of the respective companies were largely deposited according to the committee's plan. A decree was entered in the foreclosure against the Gulf Company on February 5, 1900, sale had and the property thereunder acquired by the Southern Company on March 19, 1900, the date on which it was organized and incorporated.

The Southern Company issued a new mortgage and bonds, also its stock, according to the terms of the reorganization plan, and such bonds and stock were exchanged for the bonds and stock of the old companies, the holders of which had deposited their bonds and stock in accordance with the proposed plan. The Trust Company
1174 accepted the plan and deposited its stock and bonds which it held of the Belt Company and received in new bonds and stock its proportionate amount under the reorganization agreement.

Although the Southern Company had acquired practically all of the bonds and stock of the Belt Company in exchange for its new bonds and stock, in accordance with the reorganization plan and agreement, and acquired possession and control of the property of the Belt Company, the Provident Company, Trustee in the Belt mortgage, filed its bill of foreclosure and asked for the appointment of receivers. The Master's finding in this regard was as follows: "On September 6, 1900, nearly six months after the incorporation of the Southern Company, the receivers were appointed for the Belt Company, at the instance of the Southern, and through the Provident Company, as Trustee, which filed the foreclosure bill; the foreclosure decree being made on November 6th, 1901, and the sale on December 31, 1901, to the Southern Company." The Trust Company was a party to that foreclosure suit and before the decree was entered asked leave to file an amended supplemental answer, stating in effect that the reorganization plan had been promulgated in the interests of creditors of the Belt Company as well as bondholders and stockholders, and that it had been intended to pay the Trust Company's debt, the reorganization committee having often promised to pay it

until about the time of the institution of the foreclosure suit, and that the purpose of such suit was to vest in the Southern Company title to all the Belt Company's property, free from the payment of that company's floating debt, which was a fraudulent purpose. It asked that the Southern Company be made a party to the cause, &c. The court denied the leave to file such answer but provided, however, as a condition of the denial that complainant (Provident Company) should, within five days thereafter, file a stipulation that the decree should be without prejudice to the claim of the Trust Company. The last paragraph of the foreclosure decree was as follows:

"This decree is entered on the express condition to which the complainant has assented, that it shall be without prejudice to and shall not bar the right of the Guardian Trust Company, or its receiver, to plead and insist in any litigation now pending or hereafter brought, that the Kansas City Southern Railway Company by virtue of the manner in which it was organized, or for any other reason, is legally or equitably liable for and bound to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company, either in full or to pay them to the extent of the value of any property heretofore acquired by it from the Kansas City Suburban Belt Railroad Company, or that may hereafter be acquired by it from said company by virtue of these foreclosure proceedings, and without prejudice to the right of said Guardian Trust Company or its receivers, to plead and insist, in any pending litigation or litigation hereafter brought, that the members of the reorganization committee of the Kansas City,
1175 Pittsburg & Gulf Railroad Company assumed to pay and are liable to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company existing at the time the alleged reorganization was undertaken."

On September 6, 1900, the Cambria Company filed a creditor's bill against the Belt Company, Trust Company and other companies, the object and purposes of which was to recover certain securities belonging to the Belt Company, which had been deposited with the Trust Company as security for the Belt Company's indebtedness to the Trust Company, claiming in its bill that the Belt Company was not in fact indebted to the Trust Company, and made an application for the appointment of a receiver, and on that day receivers were appointed for the Belt Company upon the joint application of the Cambria Company and the Provident Company complainant in the foreclosure suit against the Belt Company.

In the suit brought by the Cambria Company issues were joined, the receivers appointed for the Belt Company filed a cross-bill against the Trust Company, denying indebtedness upon the part of the Belt Company to the Trust Company, but claiming that the Trust Company was in fact a debtor of the Belt Company. The case was, in November, 1900, referred to Hon. Shannon C. Douglass, as Special Master, to take the testimony &c. The hearing proceeded before the Master and after much testimony had been taken an order was made by the court in February, 1905, pursuant to a stipulation of parties, admitting the Southern Company as a party and giving it leave to file a petition of intervention, and the Southern Company filed its

petition of intervention on the 27th day of that month, claiming that the various securities held by the Trust Company to secure its indebtedness against the Belt Company were covered by the mortgage which was foreclosed against the Belt Company, and sought to recover such property by its bill of intervention.

The hearing before the Master extended over several years, upwards of 34,000 pages of testimony *was* taken, and the Master, on the 21st of May, 1910, filed his report, which comprises 381 pages of the printed record. The evidence has not been brought to this court; hence all questions of fact as found by the Master are conclusive upon the parties on this appeal.

The Master found that the evidence did not support the claim of the Cambria Company and recommended that its bill be dismissed for want of equity. The Master found upon the accounting that there was due from the Belt Company to the Trust Company the sum of $639,658.86.

The Master found fully the facts as to the reorganization plan, the acquiring by the Southern Company of the stock and bonds of the Gulf Company, Dock Company and Belt Company, the issuing of its new stock and bonds to the holders of the bonds and stock
1176 of those companies, in exchange for the bonds and stock of the respective companies held by them, as we have heretofore stated.

The Master found, as a matter of law, that the Southern Company was not liable for the debts of the Belt Company.

The Trust Company filed exceptions to the report of the Master, among other things to the finding that the Southern Company was not liable for the floating indebtedness of the Belt Company, giving as reasons therefor that that was not an issue in the case, and no finding thereon should have been made by the Master.

Various exceptions were also filed by the Central Improvement Company, one of the defendants in the action.

Subsequently, a hearing was had by the court upon the report of the Master and the exceptions thereto, the exceptions were overruled and the report of the special master was in all things approved and confirmed, and a decree entered in accordance with the findings and recommendations of the Master, from which the Trust Company and the Central Improvement Company have prosecuted their appeal.

The decree also provided that, it appearing that all costs incurred by the Cambria Company prior to November 20, 1901, had been paid by it, no further costs should be taxed against the Cambria Company, nor should any costs which had been paid by the Cambria Company be chargeable against any other parties to the action. The remaining cost were taxed by the court one-third against the Trust Company and two-thirds against the Belt Company, to be paid by the Belt Company and Southern Company.

The assignments of error relied upon in this court are:

1st. That the court erred in including in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness owing by the Belt Company to the Trust Company.

2nd. That the court erred in requiring the Central Improvement Company and its receivers to convey to the Southern Company the properties specified in the decree.

3rd. That the court erred in adjudging that one-third of the costs of this action be paid by the Trust Company.

The principal question, and the one which involves the merits of the controversy, rests upon the correctness of the finding of non-liability upon the part of the Southern Company for the debt found due from the Belt Company to the Trust Company, for, as stated by counsel for the Southern Company in their brief:

"The decision of the question of the Southern Company's liability for the debts of the Belt Company was necessary to a dis-
1177 position of the case. The defense pleaded by the Trust Company to the effect that the Southern Company had assumed or become liable for the indebtedness of the Belt Company was, if true, a perfect answer to the intervening petition. It said in substance to the Southern Company—'Even though you may have the legal or equitable title to the collateral securities or to the properties represented by them, yet they were pledged by the Belt Company to secure its indebtedness, you assumed and agreed to pay that indebtedness, and a court of equity will not award you possession of the securities until you discharge your own obligation. Any relief to you must be conditioned upon your payment of the Belt Company's indebtedness.'"

This contention that if the Southern Company had become liable for the indebtedness of the Belt Company to the Trust Company that was a perfect defense to the intervening petition of the Southern Company is sound and unanswerable, and after a careful review of the record in this case this court holds, and it decides, that the issue whether or not the Southern Company was indebted to the Trust Company for the debt of the Belt Company to the Trust Company was a material and decisive issue between the Trust Company and the Southern Company in this case which it was the duty of the master and the court below to consider and decide. The remarks of this court in Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43, 96 C. C. A. 285, that "The liability of the Southern Company to pay the debts which the Trust Company alleges in the actions at law it has promised to pay is not an issue and cannot be determined in this suit in equity", upon which counsel rely, must be construed, as must all opinions of the courts, in the light of the facts and the issue then in hand. The issue before the court in that case was whether the causes of action in the state court were so identical with the cause of action theretofore pending in the court below that an injunction should be issued to stay the prosecutions of the actions in the state court. This court held that the suit in the Circuit Court was in equity, that it related to the title and ownership and the right to a conveyance of certain specific property, while the actions at law brought by the Trust Company against the Southern Company in the state court were purely in personam to recover the alleged debts of the Southern Company, that in the suit in equity the same relief was not sought as in the actions at law and that the

prosecutions of the actions at law in the state court constituted no interference with the suit in the court below. There was nothing in the decision in that case in conflict with the conclusion which has now been reached.

The master and the court below decided that the Southern Company was not indebted to the Trust Company for the indebtedness of the Belt Company to the latter. The Trust Company requests this court to review that decision upon the report of the
1178 master and contends that as a matter of law the Southern Company is so indebted upon the facts which the master finds. The Southern Company objects to this review on the ground that the only exception to the master's conclusion here and the only assignment of error in the affirmance thereof by the court below was placed upon the ground that that issue was not judicable in this suit. But an appeal in a suit in equity invokes a trial de novo in the appellate court and entitles the appellant to a just decree. Dowagiac Mfg. Co. v. Lochren, 143 Fed. 211; Blease v. Garlington, 92 U. S. 1, 8, and under Rule 11 of this court a plain error not assigned may be, and ought to be, considered where the failure to consider it would result in a great injustice. United States v. Bernays, 158 Fed. 792; New York Life Ins. Co. v. Rankin, 162 Fed. 103, 108; United States v. Tennessee etc. R. R. Co., 176 U. S. 242, 256. And in view of the facts that the issue here has been long and persistently contested below, that exception was taken and assignment of error made regarding it, though upon an erroneous ground, that both parties have prepared exhaustive briefs upon the question which the Trust Company asks us to review, that neither party can be taken by surprise and that a failure to review the legal conclusion below would result in an unjust final adjudication of the issue under consideration, we are constrained to consider and decide it.

It is claimed that the Southern Company is liable for the debt of the Belt Company to the Trust Company because it knowingly acquired the property of the Belt Company in the execution of a scheme to exclude the Trust Company's unsecured claim against the Belt Company for $639,658.86 from the benefit of the Belt Company's property and to apply that property by an exchange of stock and bonds and a mere formal and not actual foreclosure sale to the benefit of the stockholders of the Belt Company.

In Louisville Trust Co. v. Louisville &c. Ry., 174 U. S. 674, which was an action brought by a creditor to set aside a sale under a foreclosure as being in fraud of its rights, for the reason that such foreclosure was had in the interests of the stockholders as well as the bondholders, Mr. Justice Brewer, rendering the opinion of the court, said:

"The questions in this case are novel and important. They arise on the foreclosure of certain railroad mortgages, and suggest to what extent the same rules and considerations obtain in them as in the foreclosure of ordinary mortgages upon real estate. It goes without saying that the proceeding in the foreclosure of an ordinary mortgage on real estate is simple and speedy. No one need be considered except the mortgagor and mortgagee, and if they concur in the dis-

position of the foreclosure it is sufficient, and the court may properly enter a decree in accordance therewith. * * *

1179 "But this court long since recognized the fact that in the present condition of things (and all judicial proceedings must be adjusted to the facts as they are) other inquiries arise in railroad foreclosure proceedings accompanied by a receivership than the mere matter of the amount of the debt of the mortgagor to the mortgagee. We have held in a series of cases that the peculiar character and conditions of railroad property not only justify but compel a court entertaining foreclosure proceedings to give to certain limited unsecured claims a priority over the debts secured by the mortgage. It is needless to refer to the many cases in which this doctrine has been affirmed. It may be, and has often been said, that this ruling implies somewhat of a departure from the apparent priority of right secured by a contract obligation duly made and duly recorded, and yet this court, recognizing that a railroad is not simply private property, but also an instrument of public service, has ruled that the character of its business, and the public obligations which it assumes, justify a limited displacement of contract and recorded liens in behalf of temporary and unsecured creditors. * * *

"We notice, again, that railroad mortgages, or trust deeds, are ordinarily so large in amount that on foreclosure thereof only the mortgagees, or their representatives, can be considered as probable purchasers. * * *

"We must, therefore, recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor or mortgagor. * * * Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor, (that is, bondholder and stockholder,) we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

1180 A "transfer of property by a debtor with a reservation of an interest therein to himself" is always voidable by his creditors as against a debtor and all claiming under him with notice of his act, and a transfer by stockholders of a corporation of its property with a preservation of an interest in themselves is equally voidable against all who take the property with notice of their act. In Montgomery-Web Co. v. Dienelt, 133 Pa. St. 585, 596, 19 Atl. 430, a new corporation was formed and part of its stock was issued to the stockholders and a part of it was issued to the creditors of an old corporation for their holdings, and all the property of the old corporation was transferred to the new corporation. A single creditor of the old corporation assailed the transaction. The Supreme Court of Pennsylvania said:

"Under such circumstances they (the stockholders) were bound to take notice of the nature of the transaction and to know that equity would still regard the property as a trust for the payment of existing debts, and would follow it on behalf of the creditors until it should get into the hands of innocent purchasers for value. Such purchasers they were not. The old stockholders were not purchasers for value at all and the new stockholders were not innocent, for they knew, or were bound to take notice of the taint in their co-adventurers' title. We are of the opinion that as to the stockholders in the Aronia Company, this was a transfer of property by a debtor with the retention of an interest in himself within the settled rule of law that makes such transfers void as against creditors, and that, as to the Aronia creditors who became new stockholders in the Montgomery Company, they took with such notice as prevents them from claiming now as innocent holders for value against the appellants as execution creditors of the old corporation. It is not worth while to cite authorities for these principles, they are settled and familiar."

In Chicago, Rock Island & Pacific Ry. Co. v. Howard 74 U. S. 392, 409, the leading case upon this subject, where a foreclosure sale of the property of a corporation was made pursuant to an arrangement whereby 84 per cent of the purchase price was to go to its bondholders and 16 per cent to its stockholders, the Supreme Court said: "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation and recognizes the rights of creditors to pursue it into whatsoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the properties until the debts of the corporation are paid." The facts and the ruling in that case are thus stated in the syllabus:

"A sale under foreclosure of mortgage of an insolvent railroad company, expedited and made advantageous by an arrangement between the mortgagees and the stockholders, under which
1181 arrangement the mortgagees, according to their order, got more or less of their debt (100 to 30 per cent), and the stockholders of the company the residue of the proceeds—a fraction (16 per cent.) of the par of their stock—held fraudulent as against

general creditors not secured by the mortgage, and this although the road was mortgaged far above its value, and on sale in open market did not bring near enough to pay even the mortgage debts; so that in fact, if there had been an ordinary foreclosure, and one independent of all arrangement between the mortgagees and the stockholders, the whole proceeds of sale would have belonged to the mortgagees."

In Central of Georgia Ry. Co. v. Paul, 93 Fed. 878, 884, the Circuit Court of Appeals of the Fifth Circuit said:

"There is no substantial dispute that the appellee, Mary F. Paul, was and is a creditor of the Central Railroad & Banking Company of Georgia, and the question is whether the Central of Georgia Railway Company is liable for her demand. The case shows that the sale of the railway properties under the foreclosure at the suit of the Central Trust Company, the sale of the collateral securing the floating debt claims, and the sale of the 'overflow property,' all were in pursuance of a reorganization plan, which was carried out, and resulted in the transfer of all the property and assets of the Central Railroad & Banking Company of Georgia to the Central of Georgia Railway Company; and the active participating reorganizers were not only the creditors of the Central Railroad & Banking Company of Georgia, secured by mortgage and otherwise, but included as well the stockholders of said company; so that, for the purposes of the present case, it is an indisputable fact that, notwithstanding all the sales of property and other transactions in liquidation, the stockholders of the Central Railroad & Banking Company of Georgia retained their interest and rights, and by virtue thereof are now either stockholders of the new organization, Central of Georgia Railway Company, or are otherwise provided for, and that the new company has acquired, and now holds, all the former property and assets of the old company. It would seem from this state of facts that the appellee has the right to look to the new company for the payment of her claim."

Indeed, it is settled law, that "A reorganization of an insolvent railroad company by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization, and by consent of the old company and its stockholders is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid and renders the new company liable for the claims of such creditors." Northern Pacific Ry. Co. v. Boyd, 177 Fed. 804; Luedecke v. Des Moines Cabinet
1182 Co., 140 Ia. 223, 118 N. W. 456; Hurd v. New York & Commercial Steam Laundry Co., 60 N. E. 327.

The case under consideration falls directly under this rule of law. A scheme was devised and proposed for the benefit of the stockholders and bondholders of the Belt Company, the Gulf Company, and the Dock Company, as the reorganization agreement reads: "For the reorganization of the Kansas City, Pittsburg & Gulf R. R. Co., and its property, and also, if necessary, for the reorganiza-

tion of the Kansas City Suburban Belt Railroad Co. and the Port Arthur Channel & Dock Company and their properties, and for the consolidation of said corporations, if such consolidation can be lawfully made, and is found to be practicable either with or without foreclosure of either or all of said properties, or by means of the acquisition of the stock or other securities of either or all of said corporations, or in any other manner that may be deemed by said committee to be most practicable and feasible." That scheme was accepted, approved and executed by the stockholders and bondholders of the Belt Company and by the Southern Company for their benefit to the exclusion of the Trust Company's unsecured claim from all benefit from the property of its debtor, the Belt Company. A new company, the Southern Company, was organized, the stockholders and bondholders of the old company, the Belt Company, in exchange for their stock and bonds were offered and took an interest in the new company, the stockholders took for their $4,700,000.00 of stock in the old company about $1,857,000.00 of the preferred stock and about $3,562,500.00 of the common stock of the Southern Company, in all about $5,419,500.00 in stock at its par value, and the bondholders took about $1,330,000.00 of the preferred stock and $250,000.00 of the bonds of the Southern Company, in all about $1,580,000.00 at their par value, for their $1,000,000.00 of bonds of the old Belt Company and after the new company had obtained in this way more than 89 per cent of the bonds and more than 97 per cent of the stock of the old company it purchased the property of the old company at a formal, but not an actual, foreclosure sale, made pursuant to this plan of reorganization at the instigation of the Southern Company as holder of 89 per cent of the bonds of the Belt Company and with its consent as holder of more than 97 per cent of the stock of the Belt Company. And what was the actual effect of the entire performance? The property of the Belt Company was transferred to a new company and its stockholders preserved for themselves an interest in that property. Before the transaction they had common stock of the Belt Company of the par value of $4,700,000.00 and the Belt Company owned its property, after the transaction the stockholders had preferred stock of the Southern Company of the par value of about $1,857,000.00 and common stock of that company of the par value of about $3,562,500.00 and the Southern Company owned the property of the Belt Company. But a sale or transfer by
1183 stockholders of the property of their corporation in which they preserve an interest, whether that sale or transfer be by deed, by mortgage, by judgment, by foreclosure sale, or by any other means, is fraudulent and voidable against the unsecured creditors of their old corporation and a purchaser who takes and converts such property to its own use with knowledge of the facts, becomes legally liable to pay the unsecured debts of the old corporation, at least to the extent of the value of the property so taken and converted. The value of the property of the Belt Company so taken and converted by the Southern Company was many times the amount of the Belt Company's debt to the Trust Company. The

conclusion is irresistible and the judgment of this court is that the Southern Company which, pursuant to this scheme and in its execution, purchased the Belt Company's property at the formal foreclosure sale with full knowledge of the scheme and of the fact that by its execution the stockholders of the Belt Company were appropriating to themselves the benefits of the property of the Belt Company which in law and in equity belonged to the unsecured creditors of that company, became legally liable to pay and is indebted to the Trust Company to the amount of the debt of the Belt Company to the Trust Company in the sum of $639,658.86 and interest from June 22, 1910, on $473,723.59 at the rate of 6 per cent per annum, on $46,565.76 at the rate of 7 per cent per annum and on $119,369.51 at the rate of 8 per cent per annum.

The contention of the Southern Company that the Trust Company is estopped from enforcing and collecting this claim based on the unsecured debt of the Belt Company to it, because, for the bonds and stock of the Belt Company, which is owned, it received bonds and stock of the Southern Company under the plan of reorganization, is untenable. The collection of this claim is not an avoidance, it is an enforcement and execution of the scheme of reorganization and of the trust in favor of the creditors of the belt Company, which that scheme created. The published plan of reorganization was plenary notice under the law to the Southern Company, and to all who became interested under that plan, that purchasers of property of the companies foreclosed pursuant to it took that property in trust for the unsecured creditors of those companies. That plan expressly set apart $475,000.00 to be applied to the payment of the floating debts of those companies, vested in the committee of reorganization discretionary power to pay such of those floating debts as it saw fit to discharge and that it actually expended $1,164,172.56 in paying such debts. The committee had full authority to pay this claim of the Trust Company. The Trust Company may well have supposed that its claim, as well as the claims of other creditors of these foreclosed companies, which were paid to the amount of over a million dollars, would be paid by the committee. The Trust Company never represented that it
1184 would not, but persistently asserted that it would enforce its demand, and the collection of it from the Southern Company is neither barred by estoppel nor inconsistent with the previous position and action of the Trust Company.

Another objection to the enforcement of this claim is that the Trust Company was guilty of laches. There is nothing in the record to indicate that the Southern Company did not intend to pay the debts of the Belt Company until the foreclosure proceeding was brought by the Provident Company. As stated, the Trust Company interposed its claim in that action and the decree provided that its rights respecting the enforcement of such claim should remain unaffected. When the Southern Company filed its petition of intervention in the case brought by the Cambria Company, the Trust Company promptly asserted in defense thereto the liability of the Southern Company. The Trust Company also brought an action

in the state court against the Southern Company for a part of its claim, for the reasons which it had before asserted. The Southern Company filed its supplemental bill and obtained an injunction against the prosecution of the action in the state court, which was reversed by this court. Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337. The Trust Company then brought a second action in the state court for another portion of its claim. The Southern Company moved the state court to stay the actions, which motion was denied. It then filed another bill for an injunction against the Trust Company to prevent the prosecution of these actions, and the circuit court granted a preliminary injunction, which was reversed by this court. Guardian Trust Co. v. Kansas City Southern Ry Co., 171 Fed. 43. Under these circumstances, the plea of laches is unfounded.

Again, the issue of the liability of the Southern Company to the Trust Company for the debt of the Belt Company to it came into this case as an equitable defense to the intervening petition of the Southern Company of February 27, 1905, wherein it sought to appropriate to itself property of the Central Improvement Company, 1120/1407ths of the shares of the stock of which company had been pledged to the Trust Company by the Belt Company to secure $203,900.00 of the debt of the latter company to the former. The Southern Company endeavored to appropriate this property of the Central Company under the after-acquired clauses of the old foreclosed mortgages of the Belt Company, the Air Line Company and the Gulf Company. The Trust Company answered (1) that the Southern Company owed it this debt, that he who seeks equity must do equity, that the Southern Company was entitled to no relief until it paid this debt, and (2) that by virtue of the pledged stock of the Central Company to secure the payment of the debt of the Belt Company its equitable right to the property of that company was superior to that of the Southern Company. The Trust Company was
1185 guilty of no fatal laches here because it held the majority of the stock of the Central Company and that company held the title to the property which the Southern Company sought to take, so that the Trust Company had a perfect legal right by virtue of its stock to appropriate the property to the payment of its debt and it needed no affirmative relief, and a court of chancery will, and it is its duty to, condition its grant of relief to a complainant with the enforcement of any just claim of the defendant which the latter ought in equity and good conscience to pay, although on account of the statute of limitations, or for some other reason, the defendant might not be able affirmatively to enforce it. Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co., 126 Fed., 46, 51, 60 C. C. A. 588, 593; Pomeroy's Eq. Jur. Secs. 386, 393, note 4; Brent v. Bank of Washington, 10 Pet. 596; De Walsh v. Braman, 160 Ill. 415, 43 N. E. 597, 600; Farmers' Bank v. Englehart, 6 Gill., 50, 57; Fievel v. Zuber, 67 Tex. 279, 280, 3 S. W. 273; Booth v. Hoskins, 75 Cal. 271, 275, 276, 17 Pac. 225; De Cazara v. Orena, 80 Cal. 132, 134, 22 Pac. 74; Hall v. Arnott, 80 Cal. 348, 354, 22 Pac. 200; Grant v. Burr, 54 Cal. 298, 301; McKeen v. James (Tex. Civ. App.) 23 S.

W. 460, 464; Rodriguez v. Haynes, 76 Tex. 225, 232, 13 S. W. 296; Hartranft's Estate, 153 Pa. 530, 533, 26 Atl. 104; 19 Am. & Eng. Enc. of Law (2d Ed.) pp. 177, 178; Dimick v. Grand Island Banking Co., 37 Neb. 394, 399, 55 N. W. 1066; Gage v. Riverside Trust Co., (C. C.) 86 Fed. 984, 998; Whitmore v. Savings Union, 50 Cal. 145, 150; Spect v. Spect, 88 Cal. 437, 444, 26 Pac. 203, 13 L. R. A. 137.

It is insisted upon the part of the Southern Company that the reference to a Master was by consent of parties, and hence, that the findings of the Master are not subject to review. We do not think the record supports the statement that the Master was appointed by consent of parties. As before stated, the Cambria Company filed its bill September 6, 1900, and the record shows that, on the 7th of November, defendant having answered, the case was referred by the court upon its own motion to Shannon C. Douglass. On February 27, 1905, a stipulation was filed by the parties to the effect that the Southern Railway Company might become a party to the action either by joint complaint or by bill of intervention, as it might elect, and file its bill, asserting its claim, on or before February 25, 1905; that the adverse party should have ten days thereafter in which to plead and that the testimony theretofore taken should be applicable as evidence in support of and in resistance of the Southern Company's claim; "that such orders of court as may be necessary for the purpose may be entered carrying into effect this stipulation." In accordance with this stipulation, the court made an order, permitting the Southern Company to file its bill of intervention, and gave the adverse party ten days in which to plead to the same, referring the issues to Shannon C. Douglass to take the testimony
1186 thereon and report, &c. This stipulation was not a stipulation consenting to the appointment of a Master but was simply one which authorized the court to make the necessary orders relative to permitting the Southern Company to intervene, and fixing the time within which the parties should plead thereto and an order that the testimony theretofore taken should be treated and considered as testimony relative to the issues made by the Southern Company's bill of intervention. The reference to the Master was by the court upon its own motion. The court would naturally refer that issue to the Master who had theretofore been appointed by the court on its own motion to hear the case. Subsequently, on the 1st of May, 1905, the parties stipulated that the Southern Company might amend its intervening petition, setting up, in addition to the matters contained in its intervening petition on file, a claim against the Trust Company for an alleged breach of trust, and consented in the stipulation that such new issue should be referred to Shannon C. Douglass, the Special Master, and the court, pursuant to the stipulation, made an order permitting the Southern Company to file its amended intervening petition in that respect, and referred it to Shannon C. Douglass. It is this last stipulation and this order of the court upon which the Southern Company bases its argument that the reference of the case to the Master was by consent of parties. As before stated, the main issues, and the issues involved on this appeal, had

been referred to the Master by the court upon its own motion. The stipulation that the new issue made by the amended intervening petition should be referred to the Master was a stipulation with reference to that issue, that issue was decided by the Master in favor of the Trust Company, and is not before us for review. So the case is not one where the issues involved have been heard by a master appointed by consent of the parties. Even though the original appointment of the Master had been by consent of parties, a reference under those circumstances would not preclude the court from correcting manifest errors of law made by the Master. Rule 11 of this court. United States v. Tennessee & Coosa R. R. Co., 176 U. S. 242-256; Clyatt v. United States, 197 U. S. 207, 222; United States v. Bernays, 158 Fed. 792; New York Life Ins. Co. v. Rankin, 162 Fed. 103, 108.

The Central Improvement Company has made application to dismiss its appeal. It is not very material to the disposition of this case and to the adjudication of all the rights of the parties to this suit whether the application is granted or denied because the Trust Company had such an equitable interest in the property of the Central Company by virtue of the pledge to it of 1120 out of the 1407 shares of the stock of that company issued that the Trust Company's appeal completely challenges the decree of the court with reference to that property and furnishes ample warrant for its review and reversal. The Central Company has no prop-
1187 erty of substantial value except that specified in the decree. It is a mere holding company either for the Trust Company or for the Southern Company and the determination of their respective equities necessarily determines the rights of the Central Company and the ownership of the beneficial interest in its property, and the motion to dismiss its appeal is denied.

The result is that the Southern Company is entitled to no relief in this suit unless it first pays to the Trust Company the amount of the Belt Company's debt to it and the costs of this suit because it became indebted to the Trust Company in the amount of that debt by its acquisition of the property of the Belt Company under the reorganization scheme with full knowledge that the stockholders of the Belt Company thereby preserved for themselves an interest in that property to the exclusion of the Trust Company, a creditor of that corporation.

Moreover, if the Southern Company were not equitably estopped from recovering the property of the Central Company by its indebtedness to the Trust Company, nevertheless, equity would require it to pay to that company the value of the latter's 1120 pledged shares of the stock of the Central Company before it would permit it to take the property of the latter company and thus to destroy the value of its stock through its claim as a purchaser at foreclosure sales under the after-acquired clauses of the old mortgages of the Gulf Company, the Air Line Company and the Belt Company. The property in controversy is the remnant of numerous pieces of real estate to which the Central Company took title and for the purchase prices of which it issued its stock at par to the Gulf Company, the

Belt Company and the Air Line Company respectively, which companies paid the par value of that stock either to it or to the vendors from whom the property was bought. The result was that the Central Company, a corporation, owned and held the property in trust to pay the stockholders the par value of its stock which was the purchase price of the property. In this state of the case the Belt Company, which acquired 1120 of the 1407 shares of the stock thus issued by the Central Company, pledged this stock in the year 1899 to the Trust Company to secure the payment of $203,900.00 of its debt to that company and the title and rights of the parties stood thus unquestioned from 1899 until 1905, when the Southern Company filed its intervening petition in this case. It asserted that the Central Company held this property in trust for the mortgagor companies and that the after-acquired clauses of their mortgages carried it to itself, the purchaser at the foreclosure sales thereunder. Conceding that the property was appurtenant to the railroad and that the terms of the after-acquired clauses were broad enough to include it, how can this claim of the Southern Company be sustained. The after-acquired clause of a mortgage attaches to the interest acquired by the mortgagor only and it is always sub-
1188 ject and inferior to junior liens, incumbrances and equities under which the property comes to the mortgagor. Farmers' Loan & Trust Co. v. Denver L. & G. R. Co., 126 Fed. 46, 49, 60 C. C. A. 588, 591; United States v. New Orleans R. R. Co., 12 Wall. 362; Central Trust Co. v. Kneeland, 138 U. S. 414, 423. In a simple case the justice and the application of this rule is plain. A railroad company makes a mortgage of its property with an after-acquired clause. It subsequently purchases a piece of property and gives its note and mortgage for the purchase price and the vendor sells or pledges the note to a third person to secure his debt. The mortgagee of the railroad may not deprive the pledgee of the note of the property which secures it under the after-acquired clause of his mortgage until he pays the junior note and mortgage and this because he has given nothing for this property while the junior mortgagee and his pledgee have parted with value for their security upon it. In the case in hand, the Central Company acquired the property here in dispute for its liability to pay to its stockholders the par value of its stock and it held the property in trust to secure the payment to its stock-holders of that liability. The mortgagees under the railroad mortgages and the Southern Company, the purchaser thereunder knew these facts. They parted with no value on account of this property and a court of conscience may not permit them to deprive the stockholders of the Central Company, who have really paid for it, of the trust property which the Central Company holds to reimburse them unless the court first requires them to pay to the holders of the stock its actual value.

The fact that the mortgagor companies originally took and held the stock of the Central Company before the Belt Company pledged it to the Trust Company, has not been overlooked. That fact, however, only clearly fixes the legal rights and equities of the parties, fixes the title to the land in the Central Company and estops the

mortgagor companies and all claiming under them from denying that the stock which they took and sold or pledged constituted the primary liability of the Central Company and the primary equity in the property it holds as against the mortgagees of the railroad companies and the purchaser thereunder. Watson v. Bonfils, 116 Fed. 157, 163, 166, 167, 53 C. C. A. 535, 541, 544, 545.

The stock of the Central Company was not the property of that company. It was a liability of that company. Conceding that the after-acquired clauses of the mortgages conveyed the Central Company's interest in this land subject to its primary trust to pay this liability they did not convey its liability, or the stock which represented it. Humphreys v. McKissock, 140 U. S. 304, 314. The equity of the stockholders as against the Southern Company which took whatever it has with full notice of all the facts in this case, is the same that it would have been if the liability of the Central Company, now represented by its stock for the purchase price of
1189 the property, had been represented by its promissory notes and a mortgage upon this land to secure them and they had been pledged by their owners to secure their debt to the Trust Company. The Trust Company, which holds 1120 shares of the stock of the Central Company to secure a debt to it of more than $200,000.00, has an equitable interest in the land of the Central Company superior to that of the Southern Company and the latter is entitled to no relief with reference to this property until it pays to the Trust Company the value of that stock.

The controlling equities of this case require that the decree below should be so modified, among other things, that it will adjudge that the Southern Company is indebted to the Trust Company in the amount which the Belt Company owes it, that is to say, in the sum of $639,658.86 and interest thereon from the date of the original decree, and that no relief be granted to the Southern Company unless that debt is paid.

Three of the stockholders of the Trust Company, at whose instance the question of the liability of the Southern Company was pressed to a decision in this court by the Trust Company, and its counsel, have filed a petition for leave to present the suggestion, that, in case this court finds, as it has found, that the Southern Company owes this debt, a decree should be rendered against it in this suit to the effect that the Trust Company recover this amount from the Southern Company and have execution therefor. There is no prayer for this specific relief in any of the pleadings of the Trust Company, but it is relief to which, under the law and upon the facts now found, the Trust Company is clearly entitled from this, or some other court, and in its answer to one of the numerous bills filed in this case it prayed for such other and further relief as should seem meet and just in the premises. The facts that the Southern Company voluntarily intervened in this suit in 1905 and sought to take from the Trust Company the security for its claim furnished by the stock of the Central Company and by a large amount of other stocks, bonds and property, to which the Southern Company was not entitled, that this attempt of the Southern Com-

pany called into this suit the Trust Company's claim that the Southern Company owed it the amount of the debt of the Belt Company, that the Trust Company tendered that issue in actions at law which it brought as long ago as 1905 and 1906, against the Southern Company in a state court to recover from it this very indebtedness, that the Southern Company delayed and prevented the trial of that issue in those actions at law by means of two successive injunctions which it obtained from the court below, on the ground that this issue was pending in this suit, injunctions which on appeal this court promptly dissolved, Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337, 76 C. C. A. 615; Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43, 96 C. C. A. 285, that
1190 this suit has been thoroughly litigated by all parties interested in it for more than six years, that tens of thousands of pages of evidence have been taken in this litigation and that further litigation in the state court over this issue, although it becomes res adjudicata by this decision, may by appeal or otherwise result in further delay, cause this suggestion of these stockholders to challenge serious consideration. It seems that if by the amendment of any of the pleadings of the Trust Company, or by the filing by it of a cross-bill, or a supplemental bill, or without them, such a decree as suggested may be lawfully rendered, justice and equity would require that that course should be pursued. That three stockholders are accordingly permitted to file their suggestion and leave is granted to the Trust Company, the Southern Company, and to any other party to this suit, to make such motions and present such arguments and authorities, either orally or in writing, to this court at St. Louis on January 10, 1913, regarding this suggestion, as to them shall seem meet. The issue presented by this suggestion is reserved for later consideration. But whatever may be the result of that consideration, the decree below must be reversed and this case must be remanded to the court below with instructions to render a decree which shall contain the first five paragraphs of the decree below, shall adjudge that the equitable claim of the Trust Company, by virtue of the pledge to it of 1120 shares of the stock of the Central Company, in the property of that company described in the sixth paragraph of that decree, is superior to the claim and equity of the Southern Company therein, that the Southern Company is indebted to the Trust Company in the amount of the indebtedness of the Belt Company to that company, that is to say, in the sum of $639,658.86 and interest from the date of the original decree below, on $473,723.59 at 6 per cent per annum, on $46,565.76 at 7 per cent per annum and on $119,369.51 at 8 per cent per annum, that the Southern Company must pay this debt as a condition of obtaining any relief in this suit, that the ninth, tenth, eleventh and thirteenth paragraphs of the original decree be again adjudged and that the Trust Company recover its entire costs of the Southern Company and the Cambria Company, and that the share of such costs as between themselves, but not as against the Trust Company, that shall be paid by the Cambria Company and the Southern Company shall be determined by the court below as to it may seem just and equitable.

Filed October 22, 1912.

1191 (*Order Suspending Entry of Decree, etc., and Denying Motion of Central Improvement Co. for Leave to Dismiss Its Appeal.*)

September Term, 1912.

TUESDAY, October 22, 1912.

In the above entitled causes this Court having this day filed its opinion directing a reversal of the decree below with a remand of the cases for further proceedings, it is now here ordered that the entry of a decree in this Court, be, and the same is hereby, suspended and withheld until the "Suggestions" by Edward A. Shedd, et al., Petitioners, as to the form of the final decree to be entered in the Court below, shall be heard and determined as hereinafter provided, or until the further order of this Court, and full jurisdiction of these causes is hereby retained for all purposes.

It is further ordered and adjudged and leave be, and the same is hereby, granted to Edward A. Shedd, et al., Petitioners, to forthwith file their "Suggestions" as to the form of the final decree to be entered in the Court below, and that said "Suggestions" be set down for a hearing before this Court at St. Louis, Missouri, on the 10th day of January, 1913.

Leave is hereby granted to the Kansas City Southern Railway Company, to the Guardian Trust Company, or to any other party to this suit, to file such motions and to present such authorities, either orally or in writing, on or before the above named date of hearing, regarding the said "Suggestions" as to them may be deemed advisable.

It is further ordered and adjudged that the motion of the Central Improvement Company for leave to dismiss its appeal herein, be, and the same is hereby, denied.

October 22, 1912.

1192 (*Motion of Edward A. Shedd et al. for Leave to File Suggestions as to Further Directions to be Embraced in Decree of Reversal.*)

And now come Edward A. and Charles B. Shedd and Robert H. Law, and present to the court their petition entitled "Petition of Edward A. Shedd and Others for Leave to File Suggestions as to Further Directions in Reversal Order of Judgment to be entered herein", and move the Court for leave to file the same, and to have the subject-matter thereof considered along with other questions in said cause now reserved for hearing upon the arguments to be had and made on January 10, 1913, or at such other time and in such manner as the Court may order.

NEWEL H. CLAPP,
ENOCH J. PRICE,
HARRY S. MECARTNEY,
Counsel for Edward A. and Charles B. Shedd and Robert H. Law.

Dated December 21, 1912.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Dec. 21, 1912.

(Proof of Service of Motion of Shedd et al. for Leave to File Further Suggestions to be Embraced in Decree.)

Notice.

To Messrs. Samuel Untermyer and Samuel W. Moore, Counsel for Kansas City S. Ry. Co. and Central Imp. Co.:
To Frank Hagerman, Esq., Counsel for Cambria Steel Co.:
To Messrs. Gates & English and D. J. Haff, Counsel for Guardian Trust Co.:

You are hereby notified that the undersigned, as counsel for Edward A. Shedd, et al., have this day presented to the U. S. Circuit Court of Appeals for the Eighth Circuit, Honorable Walter H. Sanborn, Judge Presiding, the petition of said Shedd, et al., as to the taxing of attorneys' fees and other costs in said case, and a notice of motion for leave to file the same, with a copy of which petition and motion you are herewith served; and that said Court,
1193 by said Presiding Justice, announced that the undersigned should serve copies of said petition and motion upon the various counsel in the case, together with a notice that the arguments on January 10th next in said cause would include an argument upon the merits of said petition and that all parties would have leave to file any suggestions or answer to said petition as they might deem advisable.

Dated St. Louis, December 21, 1912.

NEWELL H. CLAPP,
ENOCH J. PRICE,
HARRY S. MECARTNEY,
Counsel for Shedd et al.

Rec'd copy of above notice, motion and Petition Dec. 23rd 1912.
GATES & ENGLISH.
D. J. HAFF, AND
EDWIN C. MESERVEY.
S. W. MOORE.
FRANK HAGERMAN.

(MEMO. OF CLERK.—Attached to the foregoing notice is a copy of the motion of Shedd, et al., for leave to file Suggestions as to further Directions to be embraced in the Decree of Reversal, which is omitted here for the reason that a copy thereof precedes the foregoing notice.

Attached to the said Notice is also a copy of the Petition of Shedd, et al., for leave to file further Suggestions as to the Decree, which is omitted here for the reason that said petition was filed on January 20, 1913, and follows this Proof of Service.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Dec. 26, 1912.

1194 In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Petition of Edward A. Shedd and Others for Leave to File Suggestions as to Further Directions in Reversal Order of Judgment to Be Entered Herein.

And now come Edward A. Shedd, Charles B. Shedd and Robert H. Law, and show to the court:

That they are stockholders in the Guardian Trust Company, holding respectively the amounts of stock shown in the following schedule, viz.:

Name.	Shares.	Par value.
Edward A. Shedd and Charles B. Shedd	766	$76,600
Robert H. Law	150	15,000

1195 That the total outstanding stock of said trust company is about $2,000,000, the stockholders being over 300 in number and widely scattered.

That said company has been in liquidation of its assets for nearly twelve years last past.

That the majority of the stock of said company has been held in voting trust (of which the West End Trust Company of Philadelphia is, or was until lately, the depositary), which stock is voted at the annual meetings by the liquidator of said company, John A. Prescott, and several others, who have on formal request made in writing therefor declined to give the petitioners, Shedd and Shedd, the names of the various stockholders appearing of record on the books of said trust company.

That therefore petitioners have no opportunity to appeal to the large number of widely scattered stockholders, either those appearing upon the face of the books or those who are such stockholders through the medium of holding certificates in said voting trust.

Petitioners are advised, however, that their petition is plainly in the interest of all the stockholders of said company, and that they therefore fully and sufficiently represent a stockholders' appeal in respect to the subject matter of this petition; and do not believe

it wise or necessary to use up resources or time in mere attempts to find additional stockholders, and to get them to join herein.

These petitioners hereby ask the court for leave to file suggestions in support of the following appeal, viz.:

That this court embody in its proposed order of reversal
1196 to be entered herein in pursuance of the opinion heretofore filed—

A special finding to the effect that the said litigation commenced by said Cambria Steel Company, and prosecuted by the Kansas City Suburban Belt Railroad Company in the way of an ancillary bill filed in this cause, which issues were raised, and said suits instigated at the instance and bequest of and prosecuted in reality on behalf of the Kansas City Southern Railway Company, and that the said intervening petition filed and prosecuted by said Southern Company were each and all instituted and prosecuted without good faith, and that said entire litigation has been trivial, wanton and oppressive.

That thereupon:

1. This court direct the lower court upon entering the decree against the said Southern Company, as ordered by the opinion lately filed herein,

(1) To reserve jurisdiction to inquire as to the amount of attorney's or solicitor's fees, stenographer's fees, expert accountant's fees, and such other expenses reasonably and necessarily incurred by said Guardian Trust Company in making its defenses to such bill and ancillary bill and intervening petition and in asserting its claims herein;

(2) That upon petition or suggestion as to the same being filed in said cause by the Trust Company and upon evidence taken by affidavits or otherwise as the court may direct, the said court make a finding as to the amount of such fees, costs and expenses;

(3) That it thereupon order the same to be taxed as costs in said cause and a further decree be entered against said Cambria Company and Southern Company for said amounts respectively, in
1197 favor of said Trust Company, and that it be awarded execution therefor—the said inquiry and taxation of costs not to delay the entry of the said principal decree, as heretofore directed by said opinion, and not to stay the collection of the same in any manner.

Or,

2nd. In the alternative that the court be disposed not to enter the orders or directions herein above requested, that then the court direct specifically that the decree to be entered by the court below shall be entered without prejudice to the right of the Guardian Trust Company to commence such suit or suits at law or otherwise, as it may be advised may be proper against said Cambria and Southern Companies for such damages, expenses, costs, attorney's or solicitor's fees, stenographer's fees, expert witness' fees, and all such other expenses and damages as may have been incurred by said Trust Company in making its defenses to said bill of complaint,

the ancillary bill and intervening petition, and in asserting its claims in said cause or causes.

3rd. That in respect to the damages, costs, fees and expenses which may have occurred to, or been incurred by, said Guardian Trust Company from the issuance of the two injunctions referred to in said opinion, restraining said Trust Company from prosecuting the actions at law in the state courts of Missouri—which injunctions were respectively ordered dissolved in the cases of Guardian Trust Company v. Kansas City Southern Railway Company, 146 Fed. Rep. 337 and Guardian Trust Company v. Kansas
1198 City Southern Railway Company, 171 Fed. Rep. 43—the said decree to be entered herein in the court below shall include such costs, solicitors' fees and other expenses and damages adjudged supplemental to the main case involved in the record herein; as to such items involved in said first mentioned case the said decree shall not prejudice the right of the Guardian Trust Company to move in said cause, if the same be still pending for the purpose, to have such costs, solicitor's fees and other expenses and damages adjudged therein to the Guardian Trust Company—unless the said Southern Company and said Trust Company shall expressly elect to have the same and the amount thereof adjudicated along with other solicitors' fees, costs and damages taxed herein or in the court below in this cause.

Your petitioners, as a basis for their said appeal, refer to the facts stated in the two petitions of Messrs. Shedd and Law filed heretofore in this cause and in this court, and the affidavits filed therewith, and to the following affidavit; and they suggest as grounds therefor those which are stated in their brief annexed hereto.

Respectfully submitted,

NEWELL H. CLAPP,
ENOCH J. PRICE,
HARRY S. MECARTNEY,
Counsel for said Petitioners.

1199 STATE OF ILLINOIS,
County of Cook, ss:

Harry S. Mecartney, being duly sworn, deposes and says:

1. That he is an attorney at law.

2. That he is one of the counsel for the petitioners in the above and foregoing petition.

3. That he knows the facts stated in the said petition, and that the same are true.

4. That he was formerly counsel for the Trust Company in this cause.

5. That the present regular counsel for said Trust Company in said cause, Messrs. Gates & English, have had called to their attention from time to time the claims made by affiant as counsel for the Trust Company, to the effect that said Trust Company should be allowed its solicitor's fees and other fees and costs and expenses suffered or incurred by it in making its defenses and in asserting

its claims in said cause. That affiant made such claim in a printed report to the Trust Company, made by him immediately prior to his formal retention in said cause in December, 1904. That affiant made said claim in various reports and letters from time to time to the Executive Committee of said company. That affiant made said claim in arguments and briefs filed in said cause before the master, and that Messrs. Gates & English have had copies of said documents in their possession for more than 3 years last past.

6. That therefore affiant believes it to be proper and timely
1200 to submit said claim for fees, expenses and damages in the name of the above petitioners and on behalf of said Trust Company and all of its stockholders.

Further affiant saith not.

HARRY S. MECARTNEY.

Subscribed and sworn to before me this 20th day of December, A. D. 1912.

B. H. MONTGOMERY,
Notary Public.

* * * * * * *

(Here follows a brief in suppport of the foregoing Petition for Leave to File Further Suggestions.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 20, 1913.

1201 United States Circuit Court of Appeals, Eighth Circuit.

No. 3489.

CENTRAL IMPROVEMENT COMPANY et al., Appellants,

vs.

CAMBRIA STEEL COMPANY et al., Appellees.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,

vs.

CAMBRIA STEEL COMPANY et al., Appellees.

Suggestions of Guardian Trust Company in Respect to a Decree for a Specific Judgment Against the Kansas City Southern Railway Company.

This court, having found upon the record, that the Kansas City Southern Railway Co. owes the debt of the Belt Company to the Trust Company, reserved for consideration the question of whether a decree should be rendered against the Southern Company in this suit to the effect that the Trust Company recover this amount from

the Southern Company, and have execution therefor. The facts which would move a court of conscience to grant this relief, if it might be done under the pleadings and in accordance with the principles of equity, are stated in the court's opinion fully, fairly and tersely. The only obstacle in the way lies in the fact
1202 that the answer of the Trust Company to the intervening petition of the Southern Company, does not pray for the specific relief to which, under the findings of the court, the Trust Company is justly and equitably entitled. Precisely the same question has been repeatedly before the Supreme Court and other courts of lesser, though unquestioned authority. The settled principles of chancery practice have been found sufficient to accomplish the high aim of equity and to enable the court to do full and complete justice.

We call the court's attention to the following precedents:

In the case of Wiggins Ferry Company v. Ohio & Mississippi Railway Company, 142 U. S. 396, 35 L. Ed. 1055, the action was in equity, wherein the Ferry Company claimed under certain deeds and contracts that certain tracks, ties and switches, upon an island in the Mississippi River belonged to it, and that its rights were for reasonable compensation for the use and occupation of the island and for certain property and material removed from it.

The Supreme Court found that the Ferry Company was not entitled to the relief sought in its bill, but that it was entitled to other relief, which relief it had never asked for, but on the contrary, even after a similar finding by a master and a recommendation that such relief be granted it, had refused to act upon such recommendation. The court said:

"When the facts of the case show the plaintiff to have an equitable title for relief, this court, while it may be unable to afford such relief upon the case made by the bill, has in several instances asserted its power to remand the case to the court below for an amendment of the pleadings, and such further proceedings as may be consonant with justice. * * * Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendment to be made."

Accordingly, the decree of the court below was reversed and the case remanded for such proceedings as should be consonant with justice and in conformity with the opinion.

1203 In Goodman v. Niblack, 102 U. S. 556, 26 L. Ed. 229, the bill was fatally defective because of the lack of certain parties defendant. The court said:

"If the decree of the Circuit Court had dismissed the case without prejudice for want of proper parties, we should have been bound

to affirm it. But standing as it does now, it is a decision on the merits of the case and a bar to any other suit. It must, therefore, be reversed, and remanded to that court. If the complainant shall ask leave to amend his bill by making Cheever and Wiles, defendants, he should be permitted to do so and proceed with his case. If he does not do this, a decree should be entered dismissing the bill for want of these parties and without prejudice to any other suit on the merits."

In Crockett v. Lee, 7 Wheat, 522, 5 L. Ed. 513, the pleadings were defective in failing to controvert the location and entry of the land in dispute. Though the court expressed itself as being inclined to the opinion that the decrees on the merits were right, still rather than reverse the cases on a question of pleading, it remanded them to the Circuit Court with directions to permit the parties to amend their pleadings.

In Walden v. Bodley, 14 Peters, 156, 10 L. Ed. 398, Bodley had sought an injunction against Walden, the dispute being in respect to the title to certain lands in Kentucky. Walden in his answer stated that he had obtained judgment in an action at law against the complainants who were tenants on the land, and had been a long time delayed by the complainants from obtaining possession. The prayer of his answer was merely for a dissolution of the injunction and that the bill be dismissed, just as here; but the court found that equity and good conscience required that the value of the improvements be estimated, the rents and profits ascertained, as well as any damages that might have been done to the land, and then that an order or decree should be made that the tenants should relinquish possession to Walden. The court said:

"It is true, the answer prays merely for a dissolution of the injunction, and that the bill may be dismissed. But the courts have, by the bill, answer and evidence, the equities of the parties before them; and having jurisdiction of the main points, they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out in detail, the means which the court shall adopt in giving relief."

1204 Accordingly, the court affirmed the decrees, with the modification that the circuit court was directed to take such steps in regard to the improvements as the putting of Walden or his representatives in possession of the premises, and should be conformable to the decrees affirmed and the principles of equity.

In Thompson v. Maxwell, 95 U. S. 391, 24 L. Ed. 481, the bill was wrongly conceived and complainants were entitled to no relief under it. The court said:

"But, so far as the present decree undertook to reverse and modify the decree of September, 1866, we think it is clearly erroneous. Still, although we feel obliged to reverse the present decree, we do not think that the bill should be absolutely dismissed. And, as the whole question between the parties has been fully litigated on the proofs, it would be unreasonable to require that these should be taken over again.

Our conclusion is, that the present decree must be reversed, with the costs, and that the cause be remanded to the court below, with directions to allow the complainants to amend their bill as they shall be advised, and with liberty to the defendants to answer any new matter introduced therein; and that all the proofs in the cause shall stand as proofs upon any future hearing thereof, with the liberty to either party to take additional proofs upon any new matter that may be put in issue by the amended pleadings."

In Hardin v. Boyd, 113 U. S. 756, 28 L. Ed. 1141, the supreme court considered the propriety of the action of the lower court in permitting the complainants, at the hearing, to amend the prayer of their bill so as to obtain relief not before specifically asked. The court held this amendment to be proper, and among the reasons assigned for its ruling stated:

"The amendment had no other effect than to make the bill read just as it might have been originally prepared, consistently with the established rules of equity practice. It suggested no change or modification of its allegations, and in no just sense made a new case. * * * The amendment here did not introduce new allegations, nor make additional parties, nor incumber the record, nor increase the expenses of the litigation, nor complicate the suit, nor make new issues of fact. It simply enabled the court, upon the case made by the original bill, to give the relief which that case — plaintiff. * * * We are of the opinion, for the reason stated, that the amendment of the prayer of the bill was properly allowed."

1205 In Lewis v. Darling, 16 Howard 1, the bill was defective for want of proper parties. The supreme court said:

"As the case stands it is not too late to amend the bill by making the proper parties. The rule in equity, permitting it to be done, is this; that upon the hearing of a cause, even upon an appeal, an order may be made for the cause to stand over, with the liberty to the plaintiff to amend by adding proper parties, if it appears that the plaintiff is entitled to relief, but that it cannot be given for the want of proper parties. The equity of the plaintiff is sufficiently obvious in this case for the application of the rule. The proofs in the case show that she has a strong claim upon the appellant for the payment of the legacy for which she sues him. It is manifest that the legacy has been made by the testator a charge upon both the real and personal estate which he means to give to his daughter. It will not do then to permit it to be defeated in this suit by any mistake or unskillfulness in pleading. We shall then reverse the judgment appealed from in conformity with the first objection made against it. But we will remand the case to the circuit court for further proceedings and for the proper parties to be made."

In Union Central Life Insurance Company v. Phillips, 102 F. 19, 41 C. C. A. 263 (5th Circuit), the insurance company had wrongfully refused to deliver an insurance policy, upon which by a misapprehension as to who the beneficiaries were, a suit at law had been brought by the wrong party. The proper party, after the period of limitation prescribed in the policy, filed a bill in equity

to compel the defendant to deliver the policy and for a decree for the amount due thereon. The court found the complainant entitled to equitable relief but not that contemplated in the bill. It therefore ruled as follows:

"In the present instance the variance between the case-made by the evidence and that by the bill is such that the latter requires amendment to support the decree, and under the controlling authorities cited to take such action as will permit such amendments as the equity rules warrant, and as counsel may advise, upon such terms as may be just.

In Hubbard v. Manhattan Trust Company, 87 F. 51, 80 C. C. A. 520 (2nd Circuit), the bill was demurrable on its face for several reasons. A demurrer had been sustained below with leave to *to* complainants to file an amended bill within thirty days. No amended bill having been filed, the bill was dismissed. Yes 1206 the appellate court in view of the equities stated in the bill, reversed the case and remanded it with directions to allow complainants to amend their bill.

In Street's Federal Equity Practice, Article 1126, it is said:

"In passing on records where the proofs shows an undoubted right to certain equitable relief but where the bill appears not to be so framed as to justify the granting of exactly that relief, the supreme court will sometimes remand the cause to the lower court in order that the bill will be so amended as to permit the relief in question to be granted. The supreme court here acts upon the idea that rules of pleading are made for the attainment of substantial justice and are to be so construed as to harmonize with it, if possible. A mistaken view of one's rights or remedies, it is said, should not be permitted wholly to defeat a claim founded on principles of equity and justice."

In Jones v. Meehan, 175 U. S. 1, 44 L. Ed. 49, after the coming in of all the evidence, the defendant's solicitor moved the trial court for leave to file a supplemental answer, wherein the devolution of the title in question (an Indian title) was differently stated than in the original answer. The new contention was clearly inadmissible under the allegations of the original answer, and the trial court denied leave to file the same. The supreme court said:

"The reasons for denying the motion in this case are *noted stated in the record. They may have been the late stage of the case at which the motion was made, and a failure to satisfy the court that the facts now attempted to be set up were not known, or, at least accessible to the defendant or his solicitor long before. But as this court might, even now, if justice appeared to require it, allow an amendment of the pleadings, this part of the case may be more satisfactorily disposed of by considering what the effect of these facts would have been, had they been duly pleaded."

The early case of Estho v. Lear, 7 Peters, 129 8 L. Ed. 632, is illustrative of the distance to which the court has gone, even from its earlier days, in order to arrive at a decree which should be adequate to the rights of the parties. The case was a bill in equity to contest the will of the celebrated Polish patriot, Kosciuszko, in

which Thomas Jefferson was named as executor. Justice Marshall rendered the opinion of the court, and apparently of the court's own motion suggested the inadequacy of the record to disclose the essential facts necessary for a complete determination of the rights of the parties. He stated that "in its opinion the court thought the case was not properly prepared for a decision." It, therefore, directed that the decree be reversed and the cause remanded with liberty to the plaintiff to amend his bill.

1207

In Liverpool, etc., Co. v. Phœnix Insurance Co., 129 U. S. 397, 32 L. Ed. 788, defendant's answer was defective in failing to aver the material facts of the existence of a certain British law and its applicability to the case. Application had been made below for leave to amend the answer in this respect, which had been denied. The Supreme Court said:

"On such a question we should be slow to overrule a decision of the Circuit Court. But we are not prepared to say that if, upon full consideration, justice should appear to require it, we might not do so, and order the case to be remanded to that court with directions to allow the answer to be amended and proof of the foreign law be introduced."

In Moran v. Hagerman, 64 Fed. 499 (C. C. A. 9th), Moran Bros., owning 310 out of 600 railway bonds brought two proceedings in equity—one to foreclose and the other to declare void the residue of the bond issue. In the latter proceeding, it was ultimately held by the Supreme Court that some of the residue were valid bonds and that their holders should share in the security on an equality with Moran Bros. In the meanwhile the property had been sold in the foreclosure suit and bought in by Moran Bros. at the amount of their debt and interest. On the return of the mandate of the Supreme Court the Circuit Court merely decreed, that the other bondholders share in the proceeds of the sale on an equality with Moran Bros. At a subsequent term of the Circuit Court, one of the other bondholders moved for a modification of the decree for an ascertainment of the amounts due him and for judgment against Moran Bros. for the amount, which the Circuit Court granted. The point was made on appeal that this was relief not within the issues of the pleadings, "since the appellees were content to answer the bill denying complainant's equities and filed no cross bill asking for affirmative relief." The court said:

"The petition on the application to amend the decree brought all the necessary facts before the court and for that purpose may be deemed a pleading in the way of a supplemental answer. Under such pleadings the court had the power to decree the relief the defendants were entitled to."

1208

The relief of a judgment against the Southern Company may be rendered upon the answer, if it contains an appropriate prayer and need not be by cross-bill.

Flournoy v. Lastrapes, 25 L. Ed. 406.

In the early case of Penhallow v. Doane, 3 Dall. 54, 1 L. Ed. 507, the court expressed itself as follows:

"It is alleged, damages were not prayed for by the libel. It is sufficient answer, that there is prayer for general relief. And so little do I think of this objection, and so much of the duty of a court, unaided by formal applications, where there is a substantial one, that I am strongly induced to think, if a case proper for a specific relief was laid before a civil law court, and the direct contrary to the proper relief was prayed for, yet the court even in this case would be justified in granting the relief that might be properly afforded, if the party who had committed the mistake consented to it; without that indeed it might be improper, for no court ought to force a benefit on a party unwilling to receive it."

In Clark v. Clark, 62 N. H. 267, the proceeding was in equity to foreclose mortgages. The pleadings are not given, but it appears that the defense was that the mortgages were without consideration. The plaintiffs were in possession, but the answer apparently did not ask for the relief of a decree awarding the defendant possession. The court held the defense good, and said:

"The defendant Tilden is entitled to a decree that the mortgage debts are extinguished; and if he desires it, upon amending his answer and asking for possession of the premises, he can have a decree accordingly."

The case of Trimble v. Bank, 71 Mo. App. 467, though involving a comparatively small amount, was carefully briefed by eminent counsel and was obviously decided after careful consideration by an eminent jurist of Missouri, Judge R. E. Rombauer sitting as special judge in that case. The plaintiff, Trimble, was the owner of certain shares of stock in the defendant bank. His clerk stole the stock and forged his name to an assignment. The defendant, Wollman, a stock broker purchased the stock from the clerk and with the aid of the clerk procured the issue of a new certificate in the name of Wollman. A portion of the proceeds of this sale were recovered from the forger. These proceeds the bank attached and ultimately obtained. Wollman's claim in his pleadings was to
1209 the stock. Although made a party to the attachment proceedings for the proceeds, he had refused to claim the money, nor did he in his pleadings in the reported case make any claim to it. The appellate court found that the plaintiff, Trimble, was entitled to the stock, that the money which was recovered from the forger was in reality Wollman's and that Wollman was equitably entitled to obtain this money back from the bank, notwithstanding that he only made claim to the stock, which claim was held to be unfounded. The court said (l. c. 484):

"This is a case in equity, and if a complete disposition can be made of the entire controversy between the parties, which will do complete equity between them, it is the duty of the court to do so. The fact that the pleadings do not warrant it is no obstacle, since the decree must necessarily be reversed, and may be reversed with directions to permit such an amendment of the pleadings as would warrant a decree in conformity with equity and good conscience, provided always that Wollman is not concluded by his election; that the necessary parties for making a complete disposition of the case

are before the court, and that the evidence warrants such a disposition."

After consideration of the question, the court held that Wollman was not bound by his election and said (l. c. 486):

"All the parties necessary to a final decree are before the court. The attachment for the $100 is still pending, and no reason is apparent why Wollman should not interplead in that suit even now, and obtain the money which is clearly his. Or, if the statute of limitations is likely to be interposed to such a plea, there is no reason why the garnishees should not amend their answer reciting the facts and stating that the money is the money of Wollman. Hence no disposition need be made of that action. The judgment will be reversed and the cause remanded with directions to the lower court to permit the defendant, Wollman, so to amend his cross bill as to pray for the relief herein indicated, and upon his cross bill being thus amended to enter judgment against the bank in his favor for the sum of $487.16, with interest from October 6th, 1891."

The foregoing authorities fully sustain the view that the practice of equity courts under the conditions disclosed in this case, is to remand the case with directions to permit an amendment and render a decree upon the pleadings as amended and the evidence already taken. The present case differs from many of the precedents above quoted, in that the amendment here in question would be merely the amendment of a prayer of the answer, and would not open up any new issuable fact, nor involve the taking of additional testimony, nor the addition of any new parties, but would merely "enable the court upon the case made by the original bill to give the relief which that case justified" (Hardin v. Boyd, supra).

1210

We, therefore most respectfully suggest and urge that this court, in remanding the case, direct the District Court to grant leave to the Guardian Trust Company to amend the prayer of its answer to the amended intervening petition of the Kansas City Southern Railway Company, so as to include a specific prayer that the Trust Company recover the amount which the Belt Company owes it from the Southern Company and have execution therefor, or to file the same answer with the formal requisites of a cross bill added and that, upon such amendment, a decree be entered in accordance with such prayer.

Respectfully submitted,

EDWARD P. GATES,
GEORGE H. ENGLISH, JR.,
Solicitors for Guardian Trust Company.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on January 20, 1913.

1211 (*Order Granting Leave to Shedd et al. to File Petition for Further Suggestions as to Decree.*)

December Term, 1912.

MONDAY, January 20, 1913.

These causes came on to be heard upon the motion of Edward A. Shedd, et al., petitioners, for leave to file "Further Suggestions" as to the form of decree to be entered in these causes in the Court below.

On consideration whereof, it is now here ordered that leave be, and is hereby, granted to file printed copies of said "Further Suggestions" forthwith.

(*Order of Reargument of Certain Questions.*)

December Term, 1912.

MONDAY, January 20, 1913.

These causes being now called for further hearing in pursuance of an order entered by this Court in these causes on the 22nd day of October, 1912, came on for reargument upon the question of liability and the subsidiary questions as to the stock of the Central Improvement Company.

Whereupon, argument was commenced by Mr. Samuel W. Moore for the Kansas City Southern Railway Company, continued by Mr. Harry S. Mecartney for Edward A. Shedd, et al., Petitioners, by Mr. George H. English, Jr., and Mr. D. J. Haff for the Guardian Trust Company and the Central Improvement Company, and concluded by Mr. Samuel Untermyer in behalf of the Kansas City Southern Railway Company.

Thereupon, the said questions were submitted and taken under advisement by the court, and the hour for adjournment having arrived the argument of further questions herein was postponed until tomorrow.

(*Order of Further Reargument of Certain Questions.*)

December Term, 1912.

TUESDAY, January 21, 1913.

1212 The above causes having been called for further hearing, argument upon the questions as to the form of the decree and the value of the property, etc., was commenced by Mr. George H. English, Jr., in behalf of appellants, and the hour for adjournment having arrived further argument on said questions is postponed until tomorrow.

(*Appearance of Mr. Delbert J. Haff as Counsel for Appellant in Cause No.* 3489.)

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,

vs.

CAMBRIA STEEL COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellant.

DELBERT J. HAFF,
Of Counsel.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 22, 1913.

(*Appearance of Mr. Harry S. Mecartney as Counsel for Petitioners Shedd et al., in Cause No.* 3489.)

The Clerk will enter my appearance as additional Counsel for the Petitioners, Edward A. Shedd, Charles B. Shedd and Robert H. Law.

HARRY S. MECARTNEY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 22, 1913.

(*Appearance of Mr. Delbert J. Haff as Counsel for Appellant in Cause No.* 3490.)

No. 3490.

GUARDIA TRUST COMPANY, Appellant,

vs.

CAMBRIA STEEL COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellant.

DELBERT J. HAFF,
Of Counsel for Guardian Trust Company.

1213 (Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 22, 1913.

(*Appearance of Mr. Harry S. Mecartney as Counsel for Petitioners Shedd et al. in Cause No.* 3490.)

The Clerk will enter my appearance as additional Counsel for the Petitioners, Edward A. Shedd, Charles B. Shedd and Robert H. Law.

HARRY S. MECARTNEY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 22, 1913.

1214 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY, Appellees.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY, et al., Appellees.

Reply to Petition of Edward A. Shedd and Others.

Counsel for Shedd et al. suggest that this litigation was neither instituted nor carried on in good faith, and they petition the Court to find that such was the case, and ask that a new precedent be established by this Court, under which the attorneys' fees and other expenses of the Trust Company may be taxed against the Southern Company.

This charge leveled against counsel instituting and carrying on these proceedings would be robbed of its seriousness if it
1215 were accompanied by the various written and printed attacks of a similar nature, made from time to time by one of the counsel for Shedd et al. against both State and Federal judges, the master, the receiver, the officers of both parties, opposing as well as associate counsel, in fact, against all who have been connected with this case. The charge now made would appear, in the light of these and other numerous effusions of a similar nature, to be more the result of a confirmed habit of indiscriminate vilification and abuse than of a conviction based upon any real or imaginary wrong. Its author obviously belongs to that class of persons who are ever ready to admit that they are always right, no matter how inconsistent or absurd their views may appear to others, and whose vocabulary of invective is quite insufficient to properly characterize those who disagree with them.

First, as to the institution of the accounting proceedings: Aside from the question of the standing and character of the counsel who signed the bill of the Cambria Company (Frank Hagerman and L. C. Krauthoff) as well as the ancillary bill of the Belt Company and its receivers (Thomas R. Morrow and C. W. Lucas) and thereby stood as professional sponsors for the proceedings, it is to be remembered that the accounting between the Belt Company and the Trust Company was provided for by stipulation (Rec. p. 570), signed by Judge Francis M. Black, the receiver of the Trust Company, as well as by Messrs. Trimble & Braley, its regular counsel. This stipulation provided that there should be an accounting upon an ancillary bill to be filed, the Trust Company apparently regarding an accounting

between the parties as inevitable and being desirous of speeding it as fast as possible. The ancillary bill of the Belt Company
1216 and its receivers was filed on November 20, 1901, pursuant to the stipulation referred to (Rec., p. 115). After the bill had been filed and the Trust Company and its counsel had had an opportunity to see and examine it, the Trust Company and Judge Black, its receiver, and Messrs. Trimble and Braley, its counsel, desired time, not to demur to the bill, but to file an answer to it, and it was accordingly stipulated (Rec., p. 136), that the time for answering should be extended to December 9, 1901, instead of December 2, 1901, as originally provided in the stipulation.

The answer of the Trust Company to the ancillary bill of the Belt Company and its receivers signed by Judge Black as well as by Messrs. Trimble and Braley, was filed on December 9, 1901, (Rec., p. 137). Exceptions to the answer were filed December 31, 1901 (Rec., p. 184). The exceptions were sustained on April 1, 1902 (Rec., p. 187), and the replication was filed to the Trust Company's answer on April 9, 1902 (Rec., p. 186). Thereupon the taking of testimony began.

Judge Black during his lifetime was an honored member of the bar of this State and for ten years was one of the judges of our Supreme Court. No man in the State stood higher as a citizen of incorruptible integrity. No able lawyer ever practiced at our bar, and no more just and upright judge ever sat upon the bench of the Supreme Court of this State. He, as well as Messrs. Trimble and Braley and the officers of the Trust Company, no less than the officers and counsel of the Belt Company, felt that an account between them was an imperative necessity. The relations between the parties for a period of more than ten years had resulted in complicated and confusing accounts and questionable charges
1217 and counter-charges, caused, it was thought, by common directors and common officers controlling all of the companies and advancing the interest of the Trust Company at the expense of the other companies. Judge Black, as receiver of the Trust Company, felt under obligation to enforce the notes of the Belt Company held by his trust, and he realized the propriety, under the circumstances, of an accounting, and therefore readily assented to it. The charge indulged in by counsel for Shedd et al., as to the institution of these proceedings, is not only an unmerited and unwarranted criticism of living counsel connected with the case at its inception, but is a wanton and unjustifiable attack upon the memory of one of the ablest and most conscientious lawyers of our State.

Next, as to the conduct of the litigation: One of the counsel for Shedd et al. came into this case as counsel of record for the Trust Company in December, 1904. He severed his connection with the Trust Company some four years later, at its request, leaving as a souvenir of his employment an action against it for attorney's fees in a large amount, which is yet pending undetermined. At the time of his advent into the case, some ten thousand pages of testimony had been taken on the accounting issue. If he thought the ancillary bill, which as before stated, had been filed under stipulation with Judge Black and the regular counsel for the Trust Company,

was bad on its face, and subject to demurrer, as is now claimed, what excuse can be offered for the failure on his part to at once file a demurrer and have it heard and sustained, and thus end this tedious and expensive litigation? If the bill is bad now, it was certainly bad then, and it was certainly the duty of counsel to stop the proceedings if it was so utterly devoid of merit. But nothing of the kind
1218 was done or attempted under his management of the case. He complacently proceeded with the taking of testimony until twenty-four thousand additional pages had been added to the record. So far from taking steps to end the case, he stipulated in February, 1905 (Rec., pp. 191-193), that the Southern Company should come into the suit as an intervenor, and again at the close of all of the evidence on July 2, 1906 (Rec., pp. 541-545), he stipulated for the filing of a second amended and supplemental ancillary bill of complaint, the filing of an answer thereto, and the withdrawal of objections to certain depositions, exhibits, etc.

The question arises as to how much good faith there is back of the charge of bad faith. Does not the charge of bad faith in the institution and prosecution of this litigation come with poor grace from one who should have put an end to the waste of time and substance, or at least have made an effort to do so, if he had entertained an honest conviction that the bill was bad on its face, or that the litigation was oppressive or vexatious. Should he not, in his generous distribution of criticism, apply some of it to himself? If the Trust Company could have stopped the litigation eight years ago, as is now insisted, is it in any position to impose upon the Southern Company, or upon anyone, the expense of attorneys' fees or other costs imposed by the willful neglect or oversight of its counsel?

We cordially invite the Court to scan the record in the case, the report of the Master, or any other proceedings, to ascertain if there is anything to criticise either in the institution of the litigation or its conduct thereafter. It is true there was a contest over the forum in which the liability issue should be determined, we insist-
1219 ing that it should be determined in the Federal Court in this case, and endeavoring to maintain our position by injunction under supplemental bills, the Trust Company contending just as strenuously for a decision of the issue in the state court, and insisting upon trial of its cases there. Each party was well within its rights in endeavoring to confine a decision of the liability issue to the forum of its preference, and neither is subject to criticism therefor. This court held that we were wrong in our injunctions, and this court also held that the Trust Company was wrong in its effort to eliminate the liability issue from the proceedings in this case in the lower court, as well as in this court.

The master, in the main, found the accounting issue in favor of the Trust Company. We filed exceptions to this finding before the master and in the lower court, and they were overruled. We did not take an appeal from that issue because the appeal taken by the Trust Company did not question the correctness of the finding of the master or the decree of the lower court on the liability issue, but sought only to eliminate that issue from the case. The master found that the Trust Company had dominated and controlled the affairs

of the Belt Company, but not to such an extent as to warrant opening up the accounts after the lapse of so much time, and the defense of laches interposed by the Trust Company was sustained. Whether the master, and the lower court in affirming the master were right or not, is a serious question. Perhaps we should have prosecuted a cross-appeal, but the enormous labor and expense involved in testing this question in the Appellate Court were not justified, in our judgment, in view of our belief that the liability issue was properly
1220 in the case and properly decided, and that the Appellate Court would so hold, as well as our belief that we were justly entitled to the properties of the Central Company, and that the ruling of the lower court in this respect would be affirmed upon appeal.

It is further contended by counsel for Shedd et al. that the Southern Company is not acting in good faith in resisting liability for the obligations of the Belt Company, and that the expense of counsel fees and other costs in that litigation should also be taxed against the Southern Company. We regard this contention as too absurd and childish to merit any consideration whatsoever.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for the Southern Company.

1221 STATE OF MISSOURI,
City of St. Louis, ss:

Samuel W. Moore, of lawful age, being duly sworn upon his oath, states:

I am now, and for many years have been, a member of the law firm of Lathrop, Morrow, Fox & Moore of Kansas City, Missouri, and have been in charge of the legal business of The Kansas City Southern Railway at Kansas City, Missouri, as its general solicitor, for the past ten years. I am familiar with the case of Cambria Steel Company v. Kansas City, Suburban Belt Railroad Company et al., now pending in the United States Circuit Court of Appeals at St. Louis, Missouri, having had charge of the interests of the Southern Company, as well as of the Belt Company and its receiver, in that litigation, since early in the year 1905.

Mr. H. S. Mecartney and his assistant, Mr. Jules C. Rosenberger, succeeded Messrs. Trimble & Braley as attorneys for the Guardian Trust Company in this cause in December, 1904. At that time some 8,000 or 10,000 pages of testimony upon the accounting feature of the case had been taken.

On February 7th, 1905 (Rec., p. 191), I stipulated with Mr. Mecartney to make the Southern Company a party to the proceeding to test its right to the collateral held by the Trust Company, the order therefor being made on February 27th, 1905 (Rec., p. 194), and the intervening petition of the Southern Company being filed on the same day (Rec., p. 194), and answered by the Trust Company on March 7th, 1905 (Rec., p. 217).

Very soon after Mr. Mecartney assumed charge of the case for

the Trust Company he complained to the Master that the
1222 ancillary bill of the Belt Company and its receivers was too general, and that it did not point out specific matters with sufficient definiteness, and it was accordingly arranged between counsel and the Master—in reality by agreement, although the record does not so recite—that I should prepare and file an amended ancillary bill for the Belt Company and its receivers, surcharging and falsifying in accordance with equity practice. This I did, filing the same on March 22nd, 1905 (Rec., p. 236), having to go through all the testimony taken, and other records, for the purpose of preparing the bill, as I had not been familiar with the case before taking charge of it, except in the most general way. Neither Mr. Mecartney nor any one else filed any demurrer to the bill, or even suggested that one should be filed. The Trust Company answered the amended ancillary bill on June 1st, 1905 (Rec., p. 362).

Mr. Mecartney and I agreed from the first that the taking of testimony should be expedited in every way possible, to the end that there should be a speedy hearing and decision. He put his assistant Mr. Rosenberger, in charge of the taking of testimony, and I assigned my assistant, Mr. Marks, to the same duty. There were a number of unnecessary delays. On one occasion the Trust Company refused to produce its books upon an order made by the Master, and appealed to the Circuit Court, which affirmed the ruling of the Master, resulting in a delay of a number of weeks. On another occasion I tried to agree with Mr. Mecartney that some long complicated statements compiled by Mr. H. B. Johnson, the auditor of the Southern Company, in narrative form, covering the history of the Central Improvement properties, should go in as his
1223 direct examination, reserving to him the right to cross-examine, but he declined to agree to this, and as a result considerable time was unnecessarily consumed in getting these facts into the record by question and answer.

The testimony, now amounting to 34,000 pages, had been completed some months before July 2nd, 1906, on which date a stipulation was entered into (Rec., p. 541), providing that the Belt Company and its receiver should file a second amended ancillary bill of complaint, which had been prepared, to conform to the proof in some minor particulars, and that the Trust Company should file its answer thereto, which had also been prepared, within ten days thereafter, all of which was done.

The case was argued before the Master in July, 1906. The argument had been delayed for some months for various causes, sometimes at my request and some ti-es at the instance of the Trust Company, and once to enable the parties in New York to get together and try to work out a settlement, which, however, failed of consummation. The argument consumed two weeks and was participated in by Mr. Mecartney, Mr. Rosenberger, Mr. Marks and myself.

Mr. Marks, under my direction, prepared and filed with the Master a most excellent abstract of all the evidence, covering each allegation of the bill and intervening petition and the evidence relating

thereto, and a reference to the volume and page of the record. This required months of the most arduous labor. Neither Mr. Mecartney nor any one else for the Trust Company ever prepared and filed an abstract or abridgment of the record to aid the Master or the lower court. The Master made his report and filed it in court in
1224 May, 1910. All parties filed exceptions, which were heard and disposed of by the lower court, and a final decree was rendered June 25th, 1910.

During the course of this litigation, and particularly after its submission to the Master in July, 1906, Mr. Mecartney made many bitter and uncalled for attacks on the Court, the Master, the receiver of the Central Company, and opposing counsel. On one occasion he prepared and his associate sought to file in the Circuit Court when this case was pending, a motion supported by his affidavit, which the Court considered so scandalous and abusive that he ordered it stricken from the files and to be sealed up and lodged in the safe in the office of the clerk. Afterwards Mr. Mecartney prepared another printed effusion which he proposed to file in the same court, which was so highly abusive and outrageous that the officers of the Trust Company intervened, as I am informed, and dispensed with his further services in the cause. He thereupon filed suit against the Trust Company for attorney's fees which is still undetermined. Mr. Mecartney represented the Trust Company in an action for attorney's fees brought by Messrs. Trimble and Braley, reputable attorneys of Kansas City, Missouri, and file- a counter-claim, in a large amount, charging them with malpractice and incompetency, which the referee found to be untrue. Mr. Mecartney wrote a long libelous letter to Mr. Samuel Untermyer, General Counsel of the Southern Company, complaining of my conduct in this cause. He has written, I am informed, a similar letter or letters, to the directors of the Trust Company abusing Mr. John A. Prescott, a gentleman of high character and standing, who has had charge of the affairs of the Trust Company for some years.

1225 I deny most emphatically that this litigation has been oppressive to the Trust Company, or that it has been carried on in bad faith. On the contrary, it is my opinion that the litigation against the Trust Company was properly instituted and properly carried on to a conclusion. My own view was that we should prosecute a cross-appeal from the decree of the lower court on the accounting issue, but this was abandoned finally, largely for the reason that the Trust Company did not except to the correctness of the Master's finding on the liability issue, and did not assign the action of the lower court thereon as error in this court. I firmly believe that the Trust Company, by its community of directors and officers, whose allegiance to the Trust Company was the greater, imposed upon the Belt Company, in a legal sense, to the amount of hundreds of thousands of dollars, and that the defense of laches or limitations, which was sustained by the Master, was of a very doubtful application in view of the relations of the parties. I personally secured the signature of Judge Black to the stipulation providing for an accounting (Rec., p. 115). He said that he was willing to

have an accounting between the Trust Company and the Belt Company—in fact, if we did not ask for one he would sue on the notes of the Trust Company against the Belt Company, and that he realized that if he did so we would answer, insisting on an accounting. He said that he would insist that the Belt Company itself should be a party complainant in the bill—the original bill had been in the name of its receivers alone—with a provision that if the balance on the accounting should be in favor of the Trust Company, it should be entered up as a judgment against the Belt Company, as well as against the receivers. He explained this by saying
1226 that if he obtained a judgment against the Belt Company he thought he could collect it from the stockholders of that company, as he was informed that its stock was not all paid up, and that there would be a stockholders' liability. The stipulation was prepared to meet his views, the Belt Company being made a party to it, and it being provided that judgment should be rendered against the Belt Company, if the balance should be against it, and he signed it.

SAMUEL W. MOORE.

Subscribed and sworn to before me this 20th day of January, 1913.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[Endorsed:] Filed in U. S. Circuit Court of Appeals on January, 22, 1913.

1227 (*Order of Submission With Leave to File Further Briefs.*)

December Term, 1912.

WEDNESDAY, January 22, 1913.

The above causes having been called for further hearing upon the questions as to the form of the decree and the value of the property, etc., argument was resumed by Mr. George H. English, Jr., in behalf of the appellants and concluded by Mr. Sampel W. Moore in behalf of the Kansas City Southern Railway Company, and said questions were submitted to the Court.

Thereupon, the question of the taxation of certain costs in the trial court was brought on for hearing and was argued by Mr. Harry S. Mecartney in support of and in behalf of the suggestions by Edward A. Shedd, et al., petitioners, and by Mr. Sampel W. Moore in behalf of the Kansas City Southern Railway Company, opposing, and this question was then submitted to the Court.

Thereupon it was ordered by the Court that Counsel for appellants have leave to file further briefs in these causes within twenty days from and after this date with like leave to counsel for the Kansas City Southern Railway Company to file further briefs herein within twenty days thereafter.

(Order Declining to Receive Further Briefs of Shedd et al., Petitioners.)

December Term, 1912.

TUESDAY, April 8, 1913.

In these causes it appearing that counsel for Shedd et al., Petitioners, have prepared and tendered additional briefs in behalf of the Petitioners after the time limited by the former order of this Court for the filing of further briefs herein, it is now here ordered by this Court that the reception of said briefs be, and is hereby, declined and the Clerk of this Court is directed to notify counsel for all parties herein of this order.

April 8, 1913.

1228 *(Opinion of December 2, 1913, as Modified by Order of January 22, 1914.)*

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1913.

No. 3489.

CENTRAL IMPROVEMENT COMPANY et al., Appellant,

vs.

CAMBRIA STEEL COMPANY et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

No. 3490.

December Term, A. D. 1913.

GUARDIAN TRUST COMPANY, Appellant,

vs.

CAMBRIA STEEL COMPANY et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Mr. George H. English, Jr., and Mr. D. J. Haff (Mr. Edward P. Gates and Mr. E. C. Meservey, on the brief), for Guardian Trust Company.

Mr. Frank Hagerman, for Cambria Steel Company.

Mr. Samuel Untermyer and Mr. Samuel W. Moore, for Kansas City Southern Railway Company.

Mr. Newell H. Clapp, Mr. Enoch J. Price and Mr. Harry S. Mecartney, for Edward A. Shedd, and others.

Before Sanborn, Circuit Judge, and Marshall and William H. Munger, District Judges.

PER CURIAM:

The paramount issue in these cases is, Did the Southern Company become liable to pay the unsecured debt of the Belt Company to the Trust Company by participating in the execution of a scheme whereby it acquired the title to the property of the Belt Com-
1229 pany, deprived its creditor, the Trust Company, of recourse thereto by execution to collect its claim and yet reserved to itself and other stockholders of the Belt Company an equity in its property and a benefit therefrom more valuable than the amount of the Trust Company's claim? After exhaustive arguments and briefs and a review of the master's report on which this case came to this court the conclusion was reached that this question should be answered in the affirmative. This question had been at issue between the Trust Company and the Southern Company in this suit and in actions at law in the state courts for many years. The prosecution of those actions had been repeatedly enjoined and delayed by orders of the court below and those orders had been as often reversed by this court. While the pleadings of the parties squarely presented the issue, while this issue had been litigated strenuougsly in this suit the Trust Company had not in any of its pleadings made a specific prayer for a decree for the payment of its claim by the Southern Company, nor for the seizure or sale to pay it of the property of the Belt Company which the Southern Company had taken. The question had been suggested by three of the stockholders of the Trust Company whether or not, in view of the long delay, this court could or should direct an entry of a decree for such relief in these cases rather than to leave that relief to be granted upon trials of the cases in the state court, and as this question had not been argued counsel for all the parties were permitted to be heard upon it. That hearing developed into a re-argument of all the salient issues in the cases and at the close of that hearing they were taken under advisement by the court. It is the purpose now to state the conclusions at which we have arrived after another consideration of the issues presented.

The history of this litigation, the issues and many of the facts found by the master are set forth in our former opinion. Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811, 120 C. C. A. 121.

(1) From all the facts pertinent to the issue which are set forth in many printed pages of his report, the master deducted this decisive conclusion. "That the Southern Company is not liable in any way for the floating indebtedness of the Belt Company." To this conclusion the Trust Company excepted on the ground that in view of other conclusions which the master reached adverse to it it was unnecessary for him to determine that issue. A considera-
1230 tion after argument of all the facts relating to this issue which the master found in his report convinced this court that the conclusion lawfully deducible from them was that the Southern Company was liable to pay to the Trust Company the debt

which the Belt Company owed it. Counsel for the Southern Company now insist that his court was without power to consider or correct this conclusion of the master which the court below followed, and that the Trust Company must suffer the loss of this amount because its counsel did not state in its exception that the conclusion was wrong on the merits of the issue. They invoke the conceded general rule that where no exception is taken to the master's report it will be deemed to be true and where exceptions to parts of it are taken the parts to which no exception is taken will stand as correct and will not be open to review in an appellate court. Burns v. Rosenstein, 135 U. S. 449; Provident Life & Trust Co. v. Railway Co., 177 Fed. 854, 859. But this rule, like most rules of law or practice, is not without its exceptions. In Sheffield, etc. Ry. Co. v. Gordon, 151 U. S. 285, 291, the Supreme Court, while holding the exceptions in that case insufficient to present the questions argued, said: "It is true that if the report of the master is clearly erroneous in any particular it is within the discretion of the court to correct the error, but we see no occasion for exercising such discretion in this case." In 2 Daniell's Chancery Pleading and Practice, at page 1314, it is said that it is entirely discretionary with the court to grant an opportunity to except to a report after it has been absolutely confirmed. Counsel also claim that by the Trust Company's exception they were induced to forego a review of the finding of the master that the Belt Company was indebted to the Trust Company and that thereby an equitable estoppel from reviewing the issue of the liability of the Southern Company was created. But suits in chancery are tried and reviewed in view of the fact that a court of equity has and frequently exercises the power where justice may thereby be done, to grant to litigants the right remedy although they have sought the wrong one. Clark v. Clark, 62 N. H. 267, 272; Hardin v. Boyd, 113 U. S. 756; Wiggins Ferry Co. v. Ohio & Mississippi Ry. Co., 142 U. S. 396, 414, 415, 416; Bradford v. Bank, 13 How. 56, 69, 70; Walden v. Bodley, 14 Pet. 156, 164; Moran v. Hagerman, 64 Fed. 499, 503, 504. As an appeal in equity in the federal courts results in a trial de novo the appellate court is not, in our opinion, so powerless that it is compelled to affirm an unjust decree, nor is
1231 the appellant so conclusively estopped that it may not attack such a decree by the fact that it gave a wrong reason for its exception to the erroneous conclusion of the master it assails.

Moreover, the conclusion here challenged was a mere deduction from the facts disclosed in the master's report and where it appears on the face of the report that the master has drawn an erroneous conclusion from the facts he found, the absence of an exception does not disable the court from correcting the error and entering a just final decree. 2 Daniell's Chancery Pleading and Practice, * page 1310; 17 Encyc. of Pleading and Practice, 1048; Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. 476, 477; Burke v. Davis, 81 Fed. 907, 910, 26 C. C. A. 675, 678; Haymond v. Murphy, 64 S. E. (W. V.) 855, 857; Hayes v. Hammond, 44 N. E. (Ill.) 422, 423; Hurd v. Goodrich, 59 Ill. 450, 456; Von Tobel v. Ostrander, 42 N. E. (Ill.) 152, 153. The contention that the Trust Company was estopped

from seeking a correction of this error and that this court was powerless to correct it does not seem to be well founded, and this court is unwilling to affirm what it deems an unjust decree on account of the defect in the exception.

(2) It is conceded that by the transaction described in the former opinion of this court and deemed by it violative of the rights of the Trust Company, a creditor of the Belt Company, if that transaction be valid, was deprived of legal recourse to the property of the Belt Company to obtain payment of that company's debt to the Trust Company of about $360,000. At that time the Southern Company by an exchange of its stock and bonds for the stock and bonds of the Belt Company, and by a formal foreclosure by itself, as holder of about 89 per cent of its bonds, by means of its representative, the Provident Company, trustee for the bondholders, against and with the consent of itself as the holder of about 97 per cent of its stock, and by a foreclosure sale of the property of the Belt Company to itself obtained the title to the Belt Company's property to itself, the bondholders of the Belt Company secured about $1,330,000 par value of the bonds and $250,000 of the preferred stock of the Southern Company, aggregating at their par value $1,580,000 for their $1,000,000 par value of bonds of the Belt Company, and the stockholders of the Belt Company secured for their $4,750,000
1232 par value of the stock of that company about $1,187,500 par value of the perferred stock and about $3,562,500 par value of the common stock, in all about $4,750,000 par value of the stock of the Southern Company.

The following propositions of law are deemed incontestable: "A reorganization of an insolvent railroad company, by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company, which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization and by the consent of the old company and its stockholders, is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid, and renders the new company liable for the claims of such creditors, at least to the extent of the value of the interest in the new company secured by the stockholders of the old company." Northern Pacific Ry. Co. v. Boyd, 177 Fed. 804, 101 C. C. A. 18; Luedecke v. Des Moines Cabinet Co., 118 N. W. 456, 140 Ia. 223; Hurd v. New York & Commercial Steam Laundry Co., 167 N. Y. 89, N. E. 327.

Where such a transaction is consummated without offering to the unsecured creditor a fair share of the benefits to be derived from the vesting of the title in the purchaser at the foreclosure sale, the intent or purpose to deprive him of recourse to the property to collect his debt becomes immaterial and the fact that it has that effect charges the purchaser with liability. "As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the

reorganized company." Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, 502. "For, if purposely or unintentionally a single creditor was not paid or provided for by the reorganization, he could assert his superior rights against the subordinate rights of the old stockholders in the property transferred to the new company. They (the stockholders of the old company) were in the position of insolvent debtors who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device whether by private contract or judicial sale under consent decree whereby
1233 stockholders were preferred before the creditors was invalid. Being bound by the debts, the purchase of their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim they were none the less bound to recognize his superior right in the property when years later his contingent claim was liquidated and established." Northern Pacific Ry. Co. v. Boyd, 228 U. S. 505. "No such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee but of every creditor of the corporation. * * * Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of prior rights of either class of creditors comes within judicial denunciation." Louisville Trust Co. v. Louisville etc. Ry. Co., 174 U. S. 674, 683, 684.

The transaction in hand, if valid, had the effect to deprive the creditors of the Belt Company of and to secure to the stockholders of that company out of its property the value of $1,187,500 par value of the preferred stock and $3,562,500 par value of the common stock of the Southern Company, and upon its face it seems to fall within the denunciation of these rules of law.

But counsel for the Southern Company argue that although the completed transaction has the effect of an illegal proceeding it is not such because it is composed of two independent and valid transactions, to-wit: (1) the organization in March, 1900, of the Southern Company and the exchange of the bonds and stock of the Belt Company for the bonds and stock of the Southern Company, so that by April 1, 1900, the latter had acquired 97 per cent of the stock and 89 per cent of the bonds of the Belt Company, and the taking possession of the property of the Belt Company by the Southern Company by virtue of its ownership of these bonds and stock on April 1, 1900, when it filled the offices of the Belt Company with its chosen agents and proceeded to control and operate it, and (2) the filing on September 6, 1900, by the Provident Trust Company, the trustee in the Belt mortgage, at the instance of the Southern Company, the owner of 89 per cent of the bonds, of the bill to foreclose the mortgage of the Belt Company, 97 per cent of whose stock was owned by the Southern Company, the appearance and consent of the
1234 Belt Company on the same day to the appointment of receivers of its property, its answer on October 19, 1901, admit-

ting the material averments of the bill, the decree on November 6, 1901, of foreclosure and sale of the Belt property and the sale thereof on December 31, 1901, under this decree to the Southern Company the owner of nearly all its bonds and stock. The contention is that while the former transaction was the result of the scheme of reorganization, the latter was independent and free from the influence thereof, and that each of these transactions taken by itself, as counsel insist they should be, is free from any just objection by any creditor of the Belt Company.

The plan of reorganization was made November 7, 1899, and it became effective December 20, 1899. This plan was made a part of the reorganization agreement and it stated that it was expected and intended that the property of the Gulf Company would be purchased by the reorganization committee, that a successor of the company would be organized to which this property and the stocks and bonds of the Belt Company deposited under the plan would be conveyed, that all this property was to be made subject to the mortgage of the new company and that it was "intended, as soon as practicable, that the new company acquire the property of the terminal companies in fee and bring them directly under the lien of the mortgage." It was then one of the objects of the scheme of reorganization which the committee and the Southern Company, which it organized, were empowered and expected to carry into effect, that the latter company should acquire the property of the Belt Company "in fee" and bring it "directly under the lien of the mortgage," and the acquisition of the stocks and bonds of that company and their pledge under that mortgage were but the means to the accomplishment of this end which the plan contemplated.

It is conceded that the organization of the Southern Company, its purchase of the Gulf Company property, its exchange of its stocks and bonds for those of the Belt Company, and its possession and control of its property on April 1, 1900, by means of its ownership of this stock, were steps in the execution of the scheme. But the reorganization committee did not cease its work until October 1, 1900, and before that date the Southern Company by its representative, the Provident Company, had, on September 6, 1900, commenced the suit to foreclose the Belt mortgage and to put its property in the hands of receivers and had caused the Belt Company to consent to the receivership. For what purpose did the
1235 Southern Company take these steps? It had the possession and absolute control of the Belt property by its ownership of 89 per cent of its bonds and 97 per cent of its stock. A default on its bonds was in reality a default of itself to itself. Foreclosure could give it no more power over the Belt Company than it already had. For what purpose then was the foreclosure? Evidently to carry out the reorganization agreement, as it was within the power and as it was the duty of the committee and of that company, its creature, to do, to acquire the property of the Belt Company in fee and bring it directly under the lien of the mortgage. Why did the Southern Company exchange its stock for the stock of the Belt Company? Was it not for the purpose of silencing

the opposition of the Belt stockholders to the coming foreclosure, and to its acquisition of the fee of the Belt Company's property, and was not the scheme of reorganization the primary cause, the vesting of the fee of the Belt property in the Southern Company by the foreclosure the object and effect of that scheme and the exchange of the stock and the foreclosure of the Belt mortgage the means contemplated and authorized by that scheme to attain that end? To the minds of the members of this court the record in this case leaves no alternative but to answer these questions in the affirmative.

Moreover, the property of the Belt Company was a trust fund. The stockholders of that company were trustees charged with the duty to apply that property to the payment of the claims of the trust company and of the other creditors of the Belt Company before they took to themselves any share in or benefit therefrom. When the Southern Company took their stock and gave them $4,750,000 par value of its stocks and bonds for their interest in the property of the Belt Company, it stepped into their shoes and became a trustee for the creditors of the Belt Company with plenary notice that the interest of those creditors in the property was at least as much as the value of the stocks and bonds it was giving for the interest of the stockholders, for the rights of the creditors in the Belt property were prior and superior to those of the stockholders. By virtue of the plan of reorganization the Southern company had become such trustee. The agreement of reorganization and its ownership of 89 per cent of the bonds and 97 per cent of the stock of the Belt Company gave the committee and the Southern Company unrestricted power to discharge its duty to the creditors of
1236 the Belt Company, as their trustee, and to accomplish the object of the agreement regarding this property, the vesting of the fee of it in the Southern Company. They had the power to attain this object in a just and lawful way, to pay, to buy or to compromise the claims of the creditors, or to offer them a just share in the benefits of the reorganization, a share at least as valuable as that given to the stockholders. They did neither, but in the face of the danger signal that "any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation," the Southern Company proceeded by a foreclosure caused by itself, the owner of 89 per cent of the bonds, trustee for the creditors, really against and with the consent of itself as such trustee, owner of 97 per cent of the stock, to obtain against the protest of the Trust Company, whom the court expressly excepted in the decree from its effect, a foreclosure decree and sale of this property in effect by itself as trustee to itself as trustee, and thenceforth to insist that it had thereby secured to itself and deprived its cestuis que trust, the creditors of the Belt Company, of all interest in the property. In view of the fact that the acquisition of the fee of the Belt property by the Southern Company was stated in the reorganization plan and agreement to be one of their intended results, that this result has been obtained,

that the exchange of the stocks and bonds were the means specified therein to attain it, and were the means by which the consent decree of foreclosure and sale of the Belt property to the Southern Company was effected, and that this foreclosure and sale were the means by which the intended result of the plan of acquisition of the fee of the Belt properties by the Southern Company was secured, this court is unwilling to hold that the validity of these proceedings can be sustained against the rule that "any device whether by private contract or judicial sale under consent decree whereby stockholders were preferred before the creditors was invalid." 228 U. S. 504, by contemplating or treating them as two separate and independent transactions, one consisting of that part of the proceedings conducted before and the other of that part of the proceedings conducted after April 2, 1900. They appear to this court to constitute a single transaction instituted, conducted and consummated pursuant to the preconceived plan to vest the fee of the properties of the Belt Company in the Southern Company and to bring them directly under the lien of its mortgage.

1237 (3) Counsel for the Southern Company contend that the Trust Company is entitled to no favorable decree for the payment of the liability of the Southern Company to it and to no affirmative relief because it did not obtain a judgment against the Belt Company and a return of nulla bona to an execution before it presented its claim and demanded relief. But that is an objection only to the jurisdiction of a national court in equity of an original and independent bill to charge a fraudulent trustee. A claim of the nature of that made by the Trust Company in the absence of judgment or execution may be presented by intervention in a foreclosure suit and may there, or in any other suit wherein the court has acquired jurisdiction of the subject matter and the parties, be adindicated. Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 379. The objection is not tenable here because the decision of the question of the liability of the Southern Company to the Trust Company became, as conceded by counsel for the Southern Company, necessary to the disposition of this case, 201 Fed. 817, to which the Trust Company was originally made a defendant against its will. This is now a suit in equity in which the court below and this court have full jurisdiction of the subject-matter and the parties to the controversy regarding this liability, and under a familiar and salutary rule the power is conferred and the duty is imposed upon a court of equity, which has acquired such jurisdiction, to consider and determine all the rights and claims of the parties relating to the subject-matter and to enter a decree that will finally determine them to the end that a multiplicity of suits may be avoided and litigation may cease. Hopkins v. Grimshaw, 165 U. S. 342, 358; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 325; Ward v. Todd, 103 U. S. 327, 329; In re Blake, 150 Fed. 279, 283, 80 C. C. A. 167, 173; United States v. Standard Oil Company, 152 Fed. 290, 296; Campbell v. Golden Cycle Mining Co., 141 Fed. 610, 614, 73 C. C. A. 260, 264.

It is contended that the remedy of the Trust Company is limited

to a pursuit of the stockholders of the Belt Company who exchanged their stock for the stock of the Southern Company. But the liability of those stockholders is founded on their relation as trustees for the creditors of the corporation. The Southern Company with full notice of their and its liability and duty to the creditors of the Belt Company by the exchange of stock became such a trustee, and by as much as its power over the property of the Belt Company by its ownership of nearly all its bonds, as well as stock, was
1238 greater than that of the former stockholders, by so much was its duty to protect the rights and interests of its cestuis que trust, the creditors, higher and more imperative. It owed them the duty to exercise good faith, care and diligence to secure and deliver to them their full equitable share of the property or the value of that share. Any sale or conveyance of the property to itself whereby they were deprived of and it secured that share, or its value, was a breach of duty and of trust which invokes plenary relief from a court of chancery, and as by its formal foreclosure sale to itself of the property of the Belt Company it took to itself and deprived the creditors of their equitable interest in the property and of the value of that interest it is not less liable in equity for this breach of trust than were the stockholders with whom it exchanged its stock. The duty and liability of the majority stockholders to minority stockholders is not less than this, Jones v. Missouri Edison Electric Co., 144 Fed. 765, 771, and cases there cited, and their duty to creditors whose equitable rights and interests in the property of the corporation are superior to those of stockholders cannot be less.

Moreover, where the property of a corporation is sold to a purchaser and part or all of the purchase price thereof is paid or distributed to its stockholders to the exclusion of its creditors from a collection of their debts from the property of the corporation, the letter may recover that part of its value from the purchaser with notice, on the ground that the conveyance is fraudulent in law, Central of Georgia Ry. Co. v. Paul, 93 Fed. 878, 882, 884; Luedecke v. Des Moines Cabinet Co., 118 N. W. 456, 457; Hibernia Ins. Co. v. St. Louis & N. O. Trans. Co., 13 Fed. 516; Grenell v. Detroit Gas Co., 70 N. W. (Mich.) 413; Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, and the fact must be constantly borne in mind in the consideration of this case, that as against the Trust Company the entire transaction was in effect that the Southern Company knowingly purchased and took to itself without even a formal foreclosure the property of the Belt Company and paid the latter's stockholders the value of $4,750,000 of its stock therefor the exclusion of the Belt Company's creditors therefrom, for by the express provision of the foreclosure decree the Trust Company was excepted from all its effects.

Another argument is that the Trust Company is entitled to no relief because the equitable interest of the creditors in the property of the Belt Company was of no value. This contention is
1239 founded on the findings of the master that there was no direct testimony of the fair value of the Belt Company's property at or before the time of the foreclosure, no proof that it was worth

more than the $1,000,000 for which it was sold at the foreclosure sale, and therefore that it was sold at its fair market value. The mortgage was $1,000,000 and the deduction is that the equitable interest of the creditors was valueless. But the crucial issue here was not what the fair market value of the mortgaged property was, nor was it how much more the mortgaged property was worth than the amount of the mortgage. Although evidence upon these subjects would have been competent in the consideration of the real issue here in the absence of an estoppel, that issue was, what was the equitable interest of the creditors in the mortgaged property of the Belt Company worth during the execution of the scheme and immediately after the foreclosure sale and the appropriation of it thereby by the Southern Company, the trustee for the creditors, to itself, for a trustee who violates his trust may not profit thereby. Ervin v. Oregon Railway & Navigation Co., 27 Fed. 625, 633; Jones v. Missouri Edison Electric Co., 144 Fed. 765, 779. The creditors were entitled to the highest value their interest had during this time, either for the purpose of sale or for the purpose of preventing a foreclosure of the mortgage upon the Belt property, or for the purpose of compromising their claims or conditioning the foreclosure, or for the purpose of the present or future control of the property. "If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever." Northern Pacific Ry. Co. v. Boyd, 228 U. S. 508.

The report of the master discloses other facts than that he received no direct evidence of the fair market value of the property except the bid at the foreclosure sale, which leave no doubt that the equitable interest of the creditors was worth much more than the amount of the Trust Company's claim, $360,000. That report shows that the Southern Company paid $1,330,000 of its bonds and $250,000 of its preferred stock, or $1,580,000 of its new bonds and stock for the $1,000,000 of the old bonds of the Belt Company.

The fact to which counsel call attention, that the new bonds
1240 drew but there per cent interest per annum while the old bonds drew five per cent, has not been over-looked. But even so, the reorganization committee and the Southern Company would not have given for these old bonds a bonus of 33 per cent in new bonds and $250,000 in the stock of the Southern Company unless the old bonds had been well secured. The master's report also shows that the Southern Company gave $1,187,500 of its preferred stock and $3,562,500 of its common stock to the stockholders of the Belt Company for their equitable interest in the property of that company, that at the same time stockholders of the Gulf Company paid, and the Southern Company received, ten dollars per share in cash and an equal number of shares of the stock of the Gulf Company for tens of thousands of shares of the Southern Company's common

stock. That stock must, therefore, have been worth at least the ten dollars cash per share which was paid for it, and it was worth as much more as the value of the stock of the Gulf Company. The preferred stock of the Southern Company could not have been worth less than its common stock. The Southern Company, therefore, paid in value at least $475,000 for the equitable interest of the stockholders of the Belt Company in its property when it gave them $4,750,000 of its preferred and common stock for their stock in that company. But the equitable interest of the creditors in the property of the Belt Company was superior to that of the stockholders and its value could not have been less, and was undoubtedly greater, than the $475,000. That interest was, therefore, worth more than enough to have paid the $360,000 which the Belt Company owed to the Trust Company and the Southern Company cannot escape liability on the ground that it was worthless. The fact that at the foreclosure sale, where there was no competition, the Belt Company was bid in at $1,000,000 fails to disprove or to even render doubtful this conclusion, and the Southern Company which gave $4,750,000 of its full paid stock, which it was readily selling for ten dollars cash per share, and Gulf stock of equal amount, for the inferior stock of the Belt Company, cannot be heard to say that the superior equity of the creditors therein was worthless. Northern Pacific Ry. Co. v. Boyd, 228 U. S. 508; Rankin v. Gardner, 34 Atl. (N. J. Eq.) 935, 937; Garrison v. Monaghan, 33 Pa. St. 232, 234.

Deliberate consideration has been given to the earnest objection to the consideration by this court of the question of the value of this equitable interest of the creditors in the Belt property on
1241 the ground that the master found that there was no direct evidence that the property of the Belt Company was worth more than $1,000,000 and hence that this was its fair value, that no exception was taken to that finding and that the evidence is not here. But because the finding of the fair market value of the mortgaged property is not conclusive of the value of the creditors' equity therein and because other facts and findings contained in the master's report, all of which are available to this court for the determination of that issue, have convinced that the value of that equity was more than $475,000, the objection of counsel has not been thought fatal to the consideration and determination of this question.

Counsel say that because the original stockholders of the Belt Company, by the exchange of their stock for that of the Southern Company retained, as they claim, only 3½ per cent of the value of their equitable interest in the Belt property, therefore the Southern Company is liable for only 3½ per cent of that interest. But the measure of the creditors' recovery is the value of the creditors' equity which was diverted from them by their trustees, the stockholders of the Belt Company, including the Southern Company, the successory trustee, and vested in that trustee. If the Southern Company had been the owner of the bonds of the Belt Company only and knowing the condition and indebtedness of the Belt Company, as it did, had paid to the stockholders of that company $475,000 to the exclusion of the creditors for a conveyance of its property

by the Belt Company to the Southern Company, it could not have escaped liability to the creditors of that company for that amount. Much less can it do so when it became owner of nearly all the Belt Company's stock, and in equity a trustee for its creditors. Story's Equity Jurisprudence, Secs. 1261, 1262; Grenell v. Detroit Gas Co., 70 N. W. (Mich.) 413; Camden Interstate Ry Co. v. Lee, 84 S. W. (Ky.) 332, 333; Central of Georgia Ry. Co. v. Paul, 93 Fed. 883, 884; Luedecke v. Des Moines Cabinet Co., 118 N. W. 457, 458; Hibernia Ins. Co. v. St. Louis & N. O. Trans. Co., 13 Fed. 516, 519.

It is another contention of counsel for the Southern Company that the remedy of the Trust Company in this court of equity is limited to the subjection of the property of the Belt Company in the possession of the Southern Company to the payment of its claim and that it may not have a decree that the Southern Company pay it. This court does not concede the soundness of this po-
1242 sition and the leading case on the subject cited by counsel for the Southern Company does not sustain it. The quotation they make from that case is in these words:

"A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller it may hold him excused from further responsibility. The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud." Clements v. Moore, 6 Wall. 299, 312.

The application of the principles there announced in that suit, which was in equity, was this: Nicholson, the debtor, had sold his property to Moore for $6,310.35 to defraud his creditors, and Moore had paid Nicholson for the goods in cash and his own notes which Nicholson had disposed of and Moore had sold the goods. But Nicholson had applied all of the $6,310.35 to the payment of his debts except $1,500.00. The Supreme Court held that Moore was liable to the creditor Clements for that amount. By the same mark

the Southern Company became liable to the Trust Company to the extent of its claim for the value of the $4,750,000 of its stocks which it issued to the stockholders of the Belt Company to secure
1243 the property of the Belt Company and divert it from its creditors. Central of Georgia Ry. Co. v. Paul, 93 Fed. 883, 884; Camden Interstate Ry. Co. v. Lee, 84 S. W. (Ky.) 332, 333.

The question, however, is not material in the case at bar because the transaction was a conveyance of the property of the Belt Company in fraud of creditors and a breach of trust by the Southern Company, which company, with full knowledge of all the facts, actively participated in the entire transaction and thereby acquired the property of the Belt Company so that that property and the improvements the Southern Company has made thereon, free from the $1,000,000 Belt Mortgage and free from any charge for the expenses which the Southern Company has made thereon, stands in its hands charged with a trust to pay the claim of the Trust Company against the Belt Company which the court may execute by a seizure and sale by its master or receiver. Railroad Company v. Soutter, 80 U. S. 517, 522, 524; Guckenheimer v. Angevine, 81 N. Y. 394, 397; Goble v. O'Connor, 61 N. W. (Neb.) 131, 132.

And if the Southern Company has disposed of the property or destroyed it, or placed it beyond the reach of the Trust Company or the court, or given a mortgage or incumbrance upon it to a party without notice, the court has plenary power and it is its duty to require the Southern Company to account for and pay over the proceeds of the property or the value of it, or the proceeds of the mortgage, or the amount of it, to the extent of the Trust Company's claim and to so conduct its proceedings and mold its decrees that full relief may be secured by the Trust Company. And as the property of the Belt Company was worth many times the amount of the claim of the Trust Company at the time of its transfer to the Southern Company the ultimate result will be the same whether the decree be for the seizure and sale of the Belt property or for the payment of the claim of the Trust Company by the Southern Company, for it must ultimately be paid either out of the property in its hands or by the Southern Company itself. 20 Cyc. 630, 631; Doherty v. Holliday, 32 N. E. (Ind.) 315, 317, 36 N. E. 907, 908; Jones v. Reeder, 22 Ind. 111; Swinford v. Rogers, 23 Cal. 234, 237; Mason v. Pierron, 34 N. W. (Wis.) 921, 925; Blair v. Smith, 15 N. E. (Ind.) 817, 819, 820; Williamson v. Williams, 11 Lea 355; Murtha v. Curley, 90 N. Y. 372; Post v. Stiger, 29 N. J. Eq. 554, 561; Chamberlin v. Jones, 16 N. E. (Ind.) 178, 179; Muskegon Valley Furniture Co. v. Phillips, 21 So. (Ala.) 822, 823; Coale v. Moline Plow
1244 Co., 25 N. E. (Ill.) 1016, 1018; Dilworth v. Curts, 29 N. E. (Ill.) 861, 864; Hulley v. Chedic, 36 Pac. 783, 786; Morrell v. Miller, 43 Pac. (Ore.) 490, 494.

(4) Counsel argue with great force and ability that the Trust Company is estopped from enforcing against the Southern Company its claim for its breach of trust to it as a creditor of the Belt Company, (1) because it signed, and induced others to sign, the trust agreement which contained this paragraph: "No right is conferred,

nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder), is credited by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoever against the said companies, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupon stocks, securities, lease, guaranty or otherwise) with respect to any security deposited under this agreement or any moneys paid to or received by the Committee or by the depositor hereunder, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing," (2) because it was one of the depositories under the agreement and on June 26, 1900, it accepted bonds and stock of the Southern Company in exchange for bonds and stock in the Gulf Company and other companies reorganized under the agreement, and especially because it accepted stock of the Southern Company in exchange for stock of the Belt Company which it held, and (3) by its laches in presenting its claim against the Southern Company.

It may be that if when the Trust Company signed the agreement that instrument had disclosed a purpose or had by its terms required the committee, or the stockholders of the Belt Company, or their successory trustee the new company, the Southern Company, to violate their trust and divert the equity of the creditors of the Belt Company in its property to its stockholders, the Trust Company's signature to it, its action as a depository of the bonds and stocks under it and its exchange of its Belt Company stock for the Southern Company stock might have wrought an estoppel against it. But the agreement must be read in the light of the law which was necessarily a part of it. It was to execute a plan, which
1245 it disclosed, to transfer the property of the Belt Company to a new company by means of the exchange of the stock of the new company for that of the Belt Company. The law was that as against creditors of the Belt Company such a plan could be lawfully executed in but one way, and that was by offering and if accepted, by paying to the creditors of the Belt Company either in cash or in stock of the new company, or in some other property at least as much in value as the stockholders should receive, and, in the absence of such an offer or payment the transfer would be fraudulent and voidable as to the creditors. Unless there was in the agreement some term or provision which required the committee or the Southern Company to violate this law and to make a transfer fraudulent and voidable as to the creditors, the legal presumption was that the agreement contemplated, and that the committee and the Southern Company would make, such an offer and payment to the creditors, and upon that presumption the Trust Company had the right to rely when it signed the agreement and thenceforth until it was clearly notified to the contrary. The legal presumption was that the committee and the new company, the Southern Company, which was to succeed to the trusteeship of the stockholders of the Belt

Company, and all others executing the agreement would obey the law, would refrain from making the transfer of the property from the Belt Company fraudulent and voidable and would make it fair, just and valid. The Trust Company had the right to calculate the natural and probable result of its signature to the agreement and of all its acts and omissions in reliance upon this presumption. Indeed, it could reckon upon no other, for it is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellowmen will either violate the laws or disregard their duties. Cole v. German Savings & Loan Co., 124 Fed. 113, 119, 59 C. C. A. 593, 599; Little Rock & M. R. Co., v. Barry, 84 Fed. 944, 950, 28 C. C. A. 644, 650; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 247; American Bridge Co. v. Seeds, 144 Fed. 605, 609, 75 C. C. A. 407, 411.

The reorganization agreement has been searched in vain for any proviison which required or notified the committee or the new company that they must violate the law and make the transfer fraudulent and void as to creditors. On the other hand, that agreement declared that the results of its execution would be (*a*) the placing of the properties of the Belt Company, the Gulf Com-
1246 pany and the Dock Company under one corporate ownership, management and control, "(*b*) the payment of the floating debt and the existing car trust obligations." It set apart $475,000 for the payment of floating debts; it expressly authorized the committee to acquire, hold or extinguish "any obligation in the nature of floating debt or otherwise against any company or property embraced in said plan," and under this power the committee actually expended $1,164,172.50. It declared that it was intended to confer on the committee any and all powers which they might deem necessary or expedient towards carrying out and promoting the purposes of the plan and the agreement, and that the methods to be adopted for carrying out the reorganization consolidation and unification of the properties should be entirely discretionary with the committee. The committee and the Southern Company, therefore, had ample power to realize and pay to the creditors of the Belt Company the value of their equity in the property of the Belt Company before they transferred that property to the Southern Company. Let us now turn to the paragraph in the agreement on which counsel for the Southern Company rely for their estoppel by deed. So far as material it provides that "no right is conferred, nor any trust, liability or obligation * * * is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of * * * any holder of any claims whatsoever against the said companies, * * * with respect to any property acquired by purchase at any foreclosure sale." There are two reasons why the Trust Company did not, by signing this paragraph, deprive itself of its equity in the property of the Belt Company, which it held as the cestui que trust of its stockholders, nor of its claim against the Southern Company, the stockholder's successory trustee. First, if that equity and trust were created or conferred by or under the agreement they were created and conferred, not by the just and lawful execution of that

agreement, but by the inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholder or stockholders, and the paragraph in question barred the Trust Company from asserting only such rights, trusts, liabilities and obligations as arose out of the lawful and equitable execution of its contract. It did not bar it from enforcing its claims accruing from illegal or inequitable acts or omissions of those engaged in the execution of the agreement. If the committee or anyone engaged in such execution had unlawfully appropriated to their or his
1247 benefit the property, money or securities of signers of the contract which came to them or him under the agreement, the signers would not have been estopped by that paragraph from recovering the property or from enforcing the personal liability of the appropriators; second, the Trust Company's right, trust and equity in the property of the Belt Company acquired by the Southern Company "by purchase at any foreclosure sale" was neither created nor conferred by the reorganization agreement. It existed in all its force and inhered in the Belt Company's property by virtue of the relation of the Trust Company as a creditor of the Belt Company to the latter's stockholders before the agreement was made, and there it still inheres so that it did not fall within the terms of the paragraph in question and therefore was not affected thereby. Nor did the liability and obligation of the Southern Company for its breach of that trust now here in suit fall within the terms of that paragraph, for it was not created by that agreement, but by the Southern Company's subsequent transfer of the equity of the creditors of the Belt Company to itself, its stockholders and the trustee for its creditors without securing and paying to them the value of that equity. For these reasons the court is of the opinion that the Trust Company was not estopped by its signature to and activity in inducing others to sign the agreement from enforcing its claims as a creditor of the Belt Company against the Southern Company and against the property of the Belt Company in its possession or control.

Was the Trust Company equitably estopped from presenting and enforcing its claim by its promotion of the reorganization agreement, its participation in its execution and its acceptance on July 26, 1900, of stock of the Southern Company in exchange for its stock in the Belt Company and its acceptance of stock and bonds of the Southern Company in exchange for its stock and bonds in the Gulf Company and some of the other reorganized companies, or by its laches? Laches is equitable estopped under another name and these two claims of estopped will be considered together. A statement in chronological order of the salient facts material to the issue here presented will greatly aid in its disposition.

The plan of reorganization was made on November 7, 1899. It became effective on December 20, 1899. In December, 1899, or during the early part of the year 1900, the Trust Company requested a prominent member of the reorganization committee to ad-
1248 just or settle and pay its claim against the Belt Company, and he answered that it was asserted that the Belt Company

did not owe the Trust Company anything, that an examination of the books of the Belt Company and the books of the Trust Company was being made and that when that was completed he would take up the question of whether anything could be done towards an equitable settlement of the claim. On February 5, 1900, the decree of foreclosure and sale of the Gulf Company's property was rendered. On March 19, 1900, the Southern Company was incorporated. On March 19, 1900, the Southern Company purchased the property of the Gulf Company at its foreclosure sale. By April 1, 1900, it had acquired, by its exchange of its stocks and bonds for those of the Belt Company, 97 per cent of the Belt Company's stock and 89 per cent of its bonds. On April 1, 1900, it placed its chosen agents in the offices of the Belt Company and took possession of its books and property by virtue of its ownership of its stock. On June 6, 1900, the reorganization committee purchased of the Trust Company and paid it $35,000, which they applied in part payment of the debt of the Belt Company to it, for certain shares of the stock of the Terminal Company and of the Airline Company, which the Trust Company held in pledge to secure the payment of its claim against the Belt Company. On July 26, 1900, the Trust Company exchanged its stock and bonds in the old reorganized companies for the stocks and bonds of the Southern Company. On September 1, 1900, the Trust Company gave notice of its proposed sale on September 7, 1900, of the securities which the Belt Company had pledged to it to secure the payment of the latter's debt. On September 6, 1900, the Provident Company, the trustee in the mortgage of the Belt Company and in duty and in reality the agent of the Southern Company which held 89 per cent of the bonds of the Belt Company and 97 per cent of its stock, brought a suit to foreclose the mortgage, for the appointment of receivers of the Belt Company's property and for an injunction against its sale or disposition. On September 6, 1900, the Belt Company appeared in that suit and consented to the appointment of receivers. On September 6, 1900, the Cambria Company, with the consent of the Belt Company the agent of the Southern Company which held 97 per cent of its stock, recovered a judgment and obtained a return of nulla bona to an execution against the Belt Company. On September 6, 1900, the Cambria Company commenced the suit here in hand against the Belt Company and against the Trust Company to enjoin the
1249 latter company from selling its collaterals and applying their proceeds to the payment of the debt of the Belt Company, a suit which it founded on the averment, which has been adjudged untrue, that the Belt Company was not indebted to the Trust Company and on other allegations so baseless that it has become clear that the Cambria Company had no cause of action against the Trust Company. On September 6, 1900, the Belt Company, the hand of the Southern Company, appeared in the Cambria suit and on the same day the Trust Company was restrained by the court from selling its collaterals, and receivers of the property of the Belt Company were appointed in this suit. On November 5, 1900, the Trust Company answered and set up its claim against the Belt Company and

the pledging of its collaterals. On December 3, 1900, the Cambria Company filed a replication to that answer. On that day the issue of the indebtedness of the Belt Company to the Trust Company was made in this suit and that issue really existed then between the Trust Company and the Southern Company, for the Southern Company by its ownership of 97 per cent of the Belt Company's stock controlled it and in all subsequent proceedings directed its course and is as much bound by its action as though it had been the Belt Company itself. This issue was referred to the special master and it was not until May 21, 1910, after testimony had been taken for years and after a record of approximately 34,000 pages had been accumulated, that the Trust Company succeeded in obtaining an adjudication thereof, and that issue was first determined by the court below a few days later. It will be interesting to note a few of the proceedings which resulted in this delay. Before the Trust Company reached the decision of the master more than fifteen pleadings were filed in this case by other parties to this suit, and the Trust Company was compelled to file six. On October 20, 1900, the Trust Company filed a petition in the Provident Company's foreclosure suit for leave to be made a party and to plead therein, wherein its set forth its claim against the Belt Company, that the Southern Company would cause the Belt Company to waive all defenses and to consent to a foreclosure of the mortgage upon its property to the detriment of the Trust Company and the creditors of the Belt Company. On October 22, 1900, the Provident Company amended its bill and asked that the Trust Company be made a defendant, and the court so ordered. On November 5, 1900, the Trust Company answered the Provident Company's bill and in its answer set forth the debt of the Belt Company to it, the control of the Belt Company
1250 by the Southern Company and its purpose to waive all defenses to and to consent to the foreclosure of the Belt Company's mortgage and the sale of its property for the purpose and with the effect of appropriating the equity of its unsecured creditors to itself. On September 12, 1901, and again on October 14, 1901, the Trust Company applied for leave to file its amended and supplemental answer in which it set forth the debt of the Belt Company to it, the facts regarding the reorganization agreement, the organization of the Southern Company, its exchange of its stock for the stock of the Belt Company and its purpose, by the control of the Belt Company and of its bonds and stock, to appropriate to itself the equity of the creditors of the Belt Company in its property by means of the foreclosure suit, and prayed that the bill of the Provident Company be dismissed, and for such further orders and decrees as it was entitled to receive. On October 19, 1901, the court ordered the application denied on condition that the Provident Company should file a stipulation to the effect that the decree of foreclosure to be rendered in its case should not bar the right of the Trust Company to plead and insist in any future litigation that the Southern Company was legally and equitably bound by reason of the method by which it would obtain the property of the Belt Company to pay the debt of the Belt Company to the Trust Company. On October

19, 1901, the Provident Company filed such a stipulation and the court denied the Trust Company leave to file its amended answer. On October 19, 1901, the Trust Company presented to the court in the Provident Company suit a petition for leave to prepare and file a cross-bill setting forth the facts stated in its amended answer and praying for an adjudication of its claim against the Belt Company for the sale of its collaterals and for a provision in the decree of foreclosure that any purchaser of the Belt Company's property at the sale thereunder should take and hold it subject to the payment of the Trust Company's claim and to the payment of the claims of all the unsecured creditors of the Belt Company. On October 19, 1901, the court denied this application. On October 19, 1901, the Belt Company filed its answer whereby it admitted the averments of the Provident Company in its bill. On November 6, 1901, the court entered the decree of foreclosure and sale of the Belt Company which contained the express condition stipulated by the Provident Company that the decree should not bar the right of the Trust Company to recover of the Southern Company personally or out
1251 of the property of the Belt Company the amount of its claim against that Company. On November 20, 1901, the Trust Company and the Belt Company and its receivers stipulated in the Cambria Company's suit that the accounting between the Trust Company and the Belt Company should be expedited and that a judgment should be entered in that suit against the party found to be the debtor. On December 31, 1901, the Southern Company bid in the Belt property at the Provident Company's foreclosure sale and the master conveyed it to the Southern Company.

On February 27, 1905, the Southern Company filed an intervening petition in the Cambria Company's suit by which it sought to recover certain collaterals pledged by the Belt Company to the Trust Company to secure the Belt Company's debt and certain moneys which the Trust Company had collected. On March 7, 1905, the Trust Company filed its answer to this petition wherein it denied the validity of the claim of the Southern Company and alleged that by virtue of the proceedings which resulted in the foreclosure sale and conveyance of the Belt Company's property to the Southern Company that property remained bound and the Southern Company became bound to pay the Trust Company's claim against the Belt Company. On May 1, 1905, the Southern Company filed an amended intervening petition seeking substantially the same relief on the same grounds. On May 25, 1905, the Trust Company answered it in substantially the same way as it answered the Southern Company's former petition, and the issues thus formed were, by order of the court, referred to the special master for hearing and report. Then followed objections and arguments and testimony until on May 21, 1910, the master finally filed his report and in a few days thereafter the court rendered its decree. The Trust Company, however, was not idle during this time, nor did it limit its endeavors to enforce its claim to the prosecution of it in the court below. On March 15, 1905, and on March 28, 1905, it commenced actions at law in a state court against the Southern

Company for certain parts of its claim against the Belt Company. On July 3, 1905, the Southern Company filed a supplemental bill in the Provident Company's foreclosure suit to enjoin the Trust Company from prosecuting those actions. On August 29, 1905, the Circuit Court ordered the Trust Company enjoined from prosecuting it. On May 31, 1906, this court reversed that order. In May, 1907, the Southern Company made a motion in the
1252 State court to stay the proceedings in these actions at law and in June, 1907, that motion was denied and the cases were set for trial on December 2, 1907. On November 16, 1907, the Southern Company filed another bill to enjoin the Trust Company from prosecuting those actions and the court below granted the injunction. On April 2, 1909, this court reversed that order.

Where is the evidence of any laches of the Trust Company in these proceedings? It presented to one of the membrs of the committee its claim against the Belt Company for adjustment and settlement and was told that when the examination of the books were completed he would take up the matter whether anything could be done towards an equitable settlement of its claim, and there that matter rested until the Trust Company was enjoined from selling its collaterals in September, 1900. By a sale of some of its collaterals to the committee it collected and applied the proceeds thereof to its claim against the Belt Company in June, 1900. It gave notice of its sale of its remaining collaterals on September 1, 1900, and was enjoined from proceeding in the baseless suit of the Cambria Company, a suit based on a judgment to which the Southern Company consented in the name of the Belt Company, and it is difficult to wink so hard as not to see that the Cambria suit was in reality the suit of the Southern Company. Twice in October, 1901, it set forth in answers to the Provident Company's suit its claim against the property of the Belt Company and against the Southern Company, and prayed the adjudication and payment thereof, to be met by a denial by the court doubtless secured by the objections of the Provident Company and by that Company's stipulation that the decree should not foreclose, bar or affect the Trust Company's claim against the Southern Company, or the property of the Belt Company which it should acquire thereunder. On October 19, 1901, it applied for leave to plead this claim on a cross-bill in that suit and to pray for a decree that its claim should be paid out of the property of the Belt Company, to be met by like denial. In this way the Trust Company was prevented from obtaining a hearing on the merits and an adjudication of its claim in the foreclosure suit and subjected to the objection to an original bill which it might otherwise have brought against the Southern Company that it had no judgment against the Belt Company and no execution returned unsatisfied thereon. Therefore it pressed for that judgment.
1253 November 20, 1901, it joined the Belt Company and its receivers in a stipulation to expedite the trial of that issue and the entry of such a judgment, but new pleadings, tens of thousands of pages of testimony delayed the result. When that result seemed

nearer and on February 27, 1905, the Southern Company intervened and claimed some of the Trust Company's collaterals, and on March 7, 1905, the Trust Company answered the intervening petition and again pleaded and pressed its claim against the Southern Company. On March 17, 1905, and on March 28, 1905, apparently despairing of reaching an adjudication in this suit in equity, it brought actions at law against the Southern Company upon its claim, but was prevented from trying them by injunctions procured and other proceedings conducted by the Southern Company until April 2, 1909, when the last injunction against its proceeding in the state court was reversed by this court. Meanwhile the Trust Company had pressed the issues in this suit through the hearings, they had been submitted to the master, and on May 21, 1910, he found that the Belt Company was indebted to the Trust Company in 1900, and that the amount of that debt with interest to June 22, 1910, was $639,658.86. There is much evidence of promptness, diligence and persistence, and none of laches, on the part of the Trust Company in the printed record before us. Nor does it lie in the mouth of the Southern Company to make or urge a charge of laches here. By its use of 89 per cent of the bonds of the Belt Company which the Provident Company was bound to represent in the foreclosure suit, and of 97 per cent of the stock of the Belt Company, it controlled the action of each of those companies in that suit. By means of those companies it prevented the hearing and adjudication of the Trust Company's claim upon its answers and upon its application to file a cross-bill in that suit. By the Belt Company's consent to a judgment against it in favor of the Cambria Company it laid the technical foundation of the Cambria Company's unwarranted suit which prevented the Trust Company from selling its collaterals, and held the issue of the Belt Company's indebtedness to it suspended for more than eight years. It prevented the trial of that issue in the actions which the Trust Company brought in the state courts in 1905 by injunctions it procured from the court below and there is no equity in its claim that the Trust Company unduly delayed the presentation or the prosecution of its claim against it or against the property of the Belt Company.

1254 But counsel argue that the Trust Company is equitably estopped from maintaining its claim by the fact that it was one of the depositories under the reorganization agreement, that it persuaded others to sign it and that on July 26, 1900, it exchanged its $76,972.00 par value of stock in the Belt Company and the stocks and bonds it held in the Gulf Company and the other reorganized companies for $1,480,909.00 par value of stock of the Southern Company. Let us see. The indispensable elements of an estoppel in pais are (1) intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation, (2) ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel, (3) action by the latter induced by the misrepresentation and (4) injury to the latter if the truth is permitted to be proved. Bigelow on Estoppel, 4th Ed. page 679; Illinois

Trust & Sav. Bank v. City of Arkansas City, 76 Fed. 271, 293; 22 C. C. A. 171, 193; Farmers' & Merchants' Bank v. Farwell, 58 Fed. 633, 638, 639; 7 C. C. A. 391, 396, 397; New York Life Ins. Co. v. McMaster, 87 Fed. 63, 66, 67, 30 C. C. A. 532, 535, 536. The estoppel here probably lacks all and it certainly lacks at least three of these essential elements; (1) the requisite misrepresentation of any material fact which the Trust Company knew, (2) ignorance or absence of equal means of knowledge of that fact by the Southern Company or its stockholders and bondholders, and (3) injury to them if the truth is permitted to be proved. First, the reorganization agreement, as we have seen, disclosed a scheme whereby the property of the Belt Company might be honestly and lawfully vested in the Southern Company by offering, and if the offer was accepted by paying, to the creditors of that company at least as much in value as the scheme offered to the stockholders of the Belt Company. The Trust Company presented its claim against the Belt Company to one of committee and was told before it made its exchange that the indebtedness of the Belt Company was denied, but was under investigation, and that when that investigation was completed he would take up the claim and see if anything could be done about its settlement, and there the matter rested until after the exchange of stock was made. Meanwhile the Southern Company had the books of the Belt Company evidencing the state of the account between the Belt Company and the Trust Company in its possession. The Trust Company never made any representation
that it had no claim against the Belt Company nor that it
1255 would not press it for payment by the committee, by the
Belt Company and by the Southern Company, but it gave notice of its claim and requested its payment and neither the committee nor the Southern Company ever declared before the Trust Company exchanged its stock and bonds that they would not settle or pay it if the Belt Company really owed it.

The legal presumption was and the Trust Company had a right to rely thereon, that the scheme disclosed by the reorganization agreement would be executed in a just and lawful way and that its claim and the claims of all crditors of the Belt Company would be adjusted and settled by full or partial payment by the committee and neither its action as a depositor nor its activity to persuade others to accept the plan, nor its exchange of its stocks and bonds constituted any representation that the plan would not be so executed, that the transfer of the property of the Belt Company to the Southern Company would be illegal and fraudulent as to creditors nor any consent to or participation in such an execution of the agreement. That transfer had not then been made, the Southern Company held the stock of the Belt Company charged with the trust to secure for its creditors at least as much as it had paid to its stockholders and there was no notice or presumption that it would violate its trust. The Trust Company made no misrepresentation by any of its acts or omissions of any known fact on which an estoppel in favor of the Southern Company can be based. Second, the reorganization agreement showed that under it the title in fee of

the property of the Belt Company was to be transferred to the new company, the Southern Company, and brought under the lien of its mortgage by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and this disclosure and the law notified the Southern Company and everyone who received any stocks or bonds of that company that the acquisition of that stock in that way and its pledge under the mortgage charged the Southern Company, its bondholders and its stockholders with a trust to secure and distribute to the creditors of the Belt Company the value of their equity in the property of that company, and the answers of the Trust Company in the Provident Company's foreclosure suit, its application to file its cross-bill and the paragraph in the decree of foreclosure which exempted the Trust Company from the effect of that decree, kept that notice flaming in the record so that neither the Southern Company nor any of
1256 its bondholders, or stockholders were without equal means of knowledge nor without notice under the law that the transfer of the property of the Belt Company to the Southern Company without offering to pay or paying anything to its creditors was a breach of trust, fraudulent and voidable as to them. Moreover, although it is immaterial under the opinion in Northern Pacific Ry. Co. v. Boyd, 228 U. S. 502, whether they were notified of the Trust Company's claim or not, they all had notice of it by its presentation to one of the committee, by the Southern Company's possession of the books of the Belt Company as early as April 1, 1901, by the answers and the application to file the cross-bill in the foreclosure suit and by the terms of the decree therein. The committee, the Southern Company, its stockholders and bondholders had at least equal means of knowledge and had notice under the law of the truth regarding all material things in this transaction to which the Trust Company's acts and omissions, and its exchange of stock and bonds relate. There were no innocent stockholders or bondholders of the Southern Company in or since this transaction. Third, neither the Southern Company nor its stockholders nor bondholders will suffer any injury by proof of the truth in this transaction and the granting to the Trust Company of the equitable relief to which it was entitled in 1901. They took to themselves by a breach of trust and a transfer fraudulent as to creditors by the foreclosure sale on December 31, 1901, an equity in the property of the Belt Company of a value in excess of the amount of the Trust Company's claim, then about $360,000, which belonged to that company, and they have held and enjoyed it ever since. Each stockholder and bondholder has had and still has the benefit of his just proportion of that equity. If now the Southern Company is required to restore that equity or its value in 1901, with interest from that date, each stockholder and bondholder will lose the benefit of its just proportion of that equity which it wrongfully holds and nothing more. Nor will the Trust Company secure or retain any unjust share or advantage. While it will receive the value of that equity to which it as a creditor of the Belt Company was entitled in 1901 with interest, its stocks and bonds issued by the Southern Com-

pany will lose the benefit of that equity in the same proportion as will the stocks and bonds of others. The stocks and bonds of the Trust Company and of all the others holders of stocks and bonds in the Southern Company will be diminished in value in the exact proportion by which they were enhanced in value by the
1257 wrongful appropriation of the equity of the Trust Company in the property of the Belt Company which the Southern Company wrongfully took and holds, and the justice and equity to all which should have been done many years ago will now as nearly as practicable be administered.

This question of estoppel was ably and exhaustively argued. It has not failed to receive the study and meditation of each member of this court. But for the reasons which have now been stated, perhaps at too great length, this study and meditation have but confirmed the court in its former view and its conclusion still remains that the Trust Company was not estopped either by its promotion of the reorganization agreement, its signature to it, its exchange of stock, or its alleged laches, from prosecuting its claim against the Southern Company to adequate relief.

In the course of their argument counsel have invoked the maxims that he who seeks equity must do equity and that he who seeks equity must come into court with clean hands, and have claimed that the Trust Company is entitled to no relief because it participated in the formation and execution of a fraudulent scheme. The answer has been given. The fraud and breach of trust which made the transfer voidable as to creditors were not committed nor disclosed until after the Trust Company's acts in the formation and execution of the plan had been done. The presumption of law was, when it exchanged its stock, that the fraud and breach of trust were not being perpetrated and it did not participate in their perpetration. Its hands are not soiled and if its claim is paid by the Southern Company it, and all the parties in interest in this transaction, will have done and received equity.

(5) Counsel have argued the question whether the Trust Company or the Southern Company has the superior equity in the lands of the Central Company, but the court is not convinced that it was in error in the conclusion upon this subject which it announced in its former opinion at pages 824, 826, 827 and 828 of 201 Federal Reporter, and as, unless the court is in error on the questions which have already been discussed, that question is no longer material because the Southern Company may have no relief in that regard, unless it pays the claim of the Trust Company, the court refrains from another discussion of it.

1258 (6) Objection is made to the entry of a decree at this time in favor of the Trust Company for the payment of its claim by the Southern Company on the grounds that the Trust Company filed no cross-bill and made no specific prayer for such relief in its answer and because the Southern Company should have an opportunity to offer evidence and to be heard upon the question whether or not the Trust Company is entitled to such relief. But the issues whether or not the property of the Belt Company taken

by the Southern Company, whether or not the property of the Central Company by reason of the pledge of its stock and whether or not the Southern Company itself, was liable to pay the debt of the Belt Company to the Trust Company, were all necessarily presented and litigated under the pleading and litigation of the controlling issue whether or not the Southern Company by its acquisition of the property of the Belt Company, its exchange of stock and its foreclosure sale deprived the Trust Company of its equity in that property and exempted itself from liability. Opportunity was offered and embraced to present evidence to consider and argue these questions. The Southern Company received ample notice of the claim of the Trust Company that it and the property of the Belt Company which it acquired were liable to pay its claim against the Belt Company. In its petition for leave to file a cross-bill in the foreclosure suit in October, 1901, the Trust Company asserted its right to be paid out of the property of the Belt Company to be superior to that of the expected purchaser at the foreclosure sale of that property and the liability of such purchaser to pay it and the right of the Trust Company to assert its claim against the property and the purchaser, were expressly reserved by the decree. In its answer to the amended intervening petition of the Southern Company in this suit filed on May 20, 1905, it made a like averment which was denied by the replication of the Southern Company. A review of the facts disclosed by the master's report and of the pleadings and proceedings printed in the record before us, has convinced that the indisputable facts and the law of this case are such that an opening of the case and the reception of further evidence would not change the result or benefit any party thereto.

The court has ample power to remand the case and permit the filing of a cross-bill or an amendment of the answer so as to pray for the specific relief to which the Trust Company is entitled. Wiggins Ferry Co. v. Ohio & Mississippi Ry. Co., 142 U. S. 396, 1259 413-416; Hardin v. Boyd, 113 U. S. 756; Clark v. Clark, 62 N. H. 267, 272; Trimble v. Bank, 71 Mo. App. 467, 484, but that would be a useless proceeding and neither the law nor the rules and practice in equity require the performance of futile acts. An answer may be treated as a cross-bill and the rights and remedies which the defendant has alleged in its answer and at the hearing has proved it is entitled to enforce may be maintained and enforced although its prayer is limited to a dismissal of the bill. Bradford v. Union Bank of Tennessee, 13 How. 56, 68, 69; Walden v. Bodley, 14 Pet. 156, 164; Moran v. Hagerman, 64 Fed. 499, 503, 504; Wyatt v. Sweet, 12 N. W. (Mich.) 692, 693. In Walden v. Bodley, 14 Pet. at page 164, the Supreme court said on this subject: "It would be a reproach to the administration of justice, if in this case, the parties should be left, by the decision of this court, apparently, as remote from a final determination of it as they were forty years ago. It is true, the answer prays merely for a dissolution of the injunction and that the bill may be dismissed. But the court have, by the bill, answer and evidence, the equities of the parties before them; and having jurisdiction of the main points they may settle

the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out in detail the means which the court should adopt in giving relief." These rules and authorities and the principle of equity that a court of chancery which once acquires jurisdiction of the subject matter and the parties to a controversy ought, if possible, to determine the entire matter and grant just relief to each party, the length of time this litigation has already been pursued and the greater danger of injustice from its continuance than from its termination, have persuaded that the ends of justice will be best served by the entry of a decree in this case upon the issue of the mandate in favor of the Trust Company for the relief to which it is entitled.

(7) Counsel for three of the stockholders of the Trust Company have been heard upon their petition that this court adjudge that certain of the litigation herein instituted by the Cambria Company, the Belt Company and the Southern Company was commenced and prosecuted in bad faith and that it direct the court below to find the amount of attorneys' fees, stenographers' fees and expert accountants' fees necessarily incurred by the Trust Company in that litigation, and, after the entry of the main decree, to render a
1260 further decree in favor of the Trust Company and against the Southern Company for the aggregate of these amounts, or that this court direct the court below to insert in its decree an adjudication that it is rendered without prejudice to the right of the Trust Company to sue the Southern Company for those sums, that this court also direct the court below to include in the costs herein the damages, cost, fees and expenses incurred by the Trust Company in the injunction suit reported in 171 Federal, 43, and also to insert in the decree an adjudication that the decree shall not prejudice the right of the Trust Company to move for such damages, costs, fees and expenses in the injunction suit reported in 146 Federal, 337. A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them and as the evidence upon the issues tried in this case was not brought to this court it would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules and practice in equity.

And the conclusion of the whole matter is that the decree below should be reversed and the District Court should render a decree which should contain the first five paragraphs of the former decree, except that the proceeds of the sale of ninety-nine first mortgage bonds and coupons of the Kansas City & Northern Connecting Rail-

road Company, amounting to $40,001.25, referred to in paragraph five of the former decree, together with all interest which has accrued and shall accrue, has been and shall actually be earned on said sum, shall be applied as a credit at the time when the Trust Company shall receive said sum as its own, upon the amount which the Southern Company should pay to the Trust Company, as hereinafter provided, which future decree should also adjudge that the Southern Company is indebted to and should pay to the Trust Company the amount of the indebtedness of the Belt Company to the Trust Company, that is to say, the sum of $639,658.86
1261 and interest from the date of the former decree, on $473,723.59 at six per cent per annum, on $46,565.76 at seven per cent per annum and on $119,369.51 at eight per cent per annum, and the costs of this suit, that the Trust Company's right to and equity in the property of the Belt Company which was transferred to the Southern Company by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and by the foreclosure proceedings, sale and conveyance and otherwise, was and is prior in time and superior in equity and right to the extent necessary to pay the debt, to the right, title and equity of the Southern Company therein, that by virtue of the indebtedness of the Belt Company to the Trust Company and the pledge to it of 1,120 shares of the stock of the Central Company, the equity and right of the Trust Company in the property of the Central Company described in the sixth paragraph of the former decree is superior, to the extent necessary to pay that debt, to the right, title, claim and equity of the Southern Company therein, that in case the Southern Company shall pay its debt to the Trust Company and the costs of this suit adjudged in this suit by a day to be named in the decree, then all the collateral security described in paragraph five of the former decree which has not then been disposed of, and all the proceeds of such security which has not then been disposed of or applied, shall be surrendered and delivered to the Southern Company, that in case the Southern Company fails to pay its debt to the Trust Company and the costs of this suit by a day to be named by the court in the decree then the said property of the Central Company and the property of the Belt Company which was transferred to the Southern Company as aforesaid, and the collateral security then remaining in the possession of the Trust Company, or such part or all said property as it shall be necessary to sell in order to pay the debt and costs out of the proceeds of the sale or sales to which the Trust Company, in view of the pledge to it of only 1,120 shares of the stock of the Central Company and the possible equities of the Central Company's other stockholders and creditors, shall be equitably entitled, be sold by a master or receiver to be named by the court, and the proceeds of such sale or sales to which the Trust Company shall be equitably entitled be applied to the payment of the debt and of the costs after as well as before the decree, until they are completely paid and that the remainder of the proceeds, if any, be paid to the Southern Company or to such other

party as may be equitably entitled thereto, that on the de-
1262 mand of the master the Southern Company, the Trust Company, the Central Company and its receiver, surrender and deliver to him, or to the purchaser or purchasers of any of this property as the master shall dicet, such part or all of said property as he shall specifiy, and that if an amount to which the Trust Company shall be equitably entitled sufficient to pay the debt with interest and the costs before and after the decree is not realized from the sales, then that the Trust Company have judgment and execution against the Southern Company for the remainder unpaid. The decree should adjudge that the Trust Company may recover its costs down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may apportion those costs between them, but not as against the Trust Company which should be permitted to pursue either or both of them until its costs are paid. The district court should reserve in the decree full jurisdiction to render such further decrees and take such subsequent proceedings in the suit as equity and good conscience may require.

Let the decree be reversed and let the cases be remanded to the District Court with directions to render a decree for the Trust Company in accord with the views expressed in this opinion.

Filed December 2, 1913.

1263 (*Decree of U. S. Circuit Court of Appeals of December 2, 1913, as Modified by Order of January 22, 1914.*)

United States Circuit Court of Appeals, Eighth Circuit.
December Term, 1913.

TUESDAY, December 2, 1913.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, H. H. CRITTENDEN, Receiver of Central Improvement Company, Appellants,
vs.
CAMBRIA STEEL COMPANY, THE KANSAS CITY SUBURBAN BELT Railroad Company, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Southern Railway Company and Guardian Trust Company.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY, THE KANSAS CITY SUBURBAN BELT Railroad Company, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Southern Railway Company, Central Improvement Company, H. H. Crittenden, as Receiver of Central Improvement Company.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

These causes came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Missouri, and were argued by counsel.

On consideration whereof, it is no where ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in these causes, be, and the same is hereby, reversed with costs; and that the Central Improvement Company, H. H. Crittenden, Receiver of Central Improvement Company, in case No. 3489, and the Guardian Trust Company, in No. 3490, have and recover against the Cambria Steel Company, The Kansas City Suburban Belt Railroad Company, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company and the Kansas City Southern Railway Company, their costs in this behalf expended in the respective cases to be taxed by the Clerk of this Court.

1264 It is further ordered that these causes be, and the same are hereby, remanded to the District Court of the United

States for the Western District of Missouri, as the successor of the Circuit Court for said District, with directions to render a decree for the Trust Company in accordance with the views expressed in the opinion of this Court.

December 2, 1913.

(*Order Modifying Opinion and Decree of U. S. Circuit Court of Appeals.*)

December Term, 1913.

THURSDAY, January 22, 1914.

These causes having been called to the attention of the Court, upon due consideration, it is hereby ordered that the Per Curiam opinion in the above entitled causes, which was filed on December 2, 1913, in this Court, be, and the smae is hereby, modified so that it shall read as does Exhibit "A" hereto attached, and it is further ordered that the said Exhibit "A", and the modification hereby made in the opinion, and such modification of the decree in this Court as shall be necessary by reason thereof, shall take effect and be in force as of the date of December 2, 1913.

January 22, 1914.

(Attached to the foregoing order is Exhibit "A" being the opinion of the United States Circuit Court of Appeals as modified, which said opinion is omitted here for the reason that a copy thereof appears at page 1228 of this transcript.)

(*Motion of Cambria Steel Company for Leave to Amend Original Bill of Complaint.*)

Comes now the Cambria Steel Company and prays leave to amend its original bill filed in this cause on September 6, 1900, by adding, by way of interlineation, at page 15 of said original bill (bottom of Record, page 13), the following:

And your orator alleges that by the Act of Congress of August 1, 1888, entitled "An Act to Regulate the Liens of Judgments and Decrees of the Court- of the United States", (25 Stat. L. 357) it is provided "that judgments and decrees rendered in a circuit
1265 or district court of the United States within any state shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgment and decree had been rendered by a court of general jurisdiction of such state"; that the laws of the State of Missouri now in force and in force and effect at the date of your orator's aforesaid judgment against the Belt Company, to-wit: Sections 3712 and 3713 of the Revised Statutes of Missouri of 1889, provide:

SECTION 3712. Judgments and decrees obtained in the Supreme

Court, in any United States District or Circuit Court, held within this state, in the Kansas City Court of Appeals or the St. Louis Court of Appeals, shall, upon the filing of a transcript thereof in the office of the clerk of any such court, be a lien on the real estate of the person against whom such judgment or decree is rendered situate in the county in which such transcript is filed.

SECTION 2713. Judgments and decrees rendered by any Court of Record shall be a lien on the real estate of the person against whom they are rendered situate in the county for which the court is held.

that by virtue of said Act of Congress and the aforesaid laws of the State of Missouri all the real estate of each and every one of the said auxiliary companies is subject to the lien of your orator's aforesaid judgment against the Belt Company, and your orator therefore avers that this is a suit arising under the laws of the United States.

All the matters contained in said proposed amendment existed at the time of the filing of said original bill. The purpose of said amendment is to make express reference to the laws of the United States whose construction and application are involved in the original bill of this complaint, and to expressly assert that the cause of action made by said original bill is one arising under the laws of the United States.

CAMBRIA STEEL COMPANY,
By FRANK HAGERMAN,
Its Solicitors.

[Endorsed:] Filed in U. S. Circuit Court of Appeals on January 22, 1914.

1266 (*Order Denying Motion of Cambria Steel Company for Leave to Amend Original Bill of Complaint.*)

December Term, 1913.

THURSDAY, January 22, 1914.

These causes having been called for further hearing, came on to be heard upon the motion of the Cambria Steel Company for leave to amend its original bill of complaint herein as stated in the motion and was argued by counsel.

On Consideration Whereof, it is now ordered by this Court, that said motion of the Cambria Steel Company for leave to amend its original bill of complaint, be, and the same is hereby denied.

January 22, 1914.

(Order Fixing Amount of Supersedeas Bond on Appeal to the Supreme Court of the United States.

December Term, 1913.

THURSDAY, January 22, 1914.

Upon application of counsel for the Kansas City Southern Railway Company, it is now here ordered that the amount of the bond on an appeal to the Supreme Court of the United States, to operate as a supersedeas of the decree of this Court, in the above entitled causes, be, and the same is hereby fixed at the sum of Six Hundred Thousand Dollars ($600,000.00).

January 22, 1914.

(Petition of Kansas City Southern Railway Company for, and Order Allowing Appeal to the Supreme Court, U. S.

The Kansas City Southern Railway Company respectfully shows that the above entitled cause, in which there are separate appeals by the Guardian Trust Company and by the Central Improvement Company, is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a final judgment and decree has therein been rendered on the 2nd day of December, 1913,
1267 reversing the decree of the Circuit (now District) Court of the United States for the Western Division of the Western District of Missouri, and directing said District Court to enter a specified judgment and decree in favor of the Guardian Trust Company; that the matter in controversy in said suit exceeds the sum of One Thousand Dollars ($1,000) besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Eighth Circuit has not final jurisdiction, and that it is a proper case to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellant prays that an appeal be allowed it in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors, complained of in the assignment of errors herewith filed by the said appellant may be reviewed and that if error be found, corrected according to the laws and customs of the United States.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Appellant.

Appeal allowed and bond in the sum of Six Hundred Thousand Dollars ($600,000) is hereby approved to operate as a supersedeas this 24th day of January, A. D. 1914.

WALTER H. SANBORN,
Presiding Judge U. S. Circuit Court of Appeals, Eighth Circuit.

[Endorsed:] Filed in U. S. Circuit Court of Appeals on January 24, 1914.

(*Assignment of Errors by Kansas City Southern Railway Company on Appeal to Supreme Court, U. S.*)

Now comes the appellant, The Kansas City Southern Railway Company, and says that in the record and proceedings herein, there is manifest error, and that the United States Circuit Court of Appeals for the Eighth Circuit erred in this, to-wit:

1. In holding and deciding that The Kansas City South-
1268 ern Railway Company was liable for and required to pay to the Guardian Trust Company the indebtedness of the Kansas City Suburban Belt Railroad Company to the Guardian Trust Company.

2. In holding and deciding that the rights and equities of the Guardian Trust Company in the properties and capital stock of the Central Improvement Company were prior and superior to the rights and equities therein of The Kansas City Southern Railway Company.

3. In holding and deciding that the Guardian Trust Company was not estopped by its participation in, and the benefits received and retained by it from, and growing out of the plan of reorganization involved herein, from maintaining that The Kansas City Southern Railway Company was or is liable for the indebtedness of the Kansas City Suburban Belt Railroad Company to the Guardian Trust Company.

4. In deciding and passing upon the issue of the alleged liability of the appellant for the indebtedness of the Belt Company, in the absence of any exception taken before the master, or in the lower court, challenging the correctness of the finding of the master that the appellant was not liable for such indebtedness.

Wherefore, the appellant prays that said judgment and decree of the said Circuit Court of Appeals may be reversed in all things.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Appellant.

[Endorsed:] Filed in U. S. Circuit Court of Appeals on January 24, 1914.

(*Supersedeas Bond on Appeal to Supreme Court of the United States by Kansas City Southern Railway Company.*)

Know all men by these presents: That, The Kansas City Southern Railway Company, as Principal and American Surety Company of New York as Surety, acknowledge themselves to be jointly indebted unto the Guardian Trust Company in the full and just sum of Six Hundred Thousand Dollars ($600,000) for the payment of which to the Guardian Trust Company they bind themselves and

each of their successors and assigns jointly and severally,
1269 firmly by these presents.

Sealed with our seals and dated the 23rd day of January, A. D. 1914.

Whereas the appellant in the above entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Eighth Circuit on the 2nd day of December, 1913.

Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs if it fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

In witness whereof said The Kansas Southern Railway Company has caused this instrument to be executed by its Treasurer, he being thereunto duly authorized, and the American Surety Company of New York has caused the same to be executed by its resident Vice-President, its corporate seal to be hereunto affixed and attested by its resident Assistant Secretary.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By H. VISSCHER, *Its Treasurer.*
[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By R. E. VALENTINE, *Resident Vice-President.*
Attest:
ROBERT S. KING,
Resident Assistant Secretary.

The above and foregoing bond is hereby approved to operate as a supersedeas this 24th day of January, 1914.

WALTER H. SANBORN,
Presiding Judge U. S. Circuit Court of Appeals, Eighth Circuit.

O. K.
____ ____,
____ ____,
Solicitors for Guardian Trust Company.

1270 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 21, 1913, at eleven o'clock A. M.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 10, 1912, for the purpose of nominating * * * officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *

Place.

Kansas City, Mo.

Resident Vice Presidents:

A. A. Tomlinson,
E. F. Swinney,
Robert F. Porter,
R. E. Valentine.

Resident Assistant Secretaries:

Robert F. Porter,
R. E. Valentine,
C. E. Chadduck.

* * * * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the Members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

1271 * * * * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice President be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, H. A. Reiss, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with

the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 5th day of February, 1913.

[SEAL.] H. A. REISS,
Assistant Secretary.

Extract from the Record Book of the Executive Committee of the American Surety Company of New York.

"A meeting of the Executive Committee of the American Surety Company of New York was held on the 18th day of
1272 March, 1913.

* * * * * * *

"The following resolution was adopted:

"Resolved, that Robert S. King, of Kansas City, Mo., be and he is hereby constituted and appointed a Resident Assistant Secretary of this Company at the town or city aforesaid, with full power and authority to attest any and all surety bonds and undertakings, for or on behalf of this Company, in its business and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be executed on behalf of this Company by one of its Resident Vice Presidents."

STATE OF NEW YORK,
County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 20th day of Nov., 1913.

[SEAL.] W. H. RILEY,
Assistant Secretary.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 24, 1914.

1273 (*Affidavit as to Notice to and Refusal of Cambria Steel Company to Join in Appeal to the Supreme Court U. S.*)

STATE OF MISSOURI,
City of St. Louis, ss:

S. W. Moore, of lawful age, being duly sworn upon his oath states: On January 19th, 1914, as counsel for The Kansas City Southern Railway Company in the Guardian Trust Case pending in the United States Circuit Court of Appeals for the Eighth Circuit, I sent to Frank Hagerman as counsel for the Cambria Steel Company, the Complainant in said action, the following telegram signed by myself and addressed to him at the Biltmore Hotel, New York City, "Please wire me acceptance of service of notice in behalf of Cambria Company to join in appeal in Guardian Trust Case and your refusal to join, unless you are willing to join in appeal, in which event please wire me to that effect."

The answering telegram from Mr. Hagerman was received by me January 21st, 1914, before 10 o'clock A. M. of that day, dated New York, January 20th, 1914, addressed to me and signed Frank Hagerman, as follows: "On behalf of Cambria Steel Company I accept notice as served but decline to join in your appeal."

S. W. MOORE.

Subscribed and sworn to before me this 21st day of January, 1914.

[SEAL.] JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 22, 1914.

1274 United States of America to Guardian Trust Company, Central Improvement Company, Cambria Steel Company, and Kansas City Suburban Belt Railroad Company, Greeting:

You are hereby notified that, in a certain case in equity in the United States Circuit Court of Appeals for the Eighth Circuit, wherein Central Improvement Company and Guardian Trust Company are separate appellants, and Cambria Steel Company, The Kansas City Southern Railway Company, and others, are appellees, an appeal has been allowed the Kansas City Southern Railway Company, appellee therein, to the Supreme Court of the United States. You are hereby cited and admonished to be and appear in said court at Washington, D. C., thirty (30) days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this the 24th day of January, A. D. 1914.

WALTER H. SANBORN,
Presiding Judge of the U. S. Circuit Court of Appeals, Eighth Circuit.

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri:

We hereby acknowledge due service of the within citation this 27th day of January, 1914.

EDWARD P. GATES,
GEO. H. ENGLISH, JR.,
Solicitors for Guardian Trust Company.
FRANK HAGERMAN,
Solicitor for Cambria Steel Company.
THOMAS D. MARKS,
Solicitor for Kansas City Suburban Belt Railroad Company.
J. A. EDSON,
President Central Improvement Company.

1275 [Endorsed:] Supreme Court of the U. S., October term, 1913. No. —. Kansas City Southern Railway Company, appellant, vs. Guardian Trust Company et al. Citation. Filed Jan. 30, 1914, John D. Jordan, Clerk.

1276 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript composed of two volumes, Volume I consisting of pages *a* to 1080, inclusive, and Volume II consisting of pages 1081 to 1275, inclusive, contains the transcript of the record from the Circuit Court of the United States for the Western District of Missouri as prepared and printed for use on the hearing in said Circuit Court of Appeals and also full, true and complete copies of all the pleadings, record entries and proceedings, including the opinions, had and filed in the United States Circuit Court of Appeals for the Eighth Circuit except the full captions, titles and endorsements in the proceedings had and filed in said Circuit Court of Appeals which are omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals, wherein the Central Improvement Company, et al., are Appellants, and the Cambria Steel Company, et al., are Appellees, No. 3489, and wherein the Guardian Trust Company is Appellant, and the Cambria Steel Company, et al., are Appellees, No. 3490, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon, on the appeal of the Kansas City Southern Railway Company to the Supreme Court of the United States, is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirtieth day of January, A. D. 1914.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 24,092. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 387. The Kansas City Southern Railway Company, appellant, vs. Guardian Trust Company, Central Improvement Company, Cambria Steel Company, and Kansas City Suburban Belt Railroad Co. Filed March 10th, 1914. File No. 24,092.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record in the case of The Kansas City Southern Railway Company, Appellant, v. Guardian Trust Company, et al., No. 387, October Term, 1914, and File No. 24,092, filed in the Supreme Court of the United States on the appeal of appellant, is one of the copies submitted to the United States Circuit Court of Appeals for the Eighth Circuit for consideration in cause No. 7784, Guardian Trust Company, Henry C. Flower, Receiver, Appellant, vs. The Kansas City Southern Railway Company, being referred to in the stipulation of parties at page 139 of the printed record in said cause No. 7784 and approved by said Circuit Court of Appeals in the Order appearing on Page A of the printed record in said cause No. 7784.

This copy of the printed record so filed in the Supreme Court is being transmitted with the certified transcript of the record in said cause No. 7784 pursuant to præcipe for transcript filed by counsel for appellee in said cause No. 7784.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixteenth day of November, A. D. 1928.

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

FILE COPY

FILED
JAN 10 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. [redacted] 22

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

GUARDIAN TRUST COMPANY,
Henry C. Flower, Receiver *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

FRANK H. MOORE,
CYRUS CRANE,
A. F. SMITH,
Attorneys for Petitioner.

SAMUEL W. MOORE,
Of Counsel.

January 9, 1929.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,
v.
GUARDIAN TRUST COMPANY,
Respondent.
No.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The Kansas City Southern Railway Company, the petitioner herein, respectfully presents its application for a writ of certiorari, requiring the United States circuit court of appeals for the eighth circuit to certify to the Supreme Court of the United States for its review and determination the case of *Guardian Trust Company,* Appellant, *v. The Kansas City Southern Railway Company,* Appellee, decided May 18, 1928 (28 F. (2d) 233). Petitioner's motion for a rehearing was filed July 16, 1928 (Rec. 751-821), and was overruled October 18, 1928 (Rec. 821).

NOTE: The transcript of the record brought to this Court consists of two volumes. The first, in point of time, is a copy of the record in the original case in this Court, in *Guardian Trust Co.* v. *The Kansas City Southern Ry. Co.,* reported in 240 U. S. 166. References to its pages are as follows: "(S. C. Rec.)." The second volume is a transcript of subsequent proceedings in the district court and circuit court of appeals for the eighth circuit. References to its pages are as follows: "(Rec.)."

Principal Question Involved.

The principal question involved in this application is the following:

Was the district court for the western district of Missouri, upon receipt of the mandate of this Court in *The Kansas City Southern Railway Company* v. *Guardian Trust Company,* 240 U. S. 166, required or authorized to tax against petitioner, in its final decree, costs "as between solicitor and client," including therein the disbursements of the Trust Company for attorneys' fees and other expenses incurred during the entire period of the litigation?

The district court held (Rec. 704-720) that only costs as between party and party should be taxed, and rendered its final decree accordingly (Rec. 128-131). Such costs have been duly taxed and paid, and are not involved herein. Our contention is that the district court was clearly right in its ruling.

The circuit court of appeals for the eighth circuit, upon appeal by the Trust Company, held that our federal courts possess the powers of the English Chancery Court over the taxation of costs, and, purporting to exercise those powers, it reversed the decree of the district court (Rec. 722-749) and remanded the case with instructions to tax costs "as between solicitor and client." Its decree requires the taxation, as costs against petitioner, of attorneys' fees, and other disbursements of the Trust Company, in the sum of approximately $300,000 (Rec. 59). Petitioner seeks a review by this Court of the decree of the circuit court of appeals.

It is believed that this highly important question of federal practice can be determined by the Court as a matter

of law, without opening the record in this twenty-eight year old case.

Summary and Short Statement of the Matter Involved.

For a statement of the facts involved in this litigation up to the time of this Court's decision, 240 U. S. 166, we adopt the statement of facts contained in the opinion.

Chronological Statement of the Proceedings.

In order that the proceedings subsequent to this Court's decision, above referred to, may be viewed in relation to the case as a whole, we summarize the entire proceedings from beginning to end in chronological order. A somewhat fuller statement will be found in the accompanying brief.

(a) In September, 1900 (S. C. Rec. 3) the Cambria Company, a judgment creditor of the Belt Company, brought suit for an accounting, in the federal court at Kansas City, Missouri, against the Trust Company, praying for a cancellation of the alleged indebtedness of the Belt Company to the Trust Company, and that the collateral held by the Trust Company to secure said alleged debt be released and subjected to the Cambria Company's debt. The gravamen of the bill was that for a period of years the Trust Company, through a community of officers and directors, had dominated and controlled the Gulf Company and a number of affiliated companies, including the Belt Company, and that by reason of such domination and control had imposed large and unwarranted charges against those companies, including the Belt Company, and that upon a true accounting between the Belt Company and the Trust Company, it would appear that the Belt Company was in no way in-

debted to the Trust Company. The Trust Company answered the bill (S. C. Rec. 33), consenting to an accounting (S. C. Rec. 48).

(b) The Belt Company and its receivers intervened in the action in 1901 by ancillary bill (S. C. Rec. 97). This ancillary bill was filed pursuant to stipulation (S. C. Rec. 890), providing that "the accounting * * * sought by the said ancillary bill shall be expedited by all of the parties hereto." The receivers, in becoming parties to the action, were acting under instructions contained in the order of the court appointing them (S. C. Rec. 29). The ancillary bill made substantially the same allegations against the Trust Company as were made by the Cambria Company and prayed for a cancellation of the alleged indebtedness and a release of the collateral security. The Trust Company answered the ancillary bill (S. C. Rec. 115), affirming the alleged indebtedness and offering to make such accounting as the court might require (S. C. Rec. 148). Amended pleadings were subsequently filed.

(c) In April, 1905, petitioner, pursuant to stipulation (S. C. Rec. 164), intervened in the case (S. C. Rec. 166), upon the ground that the Gulf mortgage and the Belt mortgage covered after-acquired property, so that petitioner, as the purchaser under foreclosure sales, was entitled to the securities in the Trust Company's hands, or the properties represented by such securities.

The Trust Company answered the intervening petition (S. C. Rec. 186) alleging, among other things, that petitioner was liable for the Belt Company's debt. This liability issue, which thereafter became the dominant issue in the action, was one which the Trust Company itself injected into the case in 1905. It is largely the attorneys' fees and

other expenses of the Trust Company incurred in litigating this issue which it now seeks to impose upon petitioner.

(d) Testimony was taken, the case was argued and submitted to the special master in the summer of 1906, and in June, 1910, the lower court rendered a final decree (S. C. Rec. 903). It reduced the debt of the Belt Company to the Trust Company by three items, and in other respects affirmed it. The properties of the Central Improvement Company, which were the most valuable part of the collateral held by the Trust Company, were awarded to petitioner; and petitioner was held to be in no way obligated for the payment of the Trust Company's debt against the Belt Company.

(e) The Trust Company appealed to the circuit court of appeals for the eighth circuit, alleging as error (201 Fed. 817) that the district court erred, first, in incorporating in the decree the finding that petitioner was not liable for the Belt Company's debt; secondly, in awarding the Central Improvement Company's properties to petitioner; and, thirdly, in taxing one-third of the costs against the Trust Company.

(f) The circuit court of appeals, on October 22, 1912, reversed the decree of the lower court, holding that petitioner was liable for the debt of the Belt Company (201 Fed. 811).

(g) A reargument was had in the circuit court of appeals and a second opinion handed down, on December 2, 1913 (210 Fed. 696), affirming, in somewhat more vigorous and emphatic language, the conclusions reached in its first opinion. The lower court was directed (pp. 723, 724) to enter a specific decree, complete in all its details, including

the taxation of "costs". The Trust Company was awarded a money judgment against petitioner for the amount of the Belt Company's debt, with a sale of the collateral in the event of a failure to pay the judgment.

The court also (pp. 722, 723) denied the petition of three intervening stockholders of the Trust Company, asking that the lower court be directed, after the entry of the amount of the decree, to render a further decree in favor of the Trust Company and against petitioner for the aggregate amount of the attorney's fees, stenographers' fees and expert accountants' fees incurred by the Trust Company, or, in the alternative, that the Trust Company be permitted to bring an independent suit for such sums.

(h) Petitioner appealed to this Court (S. C. Rec. 1057), and, in response to a motion to dismiss, filed its application for certiorari, which this Court, by order entered May 11, 1914, held should be granted on account of the nature of the questions involved, in the event that an appeal did not lie.

(i) The decree of the circuit court of appeals was affirmed by this Court on February 21, 1916, the Chief Justice and one of the Associate Justices dissenting (240 U. S. 166). In April, 1916, petitioner paid the Trust Company in full the debt and interest, amounting to $821,623.28 (Rec. 129).

(j) Six years later, in 1922, upon notice for a settlement of the decree in the district court under the mandate of this Court, application was made by the Trust Company (Rec. 16) for the taxation of costs as between solicitor and client. The motion was at first sustained by the district court in June, 1923 (Rec. 691-704), upon the existing record and without new issues or additional evidence, and a master was

appointed to take and state the account of disbursements made by the Trust Company. This was done; the report of the master showing that approximately $300,000 should be taxed against petitioner on account of the Trust Company's attorneys' fees and other disbursements from beginning to end (Rec. 59). The ordinary costs as between party and party were small, and have been paid in full.

Later, the district court granted a reargument of the entire question, and after further and exhaustive consideration, reached the conclusion, in March, 1926, that only costs as between party and party were taxable against petitioner (Rec. 704-720). A final decree (Rec. 128) was thereupon entered in accordance therewith.

(k) The Trust Company appealed from the final decree to the circuit court of appeals for the eighth circuit, and the latter, on May 18, 1928 (Rec. 722), reversed the decree of the lower court, and remanded the case with instructions to tax costs "as between solicitor and client." Petitioner filed a motion for a rehearing (Rec. 751-821), which was overruled on October 18, 1928 (Rec. 821).

(l) It is to review this last-named judgment that this application for certiorari is made.

Reasons Relied On for Allowance of the Writ.

I.

It is the practice of this Court (*St. L., K. & C. R. Co. v. Wabash R. Co.*, 217 U. S. 247, 251) to issue its writ of certiorari to review the action of the circuit court of appeals in passing upon the proper execution of this Court's mandate, where, as here, controversies have arisen in reference thereto.

This Court (240 U. S. 166) affirmed the decree of the circuit court of appeals (210 Fed. 696), which (pp. 723, 724) directed the entry, in the district court, of a specific decree, complete in all its details, awarding a money judgment in favor of the Trust Company, with "costs," and left the "taxation of costs" to the court below "under the principles, rules and practice in equity."

The circuit court of appeals has construed the opinion and mandate of this Court to mean the taxation of costs "as between solicitor and client." We confidently contend that this was error, and that the opinion and mandate of this Court contemplated and required only the taxation of costs in the usual manner, between party and party.

II.

The opinion and judgment of the circuit court of appeals are directly in conflict with the Act of Congress of 1853 (28 U. S. C. A., sec. 571, 572), providing that certain specified fees "and no other" shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States. Its provisions are as follows:

> The following fees and no other shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, and to district attorneys, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

> On a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of $20: Provided, That in cases of admiralty and maritime jurisdiction, where the libelant recovers less than $50, the docket fee of his proctor shall be but $10.

Since the date of that enactment, it has been the uniform and accepted practice in federal courts to refuse to tax as costs attorney's fees and other expenses incurred by the successful party in excess of the amount fixed by that statute. This rule was authoritatively established in *Oelrichs* v. *Williams,* 15 Wall. 211, and has since been followed and accepted as the settled rule of practice and procedure. The only exception to the rule, aside from statutes imposing attorneys' fees as costs or as a part of the judgment, is in the case of allowances made in the administration of trust funds or trust estates, which is a feature wholly absent in this case, as is pointed out in the brief.

III.

The opinion and judgment of the circuit court of appeals are in conflict with the following applicable decisions of this Court:

The Baltimore, 8 Wall. 377;
Oelrichs v. *Williams,* 15 Wall. 211;
Tullock v. *Mulvane,* 184 U. S. 497;
Missouri, K. & T. R. Co. v. *Elliott,* 184 U. S. 530;
Missouri Pacific R. R. Co. v. *Larabee,* 234 U. S. 459;
Sioux County v. *National Surety Co.,* 276 U. S. 238.

IV.

The decision of the circuit court of appeals is in conflict with the following decisions of the court of appeals for the seventh circuit: *McIntosh* v. *Ward*, 158 Fed. 66; *Fraser* v. *Cole*, 214 Fed. 556; and also in conflict with the following decisions of the court of appeals for the fourth circuit; *Kell* v. *Trenchard*, 146 Fed. 245; *Leary* v. *United States*, 257 Fed. 246; and with the following decisions of the court of appeals for the second circuit: *Motion Picture Patents Co.* v. *Steiner*, 201 Fed. 63; *Marks* v. *Leo Feist*, 8 F. (2d) 460.

V.

The opinion and judgment of the circuit court of appeals, authorizing the taxation of costs as between solicitor and client, under or by analogy to the English system of taxation of costs, where attorneys' fees, fixed by law, are included as costs in all cases, constitute a radical and revolutionary departure from the usual, accepted and established course of judicial proceedings in this country from its beginning until the present time.

If the courts of this country are to incorporate into its jurisprudence the English doctrine of the taxation of costs as between solicitor and client, it is a matter of such great importance to all citizens, as well as to bench and bar, as to invoke the deliberate consideration and judgment of this Court.

The opinion and judgment of the circuit court of appeals operate to deny one of the fundamental principles of our government, that every one is entitled to free access to our courts. This essential right of every citizen would cease to exist if an intending litigant were threatened and menaced with punishment of this character for his failure,

perhaps through no fault of his own, to anticipate the conclusion which some court or jury may ultimately reach as to the merits of his case.

VI.

The extraordinary character of the judgment of the court of appeals is plainly apparent when we consider the conceded fact that it requires petitioner to pay the attorneys' fees and other disbursements of the Trust Company during the entire period of this litigation, from beginning to end. This period includes the Trust Company's appeal to the circuit court of appeals, where the questions involved were regarded by that court as of such difficulty that it permitted a reargument of the case (201 Fed. 811, 210 Fed. 696), and of such grave importance by this Court that it held (May 11, 1914) that if an appeal did not lie, *certiorari* should be granted because of the nature of the case, and where, upon the final decision of this Court (240 U. S. 166), the Chief Justice and one of the Associate Justices dissented. These proceedings followed the rendition of the final decree in the lower court in June, 1910 (S. C. Rec. 903), and involved only questions of law.

A judicial decision that petitioner should be penalized by the payment of the Trust Company's expenses for attorney's fees and other disbursements, for resisting the Trust Company's appeal to the circuit court of appeals, and for appealing from that court to this Court, where exceedingly difficult and complicated questions of law were involved, is obviously of a radical and revolutionary character. The duty of this Court to review a decision of that character would appear to be beyond question.

VII.

The circuit court of appeals has, we respectfully submit, committed a grave error of a most prejudicial character by incorporating in its opinion (Rec. 735) the astounding statement concerning what it is pleased to call "the vexatious character of the whole litigation." It does this not only in a case where, as pointed out in the preceding paragraph, exceedingly difficult and complicated questions of law were involved, but in face of the fact that the evidence in the case was not brought to that court and was not before it (201 Fed. 816); in face of the fact that no issue of that character was made, or evidence taken, or opportunity afforded for the production of testimony; and, furthermore, in face of the fact that when demand was being made in the district court by the Trust Company for the taxation of costs as between solicitor and client, petitioner filed its application for leave to adduce testimony to prove the entire good faith of the litigation from beginning to end, setting forth in detail the facts sought to be proved (Rec. 33); and this application was denied (Rec. 45).

This imputation of bad faith not only has no support whatsoever in the record, but is coupled with a denial of any and all opportunity to enjoy the fundamental right of a day in court, guaranteed to every citizen.

VIII

The circuit court of appeals decided certain important questions of general law in a way probably untenable and in conflict with the weight of authority, as follows:

(1) It held that the Trust Company, a pledgee of securities as collateral to the debt of the Belt Company, was compelled to litigate not only the validity and amount of

its debt, but the title of the pledgor to the pledged property; and that it, under these circumstances, was entitled to a taxation of costs as between solicitor and client. But it appeared without contradiction that the Trust Company litigated the amount of its claim and the title to the pledged property, not in caring for or preserving the pledged property, nor for the benefit of the Belt Company, which was the pledgor, but to protect its own individual and personal interest as a creditor of the Belt Company. In these circumstances, the great weight of authority is against the right of the Trust Company either to a taxation of costs as between solicitor and client, or to an allowance out of a fund.

(2) It held that the complainants brought suit to charge the Trust Company as an express or constructive trustee, or to charge it with the obligations resting upon trustees, and that the Trust Company is therefore entitled to the taxation of costs as between solicitor and client. But the conceded fact is that the Trust Company in its answer disclaimed any trust relationship in the matter complained of, and denied that it had assumed any of the obligations resting upon trustees, and the finding and decree of the court upon this issue was in favor of the Trust Company. It thus appeared that there was no trusteeship, and that none of the obligations of trustees had been assumed. In these circumstances, the great weight of authority is against the right of the Trust Company either to a taxation of costs as between solicitor, or to an allowance out of a fund.

(3) It held that the Trust Company, in fastening a liability upon petitioner for its debt against the Belt Company, had brought a fund into the constructive possession of the court, and that it, therefore, was entitled to an allow-

ance of costs as between solicitor and client, by analogy to a creditor who sues in behalf of himself and others and succeeds in bringing a fund into court for distribution. But the conceded fact is that the Trust Company recovered a personal judgment against petitioner, without segregating a fund in kind and bringing its corpus into a court of equity for distribution. This judgment was promptly paid in full, with interest. The Trust Company is not, therefore, entitled to costs as between solicitor and client, or to any further allowance, either from the fund or from petitioner. This proposition is sustained by the great weight of authority.

WHEREFORE, petitioner respectfully prays that its application for a writ of certiorari may be granted.

FRANK H. MOORE,
CYRUS CRANE,
A. F. SMITH,
Attorneys for Petitioner.

SAMUEL W. MOORE,
Of Counsel.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

G. C. HAND, being duly sworn, says:

I am Vice-President of The Kansas City Southern Railway Company and make this affidavit in its behalf. I have read the foregoing petition, and the same is true of my own knowledge, information and belief.

G. C. HAND.

Subscribed and sworn to before me
this 9th day of January, 1929.

BARBARA STOIBER
Notary Public,
New York County
County Clerk's No. 436, Reg. No. 0-75
Term expires March 30, 1930

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded, and the case is one in which the prayer of the petitioner should be granted by this Court.

SAMUEL W. MOORE,
Of Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. ~~21~~ 22

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

GUARDIAN TRUST COMPANY,
Henry C. Flower, Receiver *Respondent.*

BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR CERTIORARI.

FRANK H. MOORE,
CYRUS CRANE,
A. F. SMITH,
Attorneys for Petitioner.

SAMUEL W. MOORE,
Of Counsel.

January 7, 1929.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Petitioner, v. GUARDIAN TRUST COMPANY, Respondent.	No. .....

BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR CERTIORARI.

The opinions delivered in the courts below.

The official report of the opinion of the circuit court of appeals for the eighth circuit, sought to be reviewed herein, will be found in 28 F. (2d) 233. There were two opinions rendered in the district court, not yet officially reported. The first opinion, delivered in June, 1923, will be found in the record (Rec. 691); and the second opinion,

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NOTE:—The transcript of the record brought to this Court consists of two volumes. The first, in point of time, is a copy of the record in the original case in this Court, in *Guardian Trust Co.* v. *The Kansas City Southern Ry. Co.*, reported in 240 U. S. 166. References to its pages are as follows: "(S. C. Rec. .....)." The second volume is a transcript of subsequent proceedings in the district court and circuit court of appeals for the eighth circuit. References to its pages are as follows: "(Rec. .....)."

rendered in March, 1926, will be found in the record (Rec. 704). The Trust Company appealed to the circuit court of appeals for the eighth circuit from the decree (Rec. 128) following the second opinion.

Jurisdiction.

This application for a writ of certiorari to the circuit court of appeals for the eighth circuit is made under section 240 of the Judicial Code, as amended (28 U. S. C. A. sec. 347). The decision of that court was handed down on May 18, 1928 (Rec. 722-749). A motion for a rehearing was filed by petitioner on July 16, 1928 (Rec. 751-821), and was overruled on October 18, 1928 (Rec. 821). This application is made within three months after the overruling of said motion for a rehearing and after the entry of the decree sought to be reviewed by this Court.

Statement.

We desire to supplement the brief outline of the facts and proceedings contained in our Application, by a statement of the case so far as deemed material to a consideration of the questions presented, with appropriate page references to the printed record.

The bill of the Cambria Company.

This litigation had its inception in September, 1900, when the Cambria Steel Company, a judgment creditor of the Belt Company, filed a creditor's bill (S. C. Rec. 3) in the federal court at Kansas City, Mo., against the Trust Company, the Belt Company, and others.

The complaint alleged, in substance, that the Trust Company, prior to the year 1887, conceived and entered upon the plan and purpose to cause to be constructed a number of railroads, including that of the Belt Company, by various corporations, all to be organized by the Trust Company, and to be officered with officers and directors of the Trust Company, and thereby completely to dominate and control the actions of such railroad and other companies, and their several officers and directors; that it was the plan and purpose of the Trust Company to gather unto itself all the profits and other advantages accruing in the premises, and to foist upon such railroads, including the Belt Company, any losses that might be sustained or liabilities that might result in the premises.

It was further alleged that in carrying out its said plan and purpose, the Trust Company assumed the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of such railroad and other companies, in trust for the use and benefit of the parties who might become concerned or interested therein; and that, consequently, the relation of the Trust Company to each and all of such railroad and auxiliary companies was that of principal, bound and charged with the duty to indemnify and protect the railroad and other companies, so employed and utilized in any particular transaction, against any and all losses, burdens and liabilities arising in the premises.

Then followed allegations as to the various companies organized and officered by the officers and directors of the Trust Company, and the various transactions whereby it was alleged losses had been sustained and, through the domination and control of the Trust Company, unlawfully charged to the Belt Company, and unlawful profits and

charges made at the expense of the Belt Company, resulting, on March 31, 1899, in an apparent, but not a real, indebtedness of the Belt Company to the Trust Company in the sum of approximately $360,000; that on said date promissory notes were caused to be given by the Belt Company to the Trust Company to evidence its alleged indebtedness, and the Belt Comuany was caused to pledge with the Trust Company all its available securities as collateral to secure the same; that the giving of the notes and collateral was done fraudulently, through such domination and control, in anticipation of the insolvency and receivership of the Gulf Company, which occurred the following day, April 1, 1899; and the prayer was for an accounting, for a cancellation of the alleged indebtedness from the Belt Company to the Trust Company, the subjection of the collateral to the payment of complainant's debt, and for an injunction to restrain a threatened sale by the Trust Company of said collateral.

The Trust Company's answer to the bill of the Cambria Company.

The answer of the Trust Company (S. C. Rec. 33) denied the allegations of the bill, and particularly denied the existence of any trust relations in the following language (S. C. Rec. 42):

> Denies that in carrying out any of its plans and purposes as alleged in the bill of complaint the defendant assumed the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of said railroad companies and auxiliary companies in trust, and for the use and benefit of the parties who might become interested therein, as alleged in the bill of complaint; and denies

> that as a consequence of any such alleged position the relation of this defendant to any of such railroad companies and auxiliary companies in any wise became or was as principal bound and charged with the duty to indemnify or protect any such railroad or auxiliary company in any transaction against any loss, burden or liability, as alleged in the bill of complaint. Denies that it became the duty of the defendant, as to persons becoming interested in any of said railroad companies or auxiliary companies as creditors, to dispose of the stock, bonds, funds or other assets of any such railroad companies or auxiliary companies for the use and benefit of the persons interested therein, or who might become interested therein as creditors or otherwise, as alleged in the bill of complaint.

The Trust Company expressed a willingness to render a full and true account to the Belt Company, and to furnish all such information whenever thereunto lawfully and properly requested. It said (S. C. Rec. 48):

> . . . Notwithstanding the fact that the said Belt Company has at all times had full and true accounts and knowledge of all the transactions between it and this defendant as aforesaid; yet, if, for any reason, it desires further accounting or information as to any of the said matters or things, this defendant is ready and willing and hereby offers again to render a full and true account and to furnish all such information, whenever thereunto lawfully and properly requested.

Under the bill of the Cambria Company, the issue was one of debt or no debt between the Belt Company and the Trust Company.

The ancillary bill.

The ancillary bill of the Belt Company and its receivers, under which the accounting was carried on, was filed in November, 1901 (S. C. Rec. 97), pursuant to stipulation (S. C. Rec. 890) which consented that the accounting sought should be expedited, and also required that the Belt Company should be a co-complainant with the receivers. This ancillary bill, as appears from the stipulation, superseded a so-called cross-bill, previously filed by the receivers as sole cross-complainants. The receivers became parties complainant pursuant to the instructions contained in the order appointing them (S. C. Rec. 29). The ancillary bill was substantially the same as the bill of the Cambria Company. It sought an accounting and a cancellation of the alleged indebtedness. An amended and supplemental ancillary bill was filed in March, 1905 (S. C. Rec. 202), in the nature of a surcharging and falsifying of the accounts brought in by the Trust Company (Rec. 15). A further amended ancillary bill was filed (S. C. Rec. 392), by stipulation (S. C. Rec. 391), in July, 1906, at the close of the taking of testimony, to conform the pleading to the proof. Its allegations are summarized by the master (S. C. Rec. 584, *et seq.*).

The Trust Company's answer to the ancillary bill.

The Trust Company answered the ancillary bill, in December, 1901 (S. C. Rec. 115), admitting the community of officers (S. C. Rec. 148), but denying that it had dominated and controlled the railroad companies, including the Belt Company. It also sought to justify its action in the various matters complained of, and offered to make such further accounting as might be desired. It said (S. C. Rec. 148): "The Trust Company has at all times stood ready, and is

still ready and willing, to make such further accounting thereof as may by the court be required."

And, again, it said (S. C. Rec. 155):

> These defendants further state and show that they are ready and willing, if in the judgment of this court, they ought and should do so, to render a fuller accounting of any and all of the transactions of the Trust Company with any and all of said companies, in such manner and at such times as the Court may direct.

A similar answer, but pleading laches and the state statutes of limitation (S. C. Rec. 370), was filed (S. C. Rec. 312) to the first amended ancillary bill of complaint, and also (S. C. Rec. 461) to the second ancillary bill of complaint.

Under the ancillary bill of the Belt Company and its receivers, the issue was one of debt or no debt between the Belt Company and the Trust Company.

The intervening petition and the Trust Company's answer.

Petitioner became a party to the litigation by intervening petition (S. C. Rec. 166), filed by stipulation (S. C. Rec. 164). It charged that the Gulf Company, the Belt Company and the Air Line had executed mortgages covering after-acquired property, the lien of which attached to certain of the collateral held by the Trust Company, or to the properties represented thereby; that petitioner, as purchaser at foreclosure sales of the properties of those companies, had become the owner thereof, and demand was made for the securities or the properties which they represented.

The answer of the Trust Company (S. C. Rec. 186) contained a denial of the allegations of the intervening peti-

tion, pleaded laches and the state statutes of limitation (S. C. Rec. 198), and further alleged (S. C. Rec. 199-201) that by reason of the reorganization of the Belt Company, petitioner had become liable for its debt to the Trust Company.

This liability issue, which thereafter became the dominant issue in the action, was one which the Trust Company itself injected into the case in 1905. It is largely the attorneys' fees and other expenses of the Trust Company incurred in litigating this issue which it now seeks to impose upon petitioner.

By stipulation (S. C. Rec. 267), petitioner was permitted to file an amended intervening petition, and to include therein its claim against the Trust Company for alleged breach of trust as trustee in the mortgage made by the Union Terminal Railroad Company; and the Trust Company consented that the issues so made should be referred to the special master, and waived any objection it might make to said intervening petition on the ground of multifariousness or other formal matters.

The amended intervening petition (S. C. Rec. 269) was substantially the same as the original pleading, except that (S. C. Rec. 288) it alleged that it was the duty of the Trust Company, under the mortgage of the Terminal Company, to see that as the bonds of the Union Terminal Railroad Company were sold, the proceeds thereof were used in the construction, completion and equipment of the railroad of the Union Terminal Railroad Company, and alleged a failure to perform this duty.

The answer of the Trust Company (S. C. Rec. 293) in the main followed its answer to the original intervening petition, but denied the alleged trusteeship in the matter complained of, asserting that no duty was imposed upon it, either by law or by the express terms of the mortgage, to

see that the bonds as sold were used in the construction of the railroad, saying (S. C. Rec. 307):

> Respondent denies that either by law or by the express terms of said mortgage it was the duty of respondent to see that as said bonds were sold, proceeds thereof should be used in the construction, completion and equipment of said railroad. On the contrary respondent says that there was no such duty imposed either by the terms of said mortgage or by law.

Under the intervening petition of petitioner, the issue was two-fold; first, was petitioner the owner of the collateral security, or the properties represented thereby? Secondly, did petitioner assume the debt of the Belt Company?

The charge of fraud.

Much is said in the opinion of the lower court about the charge of fraud. It is true that fraud was charged on both sides; but the fraud charged against the Trust Company was in the nature of constructive fraud (26 C. J. 1061), arising from the relation of the parties, the common officers and directors controlling the corporations in question, and the alleged misuse by the Trust Company of the power derived from this community of interest, within the rule of the *Geddes* case, 254 U. S. 590.

The master did not feel that charges of actual fraud were involved in complainants' bills, except in the one instance of the transfer of collateral security by the Belt Company to the Trust Company on March 31, 1899, on the eve of the insolvency of the Gulf Company and the prospective loss of control by the Trust Company over the affairs of the Belt Company. The ancillary bill is summarized by

the master (S. C. Rec. 584-592). The word "fraud" does not occur. The word "fraudulent" occurs but once (S. C. Rec. 592), and is there used to characterize the said transfer of the collateral security. In this connection, the master finds (S. C. Rec. 754) that when this transfer was made, the officers of the Trust Company knew that the Gulf Company would default in its interest and that receivers would be appointed for it, and that that would likely mean that the Trust Company would not thereafter have a controlling influence in Belt Company matters. These facts fairly justified the charge that the transfer was fraudulent.

The allegations of the intervening petition of petitioner are summarized by the master (S. C. Rec. 735-742). Neither the word "fraud" nor "fraudulent" appears.

The master's conception of complainants' bill was not that it abounded in charges of fraud, as suggested by the lower court, but that it was based upon the alleged domination and control by the Trust Company of the Belt Company. In this respect he says (S. C. Rec. 641):

> The underlying theory, upon which complainants' bill is grounded, is that the Trust Company dominated and controlled the Suburban Company, afterwards the Belt Company, and its constituent companies, and also, the subsidiary companies named in the bill, by virtue of causing the employees, officers and directors of the Trust Company to be elected officers and directors of the Suburban Company, and other corporations, and thereby placing the agents, employees and officers of the Trust Company in charge of such companies, respectively, so that these companies might be dominated and controlled at the behest and in the interest of the Trust Company, and, which complainants allege was done, continuously, through the period of years intervening between the incorporation of these companies and April, 1900,

> when what was known as the Stilwell management of the Belt and allied companies, lost control, and the Southern Company, and those associated with it, acquired control thereof through the receivership and foreclosure proceedings, mentioned in the bill.

The Trust Company itself did not feel that charges of gross fraud or misconduct had been made against it. It deliberately took the position that the charges made were of constructive fraud, and not "actual fraud." This is a matter of record. The intervening stockholders of the Trust Company characterized the bill as "a mere cry of domination and constructive fraud" (S. C. Rec. 963). In the "Answer of Guardian Trust Company on rule to show cause," filed in the lower court on December 16, 1907, it is said, in paragraph 13 (S. C. Rec. 558):

> There is no valid cause of action against this defendant set up in the said ancillary bill of complaint; *no actual fraud is charged therein* and said bill presents a legally meaningless theory and an impossible case.

The foregoing statement is signed by Mr. Rosenberger and Mr. Mecartney, both counsel for the Trust Company at that time, *and is sworn to by the former.*

It thus appears that it was the deliberate opinion of the Trust Company in 1907, about a year after this case had been argued for two weeks before the special master, when the whole matter was fresh in the minds of counsel, that no "actual fraud" had been charged against it.

The accounting before the master.

As before stated, the Trust Company in its answer (S. C. Rec. 48, 148, 155) consented to an accounting, and by its stipulation (S. C. Rec. 891) agreed that the accounting should be had and expedited. The lower court, in March, 1908, in an unreported decision in this case, held that this stipulation evidenced the full consent of the Trust Company to an accounting. It said: "It (the Trust Company) has consented that the master take an accounting, finding and report as to the respective rights and claims of the parties to the property, notes, bonds and claims involved." Judge Trimble, counsel for the Trust Company when its answer was filed consenting to an accounting, consulted with his partners before that course was determined upon (Rec. 278).

New counsel for the Trust Company having come into the case, they raised before the master, in February, 1905, the right of complainants to an accounting, and the master ruled "that, under the circumstances, there shall be an accounting in this case"; and the Trust Company then demanded that complainants in the ancillary bill "specify the items of this long and complicated account which are in dispute here." Whereupon counsel for complainants in the ancillary bill, at the request of the Trust Company and in response to its motion, announced his intention to file, and afterwards filed, an amended bill surcharging and falsifying. This appears from a fragment of the proceedings before the master, found in the record, pages 14-15.

A large amount of testimony was taken before the master. It appears from an affidavit filed in the lower court that there were 6950 pages of oral evidence and 27,592

pages of documentary evidence, principally copies of vouchers and records. The case was argued for two weeks before the master in July, 1906 (S. C. Rec. 1023). The master's report was filed in May, 1910 (S. C. Rec. 575). It recommended (a) that the Trust Company's claim against the Belt Company be reduced by three items, aggregating $21,850 and interest, and sustained as to all other items; (b) that the lands of Central Improvement Company, which cost $169,349.60 (S. C. Rec. 280) and which were referred to in argument as having a value of $300,000 to $400,000 (S. C. Rec. 952), be conveyed to petitioner; and (c) that petitioner was not liable in any way for the floating indebtedness of the Belt Company (S. C. Rec. 887).

The decree of June, 1910, and subsequent proceedings.

The lower court overruled all exceptions to the master's report and entered a final decree (S. C. Rec. 903), carrying out the recommendations of the master. The Trust Company appealed to the circuit court of appeals for the eighth circuit, which reversed the decree of the lower court (201 Fed. 811; 211 Fed. 696). Petititioner thereupon appealed to this Court, which affirmed the decree of the circuit court of appeals (240 U. S. 166). Petitioner, in April, 1916, paid the Trust Company $821,623.28 (Rec. 129), as the full amount of its claim, with interest. This proved to be an overpayment, which was adjusted in the final decree of May, 1926 (Rec. 130).

The decree of May, 1926, and subsequent proceedings.

Six years later, in October, 1922, the Trust Company moved in the district court for a final decree in accord-

ance with the mandate of this Court (Rec. 15). The lower court in its first opinion, in June, 1923 (Rec. 691), reached the conclusion that costs should be taxed as between solicitor and client, and appointed a master (Rec. 20) to ascertain and state all items of costs and expenses paid or incurred by the Trust Company, "including among other expenses those for attorneys' fees, counsel or solicitor fees, stenographers' fees, expert accountants' fees, printing fees, traveling expenses, and other expenses incurred in the premises."

The lower court having intimated in its first opinion that the circuit court of appeals had found that the litigation was vexatious, petitioner, in December, 1923 (Rec. 33), filed a motion and application for leave to file a duly verified petition "to introduce testimony proving that this litigation was instituted and conducted on the part of each of the complainants in entire good faith," and setting out in detail the oral and documentary evidence which it desired to introduce (Rec. 34-44). *This motion was overruled, and permission to introduce testimony was refused* (Rec. 45).

The master filed his report on September 15, 1924 (Rec. 46), finding that the costs as between party and party amounted to $11,499.32 (Rec. 49), and that the costs as between solicitor and client amounted to $296,520.37 (Rec. 59). Of this latter sum, $280,867.98 was for attorneys' fees which were incurred in the litigation from beginning to end, including services in the circuit court of appeals and in this Court. Exceptions to the master's report were filed by both parties (Rec. 94, 106).

At the argument of the exceptions, the court permitted a reargument of the entire matter, and in an opinion dated March, 1926 (Rec. 704), the court reversed its former rul-

ing, and held that the law did not permit the taxation of costs as between solicitor and client in this case, but only as between party and party. A final decree in accordance therewith was accordingly entered in May, 1926 (Rec. 128).

From this decree the Trust Company appealed to the circuit court of appeals for the eighth circuit, and that court, in May, 1928, reversed the said decree of May, 1926 (28 F. (2d) 233), to review which action of the circuit court of appeals petitioner, after an unsuccessful motion for a rehearing, now presents its application to this Court for a writ of certiorari.

SPECIFICATION OF ERRORS.

For its specification of such assigned errors as are intended to be urged, petitioner alleges that the circuit court of appeals committeed error in the following respects:

1. In holding that the opinion and mandate of this Court required or authorized the taxation of costs "as between solicitor and client."

2. In holding that "the United States courts of equity at the time of their creation became endowed with the powers, including that over costs, possessed by the English chancery courts."

3. In holding that "the federal courts of equity have jurisdiction to allow, in proper cases, costs 'as between solicitor and client'."

4. In holding that the respondent is entitled to taxation of costs "as between solicitor and client" in this case.

5. In holding that the Trust Company, as a pledgee, is entitled to taxation of costs "as between solicitor and

client," although it litigated its right to the pledged property, not in the interest of the pledgor, and not for the care, preservation or protection of the property, but in its own individual interest, and for its own personal protection.

6. In holding that the Trust Company, when sought to be charged as trustee, or with the obligations resting upon trustees, is entitled to taxation of costs "as between solicitor and client," notwithstanding the fact that the Trust Company disclaimed any trusteeship, and any and all fiduciary obligations, and was successful in maintaining this defense.

7. In holding that after the Trust Company succeeded in holding petitioner liable for the debt of the Belt Company, and in collecting from petitioner its entire debt and interest, it is entitled to taxation of costs "as between solicitor and client," upon the theory that it occupied the position of a creditor, who, in behalf of himself and others, has brought a fund into court for distribtuion, and is awarded an allowance from the fund.

8. In holding that "the whole litigation" was of a "vexatious character."

ARGUMENT.

I.

The proper execution of the mandate of this Court required the taxation of costs only as between party and party, and did not require or authorize the taxation of costs as between solicitor and client.

It is familiar law that it was the duty of the district court to which the mandate in this case was addressed by this Court, to carry it into execution according to its terms, in the light of the opinion of this Court. It could not vary it, or examine it for any other purpose than execution; or give any other or further relief, or review it, even for apparent error; nor intermeddle with it in any manner (*Ex Parte Union Steamboat Co.*, 178 U. S. 317; *Re Washington R. Co.*, 140 U. S. 91; *Re Sanford Fork & Tool Co.*, 160 U. S. 247).

So well established is this rule that this Court will grant certiorari to the court of appeals where, as here, the question "involves the construction of a prior decree of the United States circuit court affirmed by this Court" (*St. Louis, K. C. & C. R. Co.* v. *Wabash R. Co.*, 217 U. S. 247, 251). This Court will inquire into the proper execution of its own decree "either by original proceeding or in any other appropriate form" (*United States* v. *Terminal R. Assoc.*, 236 U. S. 194, 199).

This Court (240 U. S. 166) affirmed the decree of the circuit court of appeals for the eighth circuit (210 Fed. 696), which directed (pp. 723, 724) the entry by the district court of a specific decree, complete in all details, disposing of the entire controversy, *including the matter of costs.* The man-

date of this Court (Rec. 467) adjudged that said decree be "affirmed with costs," and that the Trust Company et al. recover against petitioner "twenty dollars for their costs herein expended and have execution therefor."

There are numerous references in the directions for the entry of a specific decree (210 Fed. 723, 724), to "the costs of this suit"; "the costs after as well as before the decree"; "its costs down to the entry of the decree"; with a further provision that the Trust Company shall be permitted to pursue either the Cambria Company or the Southern Company, or both of them, "until its costs are paid". After refusing to entertain, and, in effect, denying, the petition of the three stockholders for a taxation against petitioner of the amount of the Trust Company's attorneys' fees, etc., the court said: "Our conclusion is that our just course is to leave the *taxation of costs* to the court below, under the principles, rules and practice in equity."

When this Court affirmed the decree of the lower court, directing the entry of a specific decree, complete in all details, and awarding "costs", without further designation or qualification, against the unsuccessful party, and leaving the "taxation of costs" to the lower court, we submit that it could only mean taxable costs, in the ordinary acceptation of the term; that is, costs as between party and party, as the word "costs" has been used in judgments and decrees from time immemorial, in accordance with the practice of taxing costs which has prevailed in this country from the beginning; in other words, it meant *taxable costs*, as distinguished from an "allowance" out of a fund, or as distinguished from attorneys' fees fixed by statute and allowed in certain designated cases.

It is not to be assumed that this Court acted inadvertently, and that what it really intended was to import into

our jurisprudence the English system of taxation of costs, by which the losing party is to be burdened and penalized with the attorneys' fees and other expenses of the successful litigant. Nor is it to be assumed that this Court, merely by affirming a decree carrying "costs", intended thereby to overrule its long line of decisions, such as *The Baltimore,* 8 Wall. 377; *Oelrichs* v. *Williams,* 15 Wall. 211; *Tullock* v. *Mulvane,* 184 U. S. 497, and *Missouri Pacific R. Co.* v. *Larabee,* 234 U. S. 459, which, we contend, authoritatively established a rule in this country exactly to the contrary.

It seems too plain to require extended argument that if this Court had intended any departure from the ordinary practice in the taxation of costs, it would have said so in plain language. If it had intended to import the English system into our jurisprudence, it would have manifested its intention in unambiguous words, which would have sounded a warning to all future litigants that litigation thereafter was to be at the peril of paying all counsel fees in case of failure. If it had intended that the word "costs" should include "allowances", under the guise of a taxation of costs as between solicitor and client, or otherwise, it seems certain that language would have been employed which would have left no room for doubt as to its purpose.

That the word "costs" does not include attorneys' fees was authoritatively decided in this Court in *Sioux County* v. *National Surety Co.,* 276 U. S. 238. There, the action was on a surety bond, under a statute of Nebraska which provided that in such actions "a reasonable sum as an attorney's fee in addition to the amount of his recovery" may be taxed as a part of the "costs". The circuit court of appeals for the eighth circuit held (16 F. (2d) 688) that attorneys' fees were not a part of the "costs" provided for in R. S. sec. 823, 824, and, therefore, could not be allowed as

costs in a federal court. This Court, upon appeal, agreed with the lower court that such attorneys' fees are not and cannot be a part of the taxable costs prescribed by the federal statute. This Court did, however, give effect to the Nebraska statute by holding that the amount of the attorney's fee could be included in the judgment. It said (p. 243):

> That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by Rev. Stat. sec. 823, 824.
>
> The present allowance, *since it is not costs in the ordinary sense,* is not within the field of costs legislation covered by Rev. Stat. sec. 823, 824. That the particular mode of enforcing the right provided by the state statute—i. e., by taxing the allowance as costs—is not available to the federal courts under Rev. Stat. sec. 823, 824 does not preclude the recovery. Since the right exists, the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment.

In two other decisions of this Court, hereafter referred to (*Oelrichs* v. *Williams,* 15 Wall. 211, and *Tullock* v. *Mulvane,* 184 U. S. 497), it was held that "costs" did not include attorneys' fees. Those actions were upon injunction bonds which were conditioned to pay to defendants "all costs and damages". In both cases it was held that counsel fees, incurred in securing a dissolution of the injunction, did not come within the scope of either "costs" or "damages".

In several instances the lower courts have held that the word "costs" in a decree or in a statute is to be construed as including only taxable costs, as distinguished from allowances.

In *Kell* v. *Trenchard,* 146 Fed. 245 (circuit court of appeals, fourth circuit), the mandate of the court of appeals provided that the "costs" of the case in both the appellate and the lower court should be borne equally by the appellant and the appellees. In a taxation of costs pursuant to this direction, the lower court included an allowance to the receiver as a part of the costs properly to be divided. The action of the lower court in including the allowance to the receiver was appealed from, and reversed on appeal, the appellate court saying (p. 247):

> In decreeing the devision of costs in this court and the court below was meant only *the ordinary taxable costs of the litigation,* and not such charges and expenses as the costs of the receivership and payments and allowances to receivers; those being costs properly appertaining to the receivership, and chargeable against the *property* in the receiver's hands. Ferguson *v. Dent* (C. C.), 46 Fed. 88; Elkhorn Oil & Gas Co. *v.* Foster, 99 Fed. 495, 39 C. C. A. 615.

To the same effect are:

> *Doddridge County Oil & Gas Co.* v. *Smith,* 173 Fed. 386;
> *United States* v. *Wilson,* 193 Fed. 1007;
> *United States* v. *Smith,* 240 Fed. 756.

If the Trust Company felt that it was entitled to have the opinion and mandate of this Court broadened so as to include allowances in the nature of costs as between solici-

tor and client, it should have made an appropriate application to the Court for that purpose, and before the expiration of the term. After the lapse of the term, the provision relative to costs could not be altered (*Fairmont Creamery Co.* v. *Minnesota*, 275 U. S. 70, 73).

II.

We earnestly contend that the lower court committed a grave error (1) in holding "that the Federal Courts of equity have jurisdiction to allow in proper cases costs 'as between solicitor and client,'" as such jurisdiction is exercised by the English Court of Chancery, and (2) in applying that erroneous principle to the facts in this case.

The lower court reached the conclusion, which is quoted in the above heading, and which, we contend, is wholly erroneous, by two successive steps; first, it asserts (28 F. (2d) 240) that the English courts of chancery have for several centuries possessed jurisdiction to award costs as between solicitor and client; and, secondly (p. 241), that the United States courts of equity at the time of their creation became endowed with, and now possess, the powers, including that over costs, possessed by the English chancery court.

We confidently contend that the English system of taxation of costs as between solicitor and client has never been adopted in this country; and, furthermore, that if it has ever been the law here, which we do not admit, it has been expressly repudiated, by the substitution therefor of the Act of Congress of 1853, providing for the taxation of an attorney's fee of $20 "and no other" as costs on final hearing in equity. This Court and the lower courts, have

uniformly applied this statute as the settled rule in federal jurisdiction.

Space does not permit an extended discussion of the English system of taxation of costs. It is fundamentally different from our own. Under it, attorneys' fees or solicitors' fees, which are fixed by law, are taxed against the losing party in every case, whether at law or in equity. Costs as between party and party include attorneys' fees of the adversary. Costs as between solicitor and client include a somewhat large proportion of the actual expenditures of the successful party than is allowed in taxation as between party and party.

In modern practice, however, the English system of taxation as between solicitor and client "gives little more than a taxation as between party and party" (*Giles* v. *Randall*, 1 K. B. D. 290, 296; *Daniell's Chancery Pleading & Practice*, Vol. 2, 6th Am. Ed., star page 1376, note 1).

For the purpose of showing that the English system has not only never been established in this country, but that it has been definitely and finally repudiated by our courts, we will briefly trace the historical development of the subject of taxation of attorneys' fees as costs from the beginning of our government down to date.

Early statutes and rules of court.

On August 8, 1791, "the Chief Justice, in answer to the motion of the Attorney General, made yesterday, informs him and the bar, that this court consider the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary" (*Rules and Orders*

of the Supreme Court of the United States, 2 L. Ed.). This in 1822 was expanded into Equity Rule 33, and in 1842, into Equity Rule 90, which latter was dropped from the equity rules February 1, 1913.

The lower court, in its opinion, apparently takes the view that the effect of these equity rules was to import into our practice the English doctrine of taxation of costs as between solicitor and client. We contend that this cannot be so, and proceed to state our reasons.

Congress, by Act of September 29, 1789, provided that the rates of fees in the circuit and district courts of the United States, in equity cases, should be in accordance with those allowed by the chancery court of the state. The Act of May 26, 1790, continued the Act of 1789 until the end of the succeeding session, and it was again continued by the Act of February 18, 1791, until the end of the next session. The Act of March 1, 1793, provided for the taxation in the circuit courts of the United States of such attorneys' fees and counsel fees "as are allowed in the Supreme or Superior Courts of the respective states." The Act was continued another year by the Act of February 25, 1795, and was again continued by the Act of March 31, 1796, for the term of two years, and from thence until the end of the next session of Congress thereafter (Report of Mr. Justice Nelson, 1 Blatchford C. C. 652).

Is it not entirely clear that Congress, in these enactments, was declaring its own policy with respect to the taxation of attorneys' fees as costs? It deliberately adopted the policy of applying the rules of the state court where the federal court was sitting, as the rules in its own court. If it had desired to adopt the English practice, in that behalf, it seems certain that it would have said so. At that period in the development of our judicial system, the extent

to which the forms, precedents and practice of the mother country should be followed, was receiving the earnest attention of Congress. Its failure to adopt the English practice can only be regarded as an intentional repudiation of it in favor of its own rules.

Early decisions of this Court.

The first case in which there was presented to this Court the question of whether or not attorneys' fees might be taxed as costs, was *Arcambel* v. *Wiseman*, 3 Dall. 306, 1 L. Ed. 613, decided in 1796. In that case an allowance of $1,600 as counsel fees had been included as a part of the damages allowed by the circuit court, but this Court ordered the disallowance of this item, saying:

> We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, until it is changed, or modified, by statute.

Then followed *The Apollon*, 9 Wheat. 362, decided in 1824, and *Canter* v. *Ins. Co.*, 3 Pet. 307, decided in 1830, in both of which the decision was rendered by Mr. Justice Storey, and in both counsel fees were allowed. Both cases, however, were explained, as we shall see later, as having been decided as they were because the Act of 1853 was not then in force. In *Day* v. *Woodworth*, 13 How. 363, decided in 1851, the court held that attorneys' fees could not be included in an award of exemplary damages.

Prior to the statute of 1853, the practice with respect to the taxation of attorneys' fees as costs may be said to have

lacked uniformity; the general rule being that such costs were to be taxed in accordance with the varying practice in the state where the court was sitting. But this lack of uniformity is in itself conclusive evidence that the English system had not been adopted, for had that system been adopted, we would find uniformity, instead of uncertainty. The report of Mr. Justice Nelson, above referred to, was published in 1842, and disclosed not only the lack of uniformity in federal court practice, but the necessity for some uniform rule applicable to federal courts wherever sitting.

The Act of 1853, and its construction by this Court.

The Act of 1853 (28 U. S. C. A. sec. 571, 572) was intended to meet this demand for uniformity. It provided that certain specified fees "and no other" shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, and that on a final hearing in equity or admiralty, a docket fee of twenty dollars shall be taxed. It is as follows:

> Sec. 571. The following fees and no other shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, and to district attorneys, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.
>
> Sec. 572. On a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of $20:

> *Provided,* That in cases of admiralty and maritime jurisdiction, where the libelant recovers less than $50, the docket fee of his proctor shall be but $10.

This statute is in itself conclusive evidence of the complete repudiation of the English practice, if it ever existed in this country. Our courts thereafter recognized it as once and for all settling the question of the taxation of costs, and limiting the taxation of attorneys' fees in the stipulated manner.

The effect of the statute was before this Court in 1869, in *The Baltimore,* 8 Wall. 377. The court there reviewed not only the prior legislation, referred to above, but the practice which had prevailed prior to the Act of 1853, pointing out the lack of uniformity. It held, in effect, that the Act was intended to standardize the practice in federal courts; that while attorneys might charge their clients reasonably for their services, nothing could be taxed as costs against the opposite party, as an incident to the judgment, except the costs and fees prescribed and enumerated. It also held that *The Apollon,* 9 Wheat. 362, and *Canter* v. *Ins. Co.,* 3 Pet. 307, which were cited in the brief of the appellees, were inapplicable because decided before the Act of 1853. The Court said (p. 392):

> Fees and costs, allowed to the officers therein named, are now regulated by the Act of the 26th of February, 1853, which provides, in its 1st section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compensation shall be allowed.
>
> Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addi-

> tion to the taxable costs, but nothing can be taxed as cost against the opposite party, as an incident to the judgment, for their services, except the cost and fees therein described and enumerated. 10 Stat. at L. 161. They may tax a docket fee of $20 on a final hearing in admiralty, if the libelant recovers $50, but if he recovers less than $50, the docket fee of the proctor shall be but $10. The Canton, 21 Law. Rep. 473; The Liverpool Packet, 2 Sprague 37; The Connestoga, 2 Wall. Jr. 116.
>
> Reference is made to two cases where counsel fees were allowed, but it is a sufficient answer to those cases to say, that they were decided before the Act of Congress under consideration was passed. They do not, therefore, furnish the rule of decision in the case before us.

This decision would seem definitely to settle any question of the taxation of attorneys' fees as costs in excess of the amounts named in the statute. It is difficult to imagine the English doctrine as surviving after this decision.

But if there was any lingering doubt upon this subject, it was completely dispelled by the decision of this Court in *Oelrichs* v. *Williams,* 15 Wall. 211. This was an action on an injunction bond. The condition of the bond was that the obligor "should pay and satisfy all costs and damages that may accrue to the obligees, or either of them, by reason of said injunction, in case the same shall be denied." The question was squarely presented, therefore, as to whether counsel fees were included in the words "costs and damages." The injunction was in effect for a period of four years, eight months, sixteen days. Doubtless, it presented circumstances of great hardship. Both the master and the lower court allowed counsel fees, paid in securing a dissolution of the injunction, as a part of the

costs and damages covered by the bond. This was reversed. The Court, after referring to *Arcambel* v. *Wiseman, supra,* and other cases, said (p. 231):

> The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant, and assumpsit, damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured Some counsel demand much more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.
>
> We think the principle of disallowance rests on a solid foundation, and that *the opposite rule is forbidden by the analogies of the law and sound public policy.*

This comprehensive ruling should be accepted, we respectfully submit, as completely settling and disposing of the question of the taxation of counsel fees, as costs, in

this country. Such costs may not be taxed in equity cases, even where the litigation is unjust, on one side or the other, and however large the expense may be. The reasons are given. The parties stand upon a footing of equality. There is no fixed standard, in this country, by which counsel fees can be determined, as there is in England. Some counsel demand much more than others, and more counsel may be employed than are necessary. There is great danger of abuse if it be known in advance that fees, unregulated by law, are to be paid by the other party. Additional litigation would be necessary to determine the fees to be taxed. Counsel fees do not come within the designation of "costs," nor of "damages." Their disallowance rests on a solid foundation, and the opposite rule is forbidden by sound public policy as well as by the analogies of the law.

This Court, in subsequent cases, has assumed, without further re-examination of the question, that this decision has settled the law in this country. In *Tullock* v. *Mulvane,* 184 U. S. 497, the action was upon an injunction bond, which, as before, was conditioned to pay to defendant "all costs and damages." It was again insisted that attorneys' fees were properly allowed as an item of cost or damage upon the bond, and again denied. The Court said (p. 511):

> . . . it remains only to consider whether the attorneys' fees were properly allowed by the court below as an element of damages on the bond. That they were not *is settled.*

The Court then refers to *Oelrichs* v. *Williams, supra,* and concludes with the statement:

> It follows from what we have stated that there was error committed in allowing the recovery of attorneys' fees as an element of damage upon the bond in question.

The question next came before this Court in *Missouri, K. & T. R. Co.* v. *Elliott,* 184 U. S. 530, and was disposed of briefly in the following statement:

> Having thus disposed of the question of jurisdiction, we come to the merits of the case. It suffices to say, for the reasons given in the opinion in Tullock *v.* Mulvane, before referred to, 184 U. S. 497, that there was error committed by the Kansas City court of appeals in affirming the action of the trial court in allowing, in the judgment by it rendered, attorneys' fees as an element of damage upon the injunction bond contrary to the controlling rule on this subject enunciated by this court, by which the courts of the United States are governed in requiring the execution of such instruments.

The lower court, in its opinion in this case, after referring to some of the cases above cited, among them, *Arcambel* v. *Wiseman, The Baltimore, Oelrichs* v. *Williams,* states that "such refusals (to tax attorneys' fees as costs) were not based upon any lack of power in the court, but because it was not deemed wise policy to allow attorneys' fees to be taxed as costs in ordinary equity cases."

We respectfully submit, however, that it was a lack of "power" to impose attorneys' fees as costs which impelled this Court to decide as it did. This is made entirely plain in *Missouri P. R. Co.* v. *Larabee,* 234 U. S. 459, where the question arose over the imposition of attorneys' fees by a state court in respect of an appeal prosecuted to this Court. The question is there stated by the Court (p. 468):

> First. The question of the *power* of the court to make the allowance for professional services rendered in this court on the former writ of error.

It will be noted that the Court was here discussing the *power* to make the allowance, and not the equitable principles which control some allowance which it has the power to make. The Court held against the existence of the power, as follows:

> There can be not doubt that, tested by the general principles of law controlling in this court, by the *statutes of the United States* relating to the subject, or the rules of this court concerning the same, the award for the attorneys' fees in question was *absolutely unwarranted.* We do not stop to review and expound the settled line of authority demonstrating this result because it would be wholly superfluous to do so, as the principles have been so long the settled rule of conduct in this court, and are so elementary as to require not even a reference to the cases. Some of the cases, nevertheless, we cite: Arcambel *v.* Wiseman, 3 Dall. 306; Day *v.* Woodworth, 13 How. 363, 372; Oelrichs *v.* Spain (Oelrichs *v.* Williams), 15 Wall. 211, 230, 231; Tullock *v.* Mulvane, 184 U. S. 497, 511 *et seq.*

It will be noted that the cases cited above are the same cases to which we have referred heretofore. They are referred to in the opinion of this Court as establishing a settled line of authority demonstrating the lack of *power* to tax counsel fees as costs. The prior interpretation of the Act of 1853 is reaffirmed.

The right and duty of the chancellor in proper cases to make "allowances" for expenses and counsel fees within the rule of *Trustees* v. *Greenough,* 105 U. S. 527, is well recognized, and is not at all in conflict with the views above expressed with respect to the taxation of attorneys' fees and other expenses, as costs, in cases like the one under consideration. It is a general principle that the trust

estate must bear the expenses of its administration. It is also a general principle that where one of many parties having a common interest in the trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself or by a proportionate contribution from those who accept the benefit of his efforts. This rule, however, has, we contend, no application whatsoever to the present case. Its inapplicability to the facts in this record is discussed under subsequent headings.

Decisions of Circuit Courts of Appeal.

The federal courts of appeals have, without exception, followed the statute of 1853, and the rule established by this Court in the foregoing cases, that, in the absence of authorizing statute, attorneys' fees in excess of $20 may not be taxed as costs as between solicitor and client, to be paid by one of the parties to the suit. The decision of the lower court is in conflict with the decisions of circuit courts of appeal of other circuits, now to be referred to.

In *McIntosh* v. *Ward*, 159 Fed. 66, the court of appeals of the Seventh Circuit held that attorneys' fees could not be taxed as costs in a partnership accounting case. In its opinion the court said, in reference to the allowable items of expense:

> Such allowances were of statutory origin. Our statute of 1853 . . . provides what shall, as costs, "be included in and form a portion of a judgment or decree against the losing party." . . . In our opinion the discretion of a court of equity does not authorize it to require one party . . . to pay to the other,

> under the name of costs, items paid from the fund for services and expenses in administering a suit properly in court, nor any other items not within a fee bill act.

Fraser v. *Cole,* 214 Fed. 556, was a suit by a legatee to enforce his claim against an executor and reach real estate fraudulently conveyed by her. The district court added to the decree an allowance of $1,000 solicitor's fees. The court of appeals for the seventh circuit said:

> No law of Illinois warranted the increase of Grace Fraser's indebtedness by such an addition. . . . Nor can equity in a suit upon a creditor's bill or a vendor's lien bill enlarge the defendant's debt in that way.

Leary v. *United States,* 257 Fed. 246, was a fraud case in which the successful party sought to have his attorneys' fees taxed against the losing party. The court of appeals for the fourth circuit said:

> The costs that can be taxed against the losing party . . . are little more than nominal, and the winner is therefore out of pocket for the fees of his counsel. If this be unjust to the one found to be in the right, it is because the law gives him only the amount of his recovery and the scanty sum allowed as taxable costs.

In *Motion Picture Patents Company* v. *Steiner,* 201 Fed. 63, the district court allowed an attorney's fee of $150.00 in each of two cases because of the vexatious conduct of plaintiff's counsel in the litigation. The court of appeals for the second circuit held that an attorney might be compelled to pay certain costs for vexatious conduct by virtue of Section 982 of the statutes, but that the costs could not be taxed against the client.

In *Marks* v. *Leo Feist,* 8 Fed. (2d) 460, attorneys' fees were taxed as costs in a copyright case. The court of appeals for the second circuit held that while such fees were taxable under the copyright law:

> The general rule, which is subject to some exceptions, of course, is that each party to a litigation must pay his own counsel fees, no matter how unjust the litigation may have been, or how great may have been the *expensa litis* (citing the Arcambel and Oelrichs cases).

We respectfully contend that the decision of the lower court is contrary to the statute, contrary to the decisions of this Court, and contrary to the decisions of federal courts of appeal in other circuits.

Counsel fees incurred after the decree of June, 1910.

We earnestly contend that, for the reasons above stated, the law does not authorize or permit the taxation against petitioner of *any* of the attorneys' fees or other expenses of the Trust Company during the entire period of this litigation. For the purpose, however, of bringing into impressive relief what we regard as one of the glaring errors of the lower court, we desire, for the moment, to lay to one side all other controverted matters, and to direct the attention of the Court to the proceedings in this case following the final decree of June, 1910—the period during which a considerable portion of the Trust Company's liability for attorneys' fees were incurred. The grave injustice of imposing these expenses upon petitioner appears to us to be so plain and obvious that a brief reference to the uncontradicted facts should suffice.

The decree of the lower court, in June, 1910, was against the Trust Company, and, accordingly, it appealed to the circuit court of appeals. As has been heretofore pointed out, the issue—the personal liability of petitioner for the debt of the Belt Company—was an exceedingly difficult one, and involved in much doubt and uncertainty. The *Boyd Case* (228 U. S. 482, April, 1913) had not then been decided. Finite minds could not tell what the decision in our case would be. The circuit court of appeals recognized the serious and difficult nature of the controversy when it permitted two arguments and handed down two elaborate opinions. This Court held, May 11, 1914, that the nature of the case was such as to warrant the grant of its writ of certiorari, in case an appeal did not lie. The decree of the circuit court of appeals was affirmed by this Court; the Chief Justice and one Associate Justice dissenting.

Upon what conceivable principle can petitioner be condemned to pay the Trust Company's attorneys' fees and other expenses, involved in its appeal to the circuit court of appeals, and involved in petitioner's appeal to this Court, to determine this liability issue, which the Trust Company itself injected into the litigation in 1905, in its answer to the intervening petition of petitioner? What warning was there in the books of text writers or in the decisions of the courts, saying to petitioner, in effect: "If you resist the Trust Company's appeal to the circuit court of appeals, or if you appeal from that court to the Supreme Court, you do so at your peril of being mulcted for the attorneys' fees and other expenses of the Trust Company, in the event that you are unsuccessful"?

What becomes of the guaranty, declaratory of the public policy in the jurisdiction where the litigation was carried on, that "The courts of justice shall be open to every

person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay" (Const. Mo., Art. II, Sec. 10).

The right of free access to the courts is fundamental in our theory of Government. In *Straus* v. *Victor Talking Mach. Co.*, 297 Fed. 791, 798 (circuit court of appeals, second circuit), it is said: "Free access to the courts must neither be denied nor penalized."

In *Missouri Pacific R. Co.* v. *Larabee*, 234 U. S. 459, the right of a state to impose attorneys' fees upon the losing party in an appeal to this Court was denied on the ground that if that were permitted, "the right to freely seek access to the Supreme Court of the United States would cease to exist."

In *Wetmore* v. *Mellinger*, 64 Iowa, 741, it is said:

> The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts.

The imposition of the Trust Company's expenses incurred following the final decree of June, 1910, can only be justified upon the assumption that petitioner, instead of resisting the Trust Company's appeal to the circuit court of appeals, should have filed a confession of error, and permitted a perfunctory reversal of the decree; and, further, upon the assumption that petitioner should have refrained from prosecuting an appeal from the circuit court of appeals to this Court, although this Court stood ready to issue its writ of certiorari if the appeal did not lie. Such an assumption passes the limits of reason. Petitioner would

have betrayed its stockholders if it had taken any other course than the one it pursued. Upon what theory should it now be penalized?

III.

The fact that complainants sought unsuccessfully to charge the Trust Company with the duties and obligations of a trustee, does not entitle it to the taxation of costs as between solicitor and client.

The complainants charged that the Trust Company at all times dominated and controlled the Belt Company and the other corporations officered by it, and that by reason of such domination and control, the Trust Company assumed towards them the position and obligations of a trustee. In the Cambria bill, it is alleged that the Trust Company did "assume the position of trustee and agent in managing and disposing of the bonds, stocks, funds, and other assets of said railroad companies, and auxiliary companies, in trust and for the use and benefit of the parties who might become concerned or interested therein; . . . including particularly creditors thereof and your orator" (S. C. Rec. 6). The Trust Company in its answer to the Cambria bill denied, as above stated, that it assumed the position or the obligations of a trustee (S. C. Rec. 42).

The issue was thus made by the pleadings. On the one hand, it was alleged that the Trust Company has assumed the position and relation of a constructive trustee, and, on the other hand, this was emphatically denied. The master found that the Trust Company did not thus assume the position and obligation of a trustee, and his finding was approved by the lower court.

In these circumstances, the lower court held, erroneously, we contend, that the Trust Company was entitled to the taxation of costs as between solicitor and client, or that an allowance should be made in its favor by analogy to the law giving trustees their disbursements in the execution of their trusts.

The law is plain, we respectfully submit, that the rule imposing attorneys' fees as costs in favor of a trustee has no application. The reason is that there is no trustee, no *cestui que trust*, and no fund that is being handled or administered. The parties therefore occupy the position of ordinary litigants.

The applicable rule was thus stated in *Perry on Trusts*, 6th Ed., 1911, sec. 896:

> But where plaintiffs bring a bill against defendants for the purpose of creating a trust fund—as if they bring a bill to convert defendants into trustees under a constructive trust, or to compel the defendants to hold certain property in their hands for plaintiffs—the defendants can have costs only as between party and party, if the plaintiffs fail; for the suit in such case turns out to be between strangers.

In *Lewin on Law of Trusts*, 12th Ed., p. 1267, it is said:

> But if plaintiffs take proceedings for the purpose of creating a fund, of which the defendants would be trustees for the plaintiffs, if the plaintiffs succeeded, but the plaintiffs fail, the defendants are entitled as against the plaintiffs to costs only as between party and party.

In *Tiffany & Bullard on Trusts and Trustees*, p. 714, it is said:

> As those costs taxed between solicitor and client are termed trustee's costs, it follows that they will not be taxed in a case where that relation or character does not exist.

It is likewise the rule that where a trustee disclaims his trust, he is entitled only to his costs as between party and party. (*Godefroi's Law of Trusts,* Third Ed. (London, 1907), p. 28; *Daniell's Chancery Practice,* Ed. 7 (1901), Vol. 1, p. 1011; *Mohun* v. *Mohun,* 1 Swanston's Reports (1818), 201; *Bulkeley* v. *The Earl of Eglington,* 1 Jur. (1855) 994; *Norway* v. *Norway,* 2 Mylne & Keen's Rep. (1834), 278; *Heap* v. *Jones,* 5 W. R. (1856), 106; *Bray* v. *West,* 9 Simons Rep., 429.)

The same considerations apply to so much of the intervening petition of petitioner as complains of the Trust Company's action with respect to the Union Terminal bonds. A complete answer to the Trust Company's claim for indemnity is found in the fact that the intervenor sought to impose upon the Trust Company the duties and obligations of a trustee with respect to the use of the Union Terminal bonds and their proceeds. It invoked the provisions of the mortgage itself, and the implications thought to arise from the terms of the mortgage, to establish this relationship, and so to make the Trust Company a trustee with respect thereto.

The Trust Company, although a trustee in the mortgage of the Union Company, in its answer denied the existence of any such trust relations, either by law or the express terms of the mortgage, and specifically denied that any duty rested upon it to see that, as said bonds were sold, the proceeds were used in the construction, completion and equipment of the railroad. This defense was sustained by the master (S. C. Rec. 876).

We have, therefore, on the part of the intervenor, an assertion of a trust relation with respect to the disposition of the bonds and their proceeds, and, on the part of the Trust Company, a denial that any such trust relationship existed. The master found this issue in favor of the Trust Company, and thereby it was established that no such trust relation existed, or ever had existed.

In other words, the intervenor sought to hold the Trust Company to the duties and obligations of a trustee, in respect of the disposition of the bonds, or their proceeds, and failed to establish its claim in that behalf. The trustee relationship not being established, the authorities, referred to above, hold that there is no ground for a claim of indemnity.

IV.

The litigation conducted by the Trust Company for its own benefit with respect to the collateral security, does not entitle it to the taxation of costs as between solicitor and client.

The Trust Company, on March 31, 1899, the day before the receivership of the Gulf Company, took from the Belt Company, or received from it, the collateral security in question, consisting of stocks, etc.—everything, in fact, which the Belt Company had at the time, which could be used as collateral. All of this the Trust Company proceeded to hold as security for the debt which it alleged the Belt Company owed to it. When this litigation came on, on September 6, 1900, receivers were appointed of all the assets of the Belt Company (S. C. Rec. 29), of every kind and nature. Later a receiver was appointed for the Northern Townsite Company (S. C. Rec. 914), whose stock

was a part of the collateral in question; and a receiver was also appointed for the Central Improvement Company (S. C. Rec. 162, 163), whose stock was also a part of the same collateral. A receiver was also appointed for the Elevator Company (S. C. Rec. 162).

The litigation between the Cambria Company, the Belt Company and its receivers, on the one hand, and the Trust Company, on the other, concerned solely the question of debt or no debt as between the Belt Company and the Trust Company. As this should be determined, the collateral automatically would remain with the Trust Company or return to the Belt Company or its creditor, the Cambria Company.

It cannot be contended that the Trust Company, in litigating the issue of debt or no debt, was acting in the interest of the Belt Company, which was the pledgor of the collateral. It was acting adversely to the Belt Company, as well as to petitioner, which was the owner of the stock of the Belt Company. *It was acting solely in its own interest, to protect its own individual claim.*

Nor was it seeking to protect the collateral security itself, for it needed no protection. It simply remained throughout the litigation as the pawn or pledge to be awarded to the successful party when the litigation should end. The only dealing with the collateral during the entire litigation was the sale by the Trust Company, under orders of the court, of certain Northern Connecting bonds and coupons, for which $40,001.25 was realized and held by the Trust Company in special deposit until the final decree, in which it was ordered to be applied upon the Trust Company's debt (S. C. Rec. 907). That part of the collateral which possessed value, consisting of the property of the Central Improvement Company and, in lesser degree, of the

Northern Townsite Company, was being administered by the receivers of those properties, under the direction of the court (S. C. Rec. 914).

The Trust Company performed no services whatsoever for the benefit of the pledgor, or for the benefit of the collateral itself. It was performing no duties as pledgee or trustee. Its services were rendered, and its efforts expended, in protecting its own interest. In these circumstances, there is, we respectfully submit, no rule of law which permits the Trust Company, as trustee or pledgee, to impose its disbursements for counsel fees upon its adversary.

It is, of course, the ordinary rule that a pledgee has a lien on the property for any expenses, including attorneys' fees reasonably incurred by him in keeping and caring for the property pledged, protecting it against liens, taxes, assessments, etc. But our contention is that it has no application whatsoever to the facts in this case.

When we examine the reason of the rule which allows a pledgee attorneys' fees for the protection of pledged property, it becomes clear that the Trust Company does not come within it. The foundation of the rule is that the pledgee, after a sale of the pledged property, must credit the pledgor with the net amount realized by him from the proceeds. If he has been put to expense in order to protect the property pledged, for illustration, if he has been compelled to pay an incumbrance to prevent a foreclosure, or forced to defend the pledgor's title, the gross proceeds must be reduced to the extent of the expense incurred in the doing of one or all these things, because done on behalf of the pledgor and for his benefit. The pledgee has the property in his possession; the pledgor is not in position to defend it against adverse claims or to protect it generally. The

pledgee, therefore, is authorized, in law, to act for the benefit of the pledgor, as his quasi-agent, in doing what the pledgor would have done had he been in possession of his property and in position to defend it.

Where, as here, suits are undertaken by the pledgee which are of no benefit to the pledgor, the reason for the rule ceases, and the rule itself has no application.

The rule and the reason for it are recognized and set forth in *Work* v. *Tibbits,* 87 Hun 352, 34 N. Y. Supp. 308.

Other decisions to the same effect are:

Wolf v. *Am. Trust & Savings Bank,* 214 Fed. 761 (7th Circ.);

Smith v. *Equitable Trust Company,* 215 Pa. 413, 62 Atl. 591;

Willard v. *White,* 56 Hun 581, 10 N. Y. Supp. 170.

V.

It is contrary to both reason and authority to base an allowance of counsel fees in this case upon the assumption that the Trust Company uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid.

The lower court sought to justify the imposition of costs as between solicitor and client upon the assumption that "the Trust Company in the course of litigation uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid." This, we contend, is clearly erroneous, and the error is susceptible of plain demonstration.

We insist, in the first place, that no fund was uncovered and brought into the constructive possession of the court, within the meaning of the rule relied upon; and, furthermore, we insist that the case is governed by established principles which prohibit the allowance of counsel fees in the circumstances shown in this case. Before coming to a discussion of these questions, we call attention to the following considerations:

The decree of the lower court, which this Court affirmed, did not order the distribution of any fund to creditors. It merely awarded a personal judgment against petitioner, for the amount of the Belt Company's debt, with the return of the collateral upon payment of the debt, and with a sale of the collateral upon a failure to pay the debt. It was a personal judgment, which has long since been paid in full, in favor of the Trust Company, and this judgment did not inure to the benefit of any one else.

At no time did the Trust Company assert any claim except its own. There can be no pretense that it was acting for the benefit of any creditor. Its claim that petitioner was liable for the debt of the Belt Company is stated in its answer to the amended intervening petition of petitioner (S. C. Rec. 311), and is asserted solely in its own behalf. It is in the nature of a legal claim, as distinguished from an action in equity. The suits in state courts upon the same cause of action (S. C. Rec. 502) were actions at law, triable by jury (R. S. Mo. 1919, sec. 1398).

Not only was the property of the Belt Company not a trust fund, in any substantial sense, but it was not in the possession of any court at the time the Trust Company asserted its claim in 1905, nor has it been in the possession of any court since that time. The property of the Belt Company, as appears from the Trust Company's answer (S. C.

Rec. 295) was sold in November, 1901, at foreclosure sale, and was purchased by petitioner, which ever since that time has had exclusive possession thereof. Manifestly, the stock of petitioner, which was issued in exchange for the stock of the Belt Company in the reorganization (if that be regarded as a "fund"), has never been in the possession of any court.

The lower court conceives that its decision with respect to the discovery and administration of a fund is supported by *Trustees* v. *Greenough,* 105 U. S. 527, and decisions of that character. Those cases hold, in general, that where one litigant, at his own expense, has either created, preserved or protected a fund, and others were entitled to claim, and did claim, the results of his labors, it was not fair that the persons who have taken the risk and cost and expense of the litigation should bear all the costs, but those who share in the fruits should bear their pro rata share of the expense. The rule goes no further than where meritorious results have actually been achieved, those who, by inaction, seek to await the result and escape all expense if the case be lost, but if successful, to share the actual benefits by receiving their portion of this success, should not be allowed to do so without contributing their share of the expense (*Buell Case,* 201 Fed. 762, 768).

The lower court's ruling is in direct conflict with the applicable authorities.

The total inapplicability of this rule to the case at bar is manifest, for several reasons, which we now point out:

(a) In this case, the court did not take charge of, administer, preserve or distribute any fund. It awarded a money judgment, in favor of the Trust Company and

against petitioner, which has long since been paid in full. The rule of the *Greenough* case, which permits the making of an allowance to counsel, does not apply. This, because the result of the litigation was "a general personal judgment, without segregating a fund in kind, and bringing its corpus into a court of equity for distribution."

This rule is stated clearly and emphatically by the Supreme Court of Missouri in *Johnson* v. *United Rys. Co.*, 247 Mo. 326, 350, 152 S. W. 362, the jurisdiction where this litigation was carried on. There, an action in equity was brought in behalf of complainant and other creditors to subject to the payment of their debts certain property which the debtor had transferred in fraud of creditors. There was a money judgment for complainant, and his motion for an allowance of attorney's fees was denied. The court held that the rule of the *Greenough* case had no application, saying:

> With cases of that ilk eliminated, there is left to consider a doctrine of equity, viz., that a trust fund of right should bear the expenses of its own administration. According to that rule, it has been held that where a transaction has been ripped up or a conveyance set aside for fraud and an estate has been uncovered and recovered, which, in equity, belongs to creditors, and that estate is held in the hollow of the chancellor's hand to be administered and distributed, attorney's fees may be allowed as part of the trust administration. White *v.* University Land Company, 49 Mo. App. 450; Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157; Central Railroad, etc. *v.* Pettus *et al.*, 113 U. S. 116, 28 L. Ed. 915; Woodward *v.* Mastin, 106 Mo. loc. cit. 364, 365, 17 S. W. 308. Agreeably thereto are an array of other cases industriously collated in Mr. Gilliam's brief *pro se*. But it seems to us their doctrine does not apply here. This be-

> cause the power of a court of equity is flexible enough to measure out relief in cases of this kind by a general personal judgment, without segregating a fund in kind, and bringing its corpus into a court of equity for administration. Accordingly, here the judgment was a general money judgment against Railways Company. It stopped short at that point. It administered no fund. It took this form apparently by consent of the parties; at least, no one took exception to that feature. In such fix, the case falls within the doctrine of the general rule, viz., that in Missouri one litigant cannot be compelled to pay the attorneys' fees of another, either in equity or at law. Pickel *v.* Pickel, 147 S. W. 1059, not yet officially reported. It appears that Johnson contracted that Mr. Gilliam on top of a named percentage might have all attorney's fees the court allowed. That friendly turn added no virtue to movent's position. In that aspect it dealt with a bird (not in hand, but) in bush. We hold the motion well ruled.

This rule applies squarely to the case under consideration. Here, there was a general money judgment against petitioner. The decree stopped short at that point. It administered no fund. The case therefore falls within the doctrine of the general rule, in federal courts as well as in the state courts of Missouri, that one litigant cannot be compelled to pay the attorney's fees of another, either in equity or at law.

(b) Even where a creditor sues in equity for the benefit of himself and all intervening creditors, and obtains a decree for complainant and such creditors, *and the complainant and such creditors receive the full amount of their debts, with interest and taxable costs*, the complainant is not entitled to an allowance for solicitor's fees out of the surplus otherwise payable to the debtor.

In this case, the only creditor was the Trust Company. It did not sue for the benefit of other creditors who might come in and assert their claims. The Trust Company's debt became merged in a personal judgment, and that judgment, with interest, has been paid, and the taxable costs have been paid. Upon what theory of law is the Trust Company entitled to impose the burden of its counsel fees upon the surplus of the trust fund (assuming there was a trust fund), belonging to petitioner?

The authorities deny the validity of a claim of this nature. One such authority is *Huff* v. *Bidwell,* from the fifth circuit, 195 Fed. 430, where it is held:

> Where a judgment lien creditor sues in equity for the benefit of himself and all intervening creditors, and obtains decree for complainant and such creditors, and the defendant's property condemned and sold to satisfy debts exceeds the amount of debts and interest and costs, the complainant is not entitled to an allowance for his solicitor's fees out of the surplus otherwise payable to the debtor after full payment of all the debts and costs.

The court said (p. 431):

> In creditors' suits, the underlying principle upon which those who do not appear as plaintiffs are charged with a proportionate part of the solicitors' fees is that the plaintiffs represented, and were suing for, the others; and this agency is generally shown by the appearance of the other creditors in court propounding their claims and claiming to share in the result of the suit. Lamar *v.* Hall & Wilberly, 129 Fed. 79, 83, 63 C. C. A. 521; Farmers' Loan & Trust Company *v.* Green, 79 Fed. 222, 24 C. C. A. 506; Hand *v.* Railroad Company, 21 S. C. 162. But the plaintiff in this case in no sense represented

> Huff, the defendant. The suit was not brought for his benefit. There was no just reason for seizing more of his property than would pay his debts, principal and interest, and the costs of suit. The property having been sold for a sum in excess, the proceeds necessarily came into court; but it was never the purpose of the suit to accomplish more than the collection of the debts and costs. *If no creditors had intervened, if the suit had been brought by the plaintiffs to enforce and collect their judgments only, is there any known principle upon which Huff could have been made responsible for the plaintiffs' solicitor's fees?* The intervening of the creditors may in such cases oblige them to contribute to the payment of the fee; but such interventions impose no obligation on the defendant who is sued. On principle, it seems to us that this fee cannot be added to Huff's indebtedness.

The sentence which we have italicized has accurate and precise application to this case. Here, no other creditors did intervene. The Trust Company sought to enforce and collect its claim only. Is there, therefore, any known principle upon which petitioner can be made responsible for the Trust Company's solicitors' fees?

In 20 Cyc. 825, the rule is thus stated:

> Upon a conveyance by a debtor being set aside as fraudulent, at the suit of a creditor, and a sale of the property being ordered, the creditor's attorney may be allowed a fee out of the proceeds; but such fee should be paid out of that part applicable to the demands of creditors, and not out of such balance as may come to the debtor after the liquidation of the debts proven and passed.

The foregoing quotation is cited and followed in *Pickel* v. *Pickel*, 243 Mo. 641, 665, in a case where, at the

suit of a wife, a conveyance by a husband was set aside as fraudulent as to her rights of maintenance.

To the same effect are: *Waggener* v. *Mars*, 27 S. C. 97, 2 S. E. 844, 846; *Miller* v. *Kehoe*, 107 Cal. 340.

If there had been in this case a fund in the possession of the court for administration and distribution (we insist there was not), the utmost limit of recovery by the Trust Company and other creditors (assuming there were others, although, in fact, there were not) would be the full amount of their respective claims, with interest, diminished by their proper proportion of any allowance made for counsel fees. The amount distributable to the Trust Company, plus its pro rata share of the allowance of counsel fees, might equal, but could not exceed, the amount of its claim, with interest. In other words, the Trust Company would pay its proportion of counsel fees out of its own distributive share; and the same would be true of other participating creditors.

The result is the same, in principle, where, as here, the Trust Company was the only creditor. The amount awarded it in this case was the full amount of its claim, with interest, and, accordingly, on both principle and authority, the Trust Company should pay its own counsel fees out of the proceeds of its judgment.

Certainly, there is no equity in requiring petitioner to pay out of its share of the true fund (assuming, as before, that there was one), the expenses of the Trust Company's counsel, who rendered no service whatsoever for petitioner, and whose activities were wholly in conflict with its interest.

(c) Not only was the Trust Company awarded a money judgment, which has been paid, and not only does the Trust Company seek to impose its claim for counsel fees upon

the part of the trust fund (if there was one) remaining after the only creditor in the action has been paid in full, but the fact remains that the Trust Company's effort in this litigation was solely made in its own behalf, and in an endeavor to protect its own selfish interest; and the rule applies that in such cases there can be now allowance of counsel fees (*Groves* v. *Sentell*, 153 U. S. 465, 486; *Hauenstein* v. *Lynham*, 100 U. S. 483, 490; *Pike* v. *Cincinnati R. Co.*, 179 Fed. 97, 103; *Riddle* v. *Hudgins*, 58 Fed. 490, 494; *Boothe* v. *Coal Co.*, 72 Wash. 679; *Attorney General* v. *Ins. Co.*, 91 N. Y. 57; *Savage* v. *Sherman*, 87 N. Y. 285).

VI.

The statement in the opinion that the entire litigation was vexatious, is entirely unwarranted for the reasons: First, it is wholly unsupported by the record; secondly, it is in conflict with the opinion and mandate of this Court in this case (240 U. S. 166); thirdly, the record, as it stands, shows affirmatively the complete good faith of petitioner and the others associated with it during the entire litigation; and, fourthly, petitioner was wrongfully denied the right to introduce evidence in its own behalf upon that issue.

We feel strongly that the lower court's characterization of the entire litigation as vexatious is highly prejudicial and grossly unfair to petitioner and to counsel who instituted the litigation in the beginning and who have conducted it since that time. We feel, however, that the limits of a brief in support of an application for a writ of certiorari have been reached, and perhaps passed. We are constrained, therefore, to ask the indulgence of the Court

by referring it to what has been said upon this topic in our motion for a rehearing (Rec. 754-775). What is there said represents our views upon the subject, and most effectively, we respectfully submit, meets and refutes the lower court's charge that the litigation was vexatious. To repeat here what is there said would, we fear, prolong this brief beyond reasonable bounds.

Respectfully submitted,

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SAMUEL W. MOORE,
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OCT 5 1929

CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 22.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner.

v.

GUARDIAN TRUST COMPANY,
Henry C. Flower, Receiver,

Respondent.

BRIEF FOR PETITIONER.

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SAMUEL W. MOORE,
Of Counsel.

October 3, 1929.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 22.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

GUARDIAN TRUST COMPANY, Henry C. Flower, Receiver,
Respondent.

BRIEF FOR PETITIONER.

The opinions delivered in the courts below.

The official report of the opinion of the circuit court of appeals for the eighth circuit, sought to be reviewed herein, will be found in 28 F. (2d) 233. There were two opinions rendered in the district court, not yet officially reported. The first opinion, delivered in June, 1923, will be found in the record (Rec. I, 691); and the second opinion, rendered in March, 1926, will be found in the record (Rec. I, 704).

NOTE.—The transcript of the record brought to this Court consists of two volumes. Volume II, which is first, in point of time, is a copy of the record in the original case in this Court, in *Guardian Trust Co.* v. *The Kansas City Southern Ry. Co.*, reported in 240 U. S. 166. References to its pages are as follows: "Rec. II, ...)." Volume I is a transcript of subsequent proceedings in the district court and circuit court of appeals for the eighth circuit. References to its pages are as follows: "(Rec. I, ...)."

The Trust Company appealed to the circuit court of appeals for the eighth circuit from the decree (Rec. I, 128) following the second opinion.

Jurisdiction.

An application for a writ of certiorari to the circuit court of appeals for the eighth circuit was made by petitioner under section 240 of the Judicial Code, as amended (28 U. S. C. A. sec. 347). The decision of that court was handed down on May 18, 1928 (Rec. I, 722-749). A motion for a rehearing was filed by petitioner on July 16, 1928 (Rec. I, 751-821), and was overruled on October 18, 1928 (Rec. I, 821). The application was made within three months after the overruling of said motion for a rehearing and after the entry of the decree sought to be reviewed by this Court. The application was granted by this Court February 25, 1929 (279 U. S. 827).

Statement.

Volume II is the precise record before this Court when it decided this case on its merits in February, 1916 (240 U. S. 166), and it is also the record that was before the circuit court of appeals when it handed down its two opinions (201 Fed. 811; 210 Fed. 696) which that decision affirmed. It will be noted that Volume II contains the pleadings, master's report, decree, and certain other formal matters, but does not contain the evidence on the merits of the case. This evidence has not at any time been brought to this Court or to the court of appeals.

Volume I contains the proceedings in the district court touching the taxation of costs following the decision of this

Court in 1916. The record before the court of appeals when it rendered its third opinion (28 F. (2d) 233), now under review, consisted of Volumes I and II.

The principal question in the case.

The principal question in the case, quoting from our application for certiorari, is as follows:

Was the district court for the western district of Missouri, upon receipt of the mandate of this Court in *The Kansas City Southern Railway Company* v. *Guardian Trust Company,* 240 U. S. 166, required or authorized to tax against petitioner, in its final decree, costs "as between solicitor and client", including therein the disbursements of the Trust Company for attorneys' fees and other expenses incurred during the entire period of the litigation?

The district court held (Rec. I, 704-720) that only costs as between party and party should be taxed, and rendered its final decree accordingly (Rec. I, 128-131). Such costs have been duly taxed and paid, and are not involved herein. Our contention is that the district court was clearly right in its ruling.

The circuit court of appeals for the eighth circuit, upon appeal by the Trust Company, held that our federal courts possess the powers of the English Chancery Court over the taxation of costs, and, purporting to exercise those powers, it reversed the decree of the district court (Rec. I, 722-749) and remanded the case with instructions to tax costs "as between solicitor and client". Its decree requires the taxation, as costs against petitioner, of attorneys' fees, and other disbursements of the Trust Company, in the sum of approximately $300,000 (Rec. I, 59). Petitioner seeks a review by this Court of the decree of the circuit court of

appeals. It is believed that this highly important question of federal practice can be determined by the Court as a matter of law, without opening the record in this twenty-nine year old case.

The bill of the Cambria Company.

This litigation had its inception in September, 1900, when the Cambria Steel Company, a judgment creditor of the Belt Company, filed a creditor's bill in behalf of itself and other creditors (Rec. II, 3) in the federal court at Kansas City, Mo., against the Trust Company, the Belt Company, and others.

The complaint alleged, in substance (Rec. II, 5-6) that the Trust Company, prior to the year 1887, conceived and entered upon the plan and purpose to cause to be constructed a number of railroads, including that of the Belt Company, by various corporations, all to be organized by the Trust Company, and to be officered with officers and directors of the Trust Company, and thereby completely to dominate and control the actions of such railroad and other companies, and their several officers and directors; that it was the plan and purpose of the Trust Company to gather unto itself all the profits and other advantages accruing in the premises, and to foist upon such railroads, including the Belt Company, any losses that might be sustained or liabilities that might result in the premises.

It was further alleged that in carrying out its said plan and purpose, the Trust Company assumed the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of such railroad and other companies, in trust for the use and benefit of the parties who might become concerned or interested therein;

and that, consequently, the relation of the Trust Company to each and all of such railroad and auxiliary companies was that of principal, bound and charged with the duty to indemnify and protect the railroad and other companies, so employed and utilized in any particular transaction, against any and all losses, burdens and liabilities arising in the premises.

Then followed allegations (Rec. II, 6-12) as to the various companies organized and officered by the officers and directors of the Trust Company, and the various transactions whereby it was alleged losses had been sustained and, through the domination and control of the Trust Company, unlawfully charged to the Belt Company, and unlawful profits and charges made at the expense of the Belt Company, resulting, on March 31, 1899, in an apparent, but not a real, indebtedness of the Belt Company to the Trust Company in the sum of approximately $360,000; that on said date promissory notes were caused to be given by the Belt Company to the Trust Company to evidence its alleged indebtedness, and the Belt Company was caused to pledge with the Trust Company all its available securities (listed (Rec. II, 14) and disposed of in final decree (Rec. II, 906)) as collateral to secure the same; that the giving of the notes and collateral was done fraudulently, through such domination and control, in anticipation of the insolvency and receivership of the Gulf Company, which occurred the following day, April 1, 1899 (Rec. II, 12-15); and the prayer (Rec. II, 18) was for an accounting, for a cancellation of the alleged indebtedness from the Belt Company to the Trust Company, the subjection of the collateral to the payment of complainant's debt, and for an injunction to restrain a threatened sale by the Trust Company of said collateral.

The Trust Company's answer to the bill of the Cambria Company.

The answer of the Trust Company (Rec. II, 33) denied the allegations of the bill, and particularly denied the existence of any trust relations in the following language (Rec. II, 42):

> Denies that in carrying out any of its plans and purposes as alleged in the bill of complaint the defendant assumed the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of said railroad companies and auxiliary companies in trust, and for the use and benefit of the parties who might become interested therein, as alleged in the bill of complaint; and denies that as a consequence of any such alleged position the relation of this defendant to any of such railroad companies and auxiliary companies in any wise became or was as principal bound and charged with the duty to indemnify or protect any such railroad or auxiliary company in any transaction against any loss, burden or liability, as alleged in the bill of complaint. Denies that it became the duty of the defendant, as to persons becoming interested in any of said railroad companies or auxiliary companies as creditors, to dispose of the stock, bonds, funds or other assets of any such railroad companies or auxiliary companies for the use and benefit of the persons interested therein, or who might become interested therein as creditors or otherwise, as alleged in the bill of complaint.

The Trust Company expressed a willingness to render a full and true account to the Belt Company, and to furnish all such information whenever thereunto lawfully and properly requested. It said (Rec. II, 48):

> . . . Notwithstanding the fact that the said Belt Company has at all times had full and true accounts and knowledge of all the transactions between it and this defendant as aforesaid; yet, if, for any reason, it desires further accounting or information as to any of the said matters or things, this defendant is ready and willing and hereby offers again to render a full and true account and to furnish all such information, whenever thereunto lawfully and properly requested.

Under the bill of the Cambria Company, the issue was one of debt or no debt between the Belt Company and the Trust Company. With this determined the collateral would go to the party entitled to it.

The ancillary bill.

The ancillary bill of the Belt Company and its receivers, under which the accounting, in the main, was carried on, was filed in November, 1901 (Rec. II, 97), pursuant to stipulation (Rec. II, 890) which consented that the accounting sought should be expedited, and also required that the Belt Company should be co-complainant with the receivers. This ancillary bill, as appears from the stipulation, superseded a so-called cross-bill, previously filed by the receivers as sole cross-complainants. The receivers became parties complainant pursuant to the authorization contained in the order appointing them (Rec. II, 29). They were expressly authorized and empowered "to bring suits for *an accounting* . . . against any and all persons whatsoever, based upon or arising out of *past dealings or relations.*" This could only apply to an action for an accounting against the Trust Company. There was no one else with whom the Trust Company had

had "past dealings or relations" of any consequence. The ancillary bill was substantially the same as the bill of the Cambria Company. It sought an accounting and a cancellation of the alleged indebtedness. An amended and supplemental ancillary bill was filed in March, 1905 (Rec. II, 202), at the request of the Trust Company and in response to its motion for a surcharging and falsifying of the accounts brought in by the Trust Company (Rec. I, 15). A further amended ancillary bill and also the Trust Company's answer thereto were filed together on July 2, 1906 (Rec. I, 392), by stipulation (Rec. II, 391), at the close of the taking of testimony, to conform the pleadings of both parties to the proof. The allegations of this amended ancillary bill are summarized by the master (Rec. II, 584 *et seq.*).

The Trust Company's answer to the ancillary bill.

The Trust Company answered the ancillary bill, in December, 1901 (Rec. II, 115), admitting the community of officers (Rec. II, 148), but denying that it had dominated and controlled the railroad companies, including the Belt Company. It also sought to justify its action in the various matters complained of, and offered to make such further accounting as might be desired. It said (Rec. II, 148). "The Trust Company has at all times stood ready, and is still ready and willing, to make such further accounting thereof as may by the court be required."

And, again, it said (Rec. II, 155):

> These defendants further state and show that they are ready and willing, if in the judgment of this court, they ought and should do so, to render a fuller accounting of any and all of the transactions of the Trust Company with any and all of said companies,

in such manner and at such times as the Court may direct.

(In this connection, it seems proper to state that the master subsequently ruled that an accounting should be had (Rec. I, 14).)

A similar answer, but pleading laches and the state statutes of limitation (Rec. II, 370), was filed (Rec. II, 312) to the first amended ancillary bill of complaint, and also (Rec. II, 461) to the second ancillary bill of complaint.

Under the ancillary bill of the Belt Company and its receivers, the issue was one of debt or no debt between the Belt Company and the Trust Company. The fate of the collateral would depend upon the determination of this issue.

The intervening petition and the Trust Company answer.

Petitioner became a party to the litigation in 1905 by intervening petition (Rec. II, 166), filed by stipulation (Rec. II, 164). It charged that the Gulf Company, the Belt Company and the Air Line had executed mortgages covering after-acquired property, the lien of which attached to certain of the collateral held by the Trust Company, or to the properties represented thereby; that petitioner, as purchaser at foreclosure sales of the properties of those companies, had become the owner thereof, and demand was made for the securities or the properties which they represented.

The answer of the Trust Company (Rec. II, 186) contained a denial of the allegations of the intervening petition, pleaded laches and the state statutes of limitation (Rec. II, 198), and further alleged (Rec. II, 199-201) that by reason of the reorganization of the Belt Company, peti-

tioner had become liable for its debt to the Trust Company.

Thus it appears that this liability issue, which thereafter became the dominant issue in the action, was one which the Trust Company itself injected into the case in 1905. It is largely the attorneys' fees and other expenses of the Trust Company incurred in litigating this issue which it now seeks to impose upon petitioner.

By stipulation (Rec. II, 267), petitioner was permitted to file an amended intervening petition, and to include therein its claim against the Trust Company for alleged breach of trust as trustee in the mortgage made by the Union Terminal Railway Company; and the Trust Company consented that the issues so made should be referred to the special master, and waived any objection it might make to said intervening petition on the ground of multifariousness or other formal matters.

The amended intervening petition (Rec. II, 269) was substantially the same as the original pleading, except that (Rec. II, 288) it alleged that it was the duty of the Trust Company, under the mortgage of the Terminal Company, to see that as the bonds of the Union Terminal Railroad Company were sold, the proceeds thereof were used in the construction, completion and equipment of the railroad of the Union Terminal Railroad Company, and alleged a failure to perform this duty.

The answer of the Trust Company (Rec. II, 293) in the main followed its answer to the original intervening petition, but denied the alleged trusteeship in the matter complained of, asserting that no duty was imposed upon it, either by law or by the express terms of the mortgage, to see that the bonds as sold were used in the construction of the railroad, saying (Rec. II, 307):

Respondent denies that either by law or by the express terms of said mortgage it was the duty of respondent to see that as said bonds were sold, proceeds thereof should be used in the construction, completion and equipment of said railroad. On the contrary respondent says that there was no such duty imposed either by the terms of said mortgage or by law.

Under the intervening petition of petitioner, the issue was three-fold: first, was petitioner the owner of the collateral security, or the properties represented thereby? Secondly, did the Trust Company assume a relation of trust with respect to the use of the proceeds of the Union Terminal bonds; and if so, was that trust violated? Thirdly, did petitioner assume the debt of the Belt Company?

The charge of fraud.

Much is said in the opinion of the lower court about the charge of fraud. It is true that fraud was charged on both sides; but the fraud charged against the Trust Company was in the nature of constructive fraud (26 C. J. 1061), arising from the relation of the parties, the common officers and directors controlling the corporations in question, and the alleged misuse by the Trust Company of the power derived from this community of interest, within the rule of the *Geddes* case, 254 U. S. 590. This will be referred to later.

The master did not feel that charges of actual fraud were involved in complainant's bills, except in the one instance of the transfer of collateral security by the Belt Company to the Trust Company on March 31, 1899, on the eve of the insolvency of the Gulf Company and the prospective loss of control by the Trust Company over the affairs

of the Belt Company. The ancillary bill is summarized by the master (Rec. II, 584-592). The word "fraud" does not occur. The word "fraudulent" occurs but once (Rec. II, 592), and is there used to characterize the said transfer of the collateral security. In this connection, the master finds (Rec. II, 754) that when this transfer was made, the officers of the Trust Company knew that the Gulf Company would default in its interest and that receivers would be appointed for it, and that that would likely mean that the Trust Company would not thereafter have a controlling influence in Belt Company matters. These facts, we feel, fairly justified the charge that the transfer was fraudulent.

The allegations of the intervening petition of petitioner are summarized by the master (Rec. II, 735-742). Neither the word "fraud" nor "fraudulent" appears.

The master's conception of complainants' bill was not that it abounded in wholesale charges of fraud, as suggested by the court of appeals, but that it was based upon the alleged domination and control by the Trust Company of the Belt Company. In this respect he says (Rec. II, 583):

> Before, taking up, for consideration, the various "items", or complaints, contained in the second ancillary bill, the master has thought best to make a somewhat extended reference to the controlling question in this cause, that is, the alleged domination and control by the Trust Company of, and over, the Belt Company, and its constituent companies, which complainants contend to have existed throughout the whole period, covered by the transactions, complained of in said bill.
>
> It will be manifest to the Court, from a careful reading of this second ancillary bill, that it is grounded upon the proposition that the Trust Company so dominated and controlled these other com-

> panies, that their directors and officers were merely agents of the Trust Company to execute the wishes of A. E. Stilwell and others dominant in the control of Trust Company affairs.

And, again (Rec. II, 641):

> The underlying theory, upon which complainants' bill is grounded, is that the Trust Company dominated and controlled the Suburban Company, afterwards the Belt Company, and its constituent companies, and also, the subsidiary companies named in the bill, by virtue of causing the employees, officers and directors of the Trust Company to be elected officers and directors of the Suburban Company, and other corporations, and thereby placing the agents, employees and officers of the Trust Company in charge of such companies, respectively, so that these companies might be dominated and controlled at the behest and in the interest of the Trust Company, and, which complainants allege was done, continuously, through the period of years intervening between the incorporation of these companies and April, 1900, when what was known as the Stilwell management of the Belt and allied companies, lost control, and the Southern Company, and those associated with it, acquired control thereof through the receivership and foreclosure proceedings, mentioned in the bill.

The Trust Company itself did not feel that charges of gross fraud or misconduct had been made against it. It deliberately took the position that the charges made were of constructive fraud, and not "actual fraud." This is a matter of record. The intervening stockholders of the Trust Company characterized the bill as "a mere cry of domination and constructive fraud" (Rec. II, 963). In the "Answer of Guardian Trust Company on rule to show

cause," filed in the lower court on December 16, 1907, it is said, in paragraph 13 (Rec. II, 558):

> There is no valid cause of action against this defendant set up in the said ancillary bill of complaint; *no actual fraud is charged therein* and said bill presents a legally meaningless theory and an impossible case.

The foregoing statement is signed by Mr. Rosenberger and Mr. Mecartney, both counsel for the Trust Company at that time, and is sworn to by the former.

It thus appears that it was the deliberate opinion of the Trust Company in 1907, about a year after this case had been argued for two weeks before the special master, when the whole matter was fresh in the minds of counsel, that no "actual fraud" had been charged against it.

The accounting before the master.

As before stated, the Trust Company in its answer (Rec. II, 48, 148, 155) consented to an accounting, and by its stipulation (Rec. II, 891) agreed that the accounting should be had and expedited. The district court, in March, 1908, in an unreported opinion in this case, held that this stipulation evidenced the full consent of the Trust Company to an accounting. It said: "It (the Trust Company) has consented that the master take an accounting, finding and report as to the respective rights and claims of the parties to the property, notes, bonds and claims involved." Judge Trimble, counsel for the Trust Company when its answer was filed consenting to an accounting, consulted with his partners before that course was determined upon (Rec. I, 278).

New counsel for the Trust Company having come into the case, they raised before the master, in February, 1905, the right of complainants to an accounting, and the master ruled "that, under the circumstances, there shall be an accounting in this case"; and the Trust Company then demanded that complainants in the ancillary bill "specify the items of this long and complicated account which are in dispute here." Whereupon counsel for complainants in the ancillary bill, at the request of the Trust Company and in response to its motion, announced his intention to file, and afterwards filed, an amended bill surcharging and falsifying. This appears from a fragment of the proceedings before the master, found in Rec. I, pages 14-15.

A large amount of testimony was taken before the master. It appears from an affidavit filed in the lower court that there were 6,950 pages of oral evidence and 27,592 pages of documentary evidence, principally copies of vouchers and records. The case was argued for two weeks before the master in July, 1906 (Rec. II, 1023). The master's report was filed in May, 1910 (Rec. II, 575). It recommended (a) that the Trust Company's claim against the Belt Company be reduced by three items, aggregating $21,850 and interest, and sustained as to all other items; (b) that the lands of Central Improvement Company, which cost $169,349.60 (Rec. II, 280) and which were referred to in argument as having a value of $300,000 to $400,000 (Rec. II, 952), be conveyed to petitioner; and (c) that petitioner be held not liable in any way for the floating indebtedness of the Belt Company (Rec. II, 887).

The decree of June, 1910, and subsequent proceedings.

The district court overruled all exceptions to the master's report and entered a final decree, in June, 1910 (Rec. II, 903), carrying out the recommendations of the master. The Trust Company appealed to the circuit court of appeals for the eighth circuit, which (1912-1913) reversed the decree of the lower court (201 Fed. 811; 211 Fed. 696). Petitioner thereupon appealed to this Court, which, in February, 1916, affirmed the decree of the circuit court of appeals (240 U. S. 166). Petitioner, in April, 1916, paid the Trust Company $821,623.28 (Rec. I, 129), as the full amount of its claim, with interest. This proved to be an overpayment, which was adjusted in the final decree of May, 1926 (Rec. I, 130).

The decree of May, 1926, and subsequent proceedings.

Six years later, in October, 1922, the Trust Company moved in the district court for a final decree in accordance with the mandate of this Court (Rec. I, 15). The lower court in its first opinion, in June, 1923 (Rec. I, 691), reached the conclusion that costs should be taxed as between solicitor and client, and appointed a master (Rec. I, 20) to ascertain and state all items of costs and expenses paid or incurred by the Trust Company, "including among other expenses those for attorneys' fees, counsel or solicitor fees, stenographers' fees, expert accountants' fees, printing fees, traveling expenses, and other expenses incurred in the premises".

The district court having intimated in its first opinion (Rec. I, 698) that the circuit court of appeals had found that the litigation was vexatious, but expressly stating that

it expressed no independent judgment of its own thereon, petitioner, in December, 1923 (Rec. I, 33), filed a motion and application for leave to file a duly verified petition "to introduce testimony proving that this litigation was instituted and conducted on the part of each of the complainants in entire good faith", and setting out in detail the oral and documentary evidence which it desired to introduce (Rec. I, 34-44). This motion was overruled, and permission to introduce testimony was refused (Rec. I, 45).

The master filed his report on September 15, 1924 (Rec. I, 46), finding that the costs as between party and party amounted to $11,499.32 (Rec. I, 49), and that the costs as between solicitor and client amounted to $296,520.37 (Rec. I, 59). Of this latter sum, $280,867.98 was for attorneys' fees which were incurred in the litigation from beginning to end, including services in the circuit court of appeals and in this Court. Exceptions to the master's report were filed by both parties (Rec. I, 94, 106).

At the argument of the exceptions, the court permitted a reargument of the entire matter, and in an opinion dated March, 1926 (Rec. I, 704), the court reversed its former ruling, and held that the law did not permit the taxation of costs as between solicitor and client in this case, but only as between party and party. A final decree in accordance therewith was accordingly entered in May, 1926 (Rec. I, 128).

From this decree the Trust Company appealed to the circuit court of appeals for the eighth circuit, and that court, in May, 1928, reversed the said decree of May, 1926 (28 F. (2d) 233), to review which action of the circuit court of appeals petitioner, after an unsuccessful motion for a rehearing, presented its application to this Court for a writ

of certiorari, which was granted February 25, 1929 (279 U. S. 827).

Some additional facts are stated under the following heading, and also in that part of the brief, beginning at page 59 dealing with the lower court's intimation that this entire litigation was vexatious.

"The character of the litigation."

Under this heading (28 F. (2d) 234), the court of appeals, in its decision now under review, seeks to differentiate this case from the usual and ordinary equity proceeding and to place it in a special category, and to apply to it special and unusual rules. We desire to point out several matters which, we feel, have been misunderstood or misconstrued by the court.

1. The court of appeals regarded this case as essentially one of fraud, where wholesale and indiscriminate charges of fraud have been made against the Trust Company and adjudged to be unfounded. With all due respect to the lower court, we feel that this is entirely erroneous, and have no hesitation in saying that the parties who conducted the litigation in the lower court, and the master, as well as the lower court itself, took a different view. Complainants' theory throughout the litigation was, as above stated, that the Trust Company, through a community of officers and directors, had dominated and controlled the Belt Company and imposed unjust charges upon it. The community of officers and directors was one of the established facts in the case (Rec. II, 148, 597). It was conceded that over a period of years the same officers representing both companies dealt with themselves in a dual capacity. This, and not actual fraud, was the gravamen of the action.

It is entirely plain that the master did not for a moment, during the nine and one-half years that the case was before him, imagine that he was trying a case where actual fraud was the dominant and controlling element, or even a substantial element. This is clear from his statements in his report (Rec. II, 641, and Rec. II, 583, quoted above).

2. It is said by the court of appeals (p. 239) that "the charge that the Trust Company had violated fiduciary relations with the Belt Company and its subsidiary companies was adjudged not true." We feel that this statement, while true enough in a general sense, is nevertheless quite misleading in this case. It assumes that the Trust Company, having assumed admitted or established fiduciary relations towards the Belt Company and its subsidiary companies, was charged in the bill with the violation of its duties and obligations thereunder. The charge in this case was that the Trust Company *had assumed* fiduciary relations of this character, which, if established, would create certain obligations. The Trust Company vigorously denied that it had assumed any such relations. The finding of the master and the district court supported the Trust Company's contention. Hence, there were no fiduciary relations to be violated. The parties, therefore, sustained the relation of ordinary litigants toward each other. It is apparent, therefore, that the case is quite fundamentally different, as hereafter pointed out, from one where, fiduciary relations having been established or admitted, the issue is whether or not they have been violated.

3. Again, the court of appeals says (p. 239): "the charge that the Trust Company had violated its duty as trustee under mortgages of the Belt Company and its subsidiary companies was adjudged not true." But what was

actually adjudged was that no trusteeship in the matter in question actually existed, or ever had existed. Hence, no such duty or obligation as rests on trustees ever came into existence. It is one thing to charge the existence of a trusteeship and fail to establish it, as was the case here, and quite another thing to charge a violation of a trusteeship which has been actually established or admitted. There were two instances where complainants sought an adjudication that the Trust Company had assumed the duties of trustee in the particular matter specified: First, with respect to the Union Terminal bonds, where it was charged that the Trust Company had assumed certain duties and obligations as trustee with respect to the use of Union Terminal bonds and their proceeds. The Trust Company denied the existence of any such trust relations, and this defense was sustained (Rec. II, 872 *et seq.*). No trust relation therefore ever existed.

In the other instance, it was charged that the Trust Company, being a trustee in the Belt Company mortgage, thereby assumed such a trust relation to the Belt properties and the Belt bondholders as to disable it from taking or receiving any of the Belt assets or properties as security for its own indebtedness (Rec. II, 757). The master held that no such trust relation existed, saying (Rec. II, 760): "the Trust Company was under no such duty to the Belt bondholders as would prohibit it from taking collateral security to secure an indebtedness to it from the Belt Company." It was the non-existence of the trust relation which was adjudicated.

4. It was said by the court of appeals (p. 238): "The master recommended, further, that the amended petition of intervention of the Southern Company be dismissed as

being without either law or equity, except as to one paragraph in regard to certain lands standing in the name of the Central Improvement Company, one of the subsidiary companies, and that the Trust Company was entitled to hold and subject to the payment of the debt to it from the Belt Company all of the collateral mentioned." One would naturally infer from this statement that the Trust Company had been completely successful in its contest over the collateral, except in one matter of minor importance, touching the Central Improvement Company lands. Such, however, was not the case. The Central Improvement Company lands, or the Central Improvement Company stock (which had no value outside of the lands) was the most important of the items in controversy, and these were awarded to petitioner. The master (Rec. II, 781) refers to the stock as "one of the most valuable collateral securities." The value of the lands, as pointed out above, ran into several hundred thousand dollars.

On the other hand, the stocks and bonds adjudicated to the Trust Company in the final decree (Rec. II, 906) were either of small value, or had disappeared from the case as items of collateral before the litigation began (Sept. 7, 1900), or was fairly under way. Thus, the 15,000 shares of Union Company stock and the 5,000 shares of Air Line stock were sold by the Trust Company in June, 1900, for $35,000, and that amount was credited upon its debt against the Belt Company (Rec. II, 769). The 1120 shares of capital stock of Central Improvement Company, for which a separate receiver had been appointed, had no value outside of the lands, which, as above stated, were awarded to petitioner. The 439 shares of stock of Northern Townsite Company, which also had its own receiver, were of small value, as appears from the decree (Rec. II, 914). The 425 shares

of stock of Missouri Elevator & Terminal Company, also in receivership, were worthless, the property of that company having been turned over to the mortgagee by order of the court. The 25 shares of Fairmount Amusement Company were of no value. The 13,920 shares of stock of Northern Connecting Railroad Company were sold by the Trust Company on September 30, 1899, for $19,885.71 and credited upon the Belt debt (Rec. II, 773). The 315 First Mortgage Bonds were sold by the Trust Company on October 23, 1900, for $110,250, and applied on the Belt debt (Rec. II, 772). The 99 First Mortgage Bonds of the Northern Connecting Railroad Company were sold November 1, 1901, under order of court, and the proceeds, $40,001.25, credited on the decree (Rec. II, 903, 907). The steel rails and fastenings were sold by the Trust Company for $11,133.06, on September 26, 1900, and the proceeds credited upon its claim against the Belt Company (Rec. II, 780). There is no record of the disposition of the claim of the Belt Company against the Gulf Company for switching charges and terminal services, amounting to about $133,000.00. This completes the list.

It thus appears that petitioner was awarded the only item of collateral security of substantial value held by the Trust Company during the years of the litigation.

Specification of Errors.

For its specification of such assigned errors as are intended to be urged, petitioner alleges that the circuit court of appeals committed error in the following respects:

1. In holding that the opinion of this Court required or authorized the taxation of costs "as between solicitor and client".

2. In holding that "the United States courts of equity at the time of their creation became endowed with the powers, including that over costs, possessed by the English chancery courts".

3. In holding that "the federal courts of equity have jurisdiction to allow, in proper cases, costs 'as between solicitor and client'."

4. In holding that the respondent is entitled to taxation of costs "as between solicitor and client" in this case.

5. In holding that the Trust Company, as a pledgee, is entitled to taxation of costs "as between solicitor and client", although it litigated its right to the pledged property, not in the interest of the pledgor, and not for the care, preservation or protection of the property, but in its own individual interest, and for its own personal protection.

6. In holding that the Trust Company, when sought to be charged as trustee, or with the obligations resting upon trustees, is entitled to taxation of costs "as between solicitor and client", notwithstanding the fact that the Trust Company disclaimed any trusteeship and any and all fiduciary obligations, and was successful in maintaining this defense.

7. In holding that after the Trust Company succeeded in holding petitioner liable for the debt of the Belt Company, and in collecting from petitioner its entire debt and interest, it is entitled to taxation of costs "as between solicitor and client", upon the theory that it occupied the position of a creditor, who, in behalf of itself and others, has brought a fund into court for distribution, and is awarded an allowance from the fund.

8. In holding that "the whole litigation" was of a "vexatious character", particularly after denying petitioner an opportunity to offer evidence in its own behalf on that issue.

ARGUMENT.

I.

The proper execution of the mandate of this Court required the taxation of costs only as between party and party, and did not require or authorize the taxation of costs as between solicitor and client.

It is familiar law that it was the duty of the district court to which the mandate in this case was addressed by this Court, to carry it into execution according to its terms, in the light of the opinion of this Court. It could not vary it, or examine it for any other purpose than execution; or give any other or further relief, or review it, even for apparent error; nor intermeddle with it in any manner (*Ex Parte Union Steamboat Co.*, 178 U. S. 317; *Re Washington R. Co.*, 140 U. S. 91; *Re Sanford Fork & Tool Co.*, 160 U. S. 247).

So well established is this rule that this Court will grant certiorari to the court of appeals where, as here, the question "involves the construction of a prior decree of the United States circuit court affirmed by this Court" (*St. Louis, K. C. & C. R. Co.* v. *Wabash R. Co.*, 217 U. S. 247, 251). This Court will inquire into the proper execution of its own decree "either by original proceeding or in any other appropriate form" (*United States* v. *Terminal R. Assoc.*, 236 U. S. 194, 199).

This Court (240 U. S. 166) affirmed the decree of the circuit court of appeals for the eighth circuit (210 Fed. 696), which directed (pp. 723, 724) the entry by the district court of a specific decree, complete in all details, disposing of the entire controversy, *including the matter of costs.* The mandate of this Court (Rec. I, 467) adjudged that said decree be "affirmed with costs," and that the Trust Company et al. recover against petitioner "twenty dollars for their costs herein expended and have execution therefor."

There are numerous references in the directions for the entry of a specific decree (210 Fed. 723, 724), to "the costs of this suit"; "the costs after as well as before the decree"; "its costs down to the entry of the decree"; with a further provision that the Trust Company shall be permitted to pursue either the Cambria Company or the Southern Company, or both of them, "until its costs are paid". After refusing to entertain, and, in effect, denying, the petition of the three stockholders for a taxation against petitioner of the amount of the Trust Company's attorneys' fees, etc., the court said: "Our conclusion is that our just course is to leave the *taxation of costs* to the court below, under the principles, rules and practice in equity."

When this Court affirmed the decree of the lower court, directing the entry of a specific decree, complete in all details, and awarding "costs", without further designation or qualification, against the unsuccesssful party, and leaving the "taxation costs" to the lower court, we submit that it could only mean taxable costs, in the ordinary acceptation of the term; that is, costs as between party and party, as the word "costs" has been used in judgments and decrees from time immemorial, in accordance with the practice of taxing costs which has prevailed in this country from the beginning; in other words, it meant *taxable costs,*

as distinguished from an "allowance" out of a fund, or as distinguished from attorneys' fees fixed by statute and allowed in certain designated cases.

It is not to be assumed that this Court acted inadvertently, and that what it really intended was to import into our jurisprudence the English system of taxation of costs, by which the losing party is to be burdened and penalized with the attorneys' fees and other expenses of the successful litigant. Nor is it to be assumed that this Court, merely by affirming a decree carrying "costs", intended thereby to overrule its long line of decisions, such as *The Baltimore,* 8 Wall, 377; *Oelrichs* v. *Williams,* 15 Wall. 211; *Tullock* v. *Mulvane,* 184 U. S. 497, and *Missouri Pacific R. Co.* v. *Larabee,* 234 U. S. 459, which, we contend, authoritatively established a rule in this country exactly to the contrary.

It seems too plain to require extended argument that if this Court had intended any departure from the ordinary practice in the taxation of costs, it would have said so in plain language. If it had intended to import the English system into our jurisprudence, it would have manifested its intention in unambiguous words, which would have sounded a warning to all future litigants that litigation thereafter was to be at the peril of paying all counsel fees in case of failure. If it had intended that the word "costs" should include "allowances", under the guise of a taxation of costs as between solicitor and client, or otherwise, it seems certain that language would have been employed which would have left no room for doubt as to its purpose.

That the word "costs" does not include attorneys' fees was authoritatively decided by this Court in *Sioux County* v. *National Surety Co.,* 276 U. S. 238. There, the action was on a surety bond, under a statute of Nebraska which provided that in such actions "a reasonable sum as an at-

torney's fee in addition to the amount of his recovery" may be taxed as a part of the "costs". The circuit court of appeals for the eighth circuit held (16 F. (2d) 688) that attorneys' fees were not a part of the "costs" provided for in R. S. sec. 823, 824, and, therefore, could not be allowed as costs in a federal court. This Court, upon appeal, agreed with the lower court that such attorneys' fees are not and cannot be a part of the taxable costs prescribed by the federal statute. This Court did, however, give effect to the Nebraska statute by holding that the amount of the attorney's fee could be included in the judgment. It said (p. 243):

> That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by Rev. Stat. sec. 823, 824.
>
> The present allowance, *since it is not costs in the ordinary sense,* is not within the field of costs legislation covered by Rev. Stat. sec. 823, 824. That the particular mode of enforcing the right provided by the state statute—i. e., by taxing the allowance as costs—is not available to the federal courts under Rev. Stat. sec. 823, 824 does not preclude the recovery. Since the right exists, the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment.

In two other decisions of this Court, hereafter referred to (*Oelrichs* v. *Williams,* 15 Wall, 211, and *Tullock* v. *Mulvane,* 184 U. S. 497), it was held that "costs" did not include attorneys' fees. Those actions were upon injunction bonds which were conditioned to pay to defendants "all

costs and damages". In both cases it was held that counsel fees, incurred in securing a dissolution of the injunction, did not come within the scope of either "costs" or "damages".

In several instances the lower courts have held that the word "costs" in a decree or in a statute is to be construed as including only taxable costs, as distinguished from allowances.

In *Kell* v. *Trenchard*, 146 Fed. 245 (circuit court of appeals, fourth circuit), the mandate of the court of appeals provided that the "costs" of the case in both the appellate and the lower court should be borne equally by the appellant and the appellees. In a taxation of costs pursuant to this direction, the lower court included an allowance to the receiver as a part of the costs properly to be divided. The action of the lower court in including the allowance to the receiver was appealed from, and reversed on appeal, the appellate court saying (p. 247):

> In decreeing the division of costs in this court and the court below was meant only *the ordinary taxable costs of the litigation*, and not such charges and expenses as the costs of the receivership and payments and allowances to receivers; those being costs properly appertaining to the receivership, and chargeable against the *property* in the receiver's hands. Ferguson *v.* Dent (C. C.), 46 Fed. 88; Elkhorn Oil & Gas Co. *v.* Foster, 99 Fed. 495, 39 C. C. A 615.

To the same effect are:

Doddridge County Oil & Gas Co. v. *Smith*, 173 Fed. 386;
United States v. *Wilson*, 193 Fed. 1007;
United States v. *Smith*, 240 Fed. 756.

If the Trust Company felt that it was entitled to have the opinion and mandate of this Court broadened so as to include allowances in the nature of costs as between solicitor and client, it should have made an appropriate application to the Court for that purpose, and before the expiration of the term. After the lapse of the term, the provision relative to costs could not be altered (*Fairmount Creamery Co.* v. *Minnesota,* 275 U. S. 70, 73).

II.

We earnestly contend that the lower court committed a grave error (1) in holding "that the federal courts of equity have jurisdiction to allow in proper cases costs 'as between solicitor and client,' " as such jurisdiction is exercised by the English Court of Chancery, and (2) in applying that erroneous principle to the facts in this case.

The lower court reached the conclusion, which is quoted in the above heading, and which, we contend, is wholly erroneous, by two successive steps; first, it asserts (28 F. (2d) 240) that the English courts of chancery have for several centuries possessed jurisdiction to award costs as between solicitor and client; and, secondly (p. 241), that the United States courts of equity at the time of their creation became endowed with, and now possess, the powers, including that over costs, possessed by the English chancery court.

We confidently contend that the English system of taxation of costs as between solicitor and client has never been adopted in this country; and, furthermore, that if it has ever been the law here, which we do not admit, it has been expressly repudiated, by the substitution therefor of the

Act of Congress of 1853, providing for the taxation of an attorney's fee of $20 "and no other" as costs on final hearing in equity. This Court and the lower courts have uniformly applied this statute as the settled rule in federal jurisdiction.

Space does not permit an extended discussion of the English system of taxation of costs. It is fundamentally different from our own. Under it, attorneys' fees or solicitors' fees, which are fixed by law, are taxed against the losing party in every case, whether at law or in equity. Costs as between party and party include attorneys' fees of the adversary. Costs as between solicitor and client include a somewhat larger proportion of the actual expenditures of the successful party than is allowed in taxation as between party and party.

In modern practice, however, the English system of taxation as between solicitor and client "gives little more than a taxation as between party and party" (*Giles* v. *Randall,* 1 K. B. D. 290, 296; *Daniell's Chancery Pleading & Practice,* Vol. 2, 6th Am. Ed., star page 1376, note 1).

For the purpose of showing that the English system has not only never been established in this country, but that it has been definitely and finally repudiated by our courts, we will briefly trace the historical development of the subject of taxation of attorneys' fees as costs from the beginning of our government down to date.

Early statutes and rules of court.

On August 8, 1791, "the Chief Justice, in answer to the motion of the Attorney General, made yesterday, informs him and the bar, that this court consider the practice of the courts of king's bench, and of chancery, in England, as

affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary'' (*Rules and Orders of the Supreme Court of the United States,* 2 L. Ed.). This in 1822 was expanded into Equity Rule 33, and in 1842, into Equity Rule 90, which latter was dropped from the equity rules February 1, 1913.

The lower court, in its opinion, apparently takes the view that the effect of these equity rules was to import into our practice the English doctrine of taxation of costs as between solicitor and client. We contend that this cannot be so, and proceed to state our reasons.

Congress, by Act of September 29, 1789, provided that the rates of fees in the circuit and district courts of the United States, in equity cases, should be in accordance with those allowed by the chancery court of the state. The Act of May 26, 1790, continued the Act of 1789 until the end of the succeeding session, and it was again continued by the Act of February 18, 1791, until the end of the next session. The Act of March 1, 1793, provided for the taxation in the circuit courts of the United States of such attorneys' fees and counsel fees ''as are allowed in the Supreme or Superior Courts of the respective states''. The Act was continued another year by the Act of February 25, 1795, and was again continued by the Act of March 31, 1796, for the term of two years, and from thence until the end of the next session of Congress thereafter (Report of Mr. Justice Nelson, 1 Blatchford C. C. 652).

Is it not entirely clear that Congress, in these enactments, was declaring its own policy with respect to the taxation of attorneys' fees as costs? It deliberately adopted the policy of applying the rules of the state court where the federal court was sitting, as the rules in its own court.

If it had desired to adopt the English practice, in that behalf, it seems certain that it would have said so. At that period in the development of our judicial system, the extent to which the forms, precedents and practice of the mother country should be followed, was receiving the earnest attention of Congress. Its failure to adopt the English practice can only be regarded as an intentional repudiation of it in favor of its own rules.

Early decisions of this Court.

The first case in which there was presented to this Court the question of whether or not attorneys' fees might be taxed as costs, was *Arcambel* v. *Wiseman,* 3 Dall. 306, 1 L. Ed. 613, decided in 1796. In that case an allowance of $1,600 as counsel fees had been included as a part of the damages allowed by the circuit court, but this Court ordered the disallowance of this item, saying:

> We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, until it is changed, or modified, by statute.

Then followed *The Apollon,* 9 Wheat. 362, decided in 1824, and *Canter* v. *Ins. Co.,* 3 Pet. 307, decided in 1830, in both of which the decision was rendered by Mr. Justice Story, and in both counsel fees were allowed. Both cases, however, were explained, as we shall see later, as having been decided as they were because the Act of 1853 was not then in force. In *Day* v. *Woodworth,* 13 How. 363, decided in 1851, the court held that attorneys' fees could not be included in an award of exemplary damages.

Prior to the statute of 1853, the practice with respect to the taxation of attorneys' fees as costs may be said to have lacked uniformity; the general rule being that such costs were to be taxed in accordance with the varying practice in the state where the court was sitting. But this lack of uniformity is in itself conclusive evidence that the English system had not been adopted, for had that system been adopted, we would find uniformity, instead of uncertainty. The report of Mr. Justice Nelson, above referred to, was published in 1842, and disclosed not only the lack of uniformity in federal court practice, but the necessity for some uniform rule applicable to federal courts wherever sitting.

The Act of 1853, and its construction by this Court.

The Act of 1853 (28 U. S. C. A. sec. 571, 572) was intended to meet this demand for uniformity. It provided that certain specified fees "and no other" shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, and that on a final hearing in equity or admiralty, a docket fee of twenty dollars shall be taxed. It is as follows:

> Sec. 571. The following fees and no other shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, and to district attorneys, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.
>
> Sec. 572. On a trial before a jury, in civil or criminal causes or before referees, or on a final hear-

> ing in equity or admiralty, a docket fee of $20: *Provided,* That in cases of admiralty and maritime jurisdiction, where the libelant recovers less than $50, the docket fee of his proctor shall be but $10.

This statute is in itself conclusive evidence of the complete repudiation of the English practice, if it ever existed in this country. Our courts thereafter recognized it as once and for all settling the question of the taxation of costs, and limiting the taxation of attorneys' fees in the stipulated manner.

The effect of the statute was before this Court in 1869, in *The Baltimore,* 8 Wall. 377. The court there reviewed not only the prior legislation, referred to above, but the practice which had prevailed prior to the Act of 1853, pointing out the lack of uniformity. It held, in effect, that the Act was intended to standardize the practice in federal courts; that while attorneys might charge their clients reasonably for their services, nothing could be taxed as costs against the opposite party, as an incident to the judgment, except the costs and fees prescribed and enumerated. It also held that *The Apollon,* 9 Wheat. 362, and *Canter* v. *Ins. Co.,* 3 Pet. 307, which were cited in the brief of the appellees, were inapplicable because decided before the Act of 1853. The Court said (p. 392):

> Fees and costs, allowed to the officers therein named, are now regulated by the Act of the 26th of February, 1853, which provides, in its 1st section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compensation shall be allowed.
>
> Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addi-

tion to the taxable costs, but nothing can be taxed as cost against the opposite party, as an incident to the judgment, for their services, except the cost and fees therein described and enumerated. 10 Stat. at L. 161. They may tax a docket fee of $20 on a final hearing in admiralty, if the libelant recovers $50, but if he recovers less than $50, the docket fee of the proctor shall be but $10. The Canton, 21 Law, Rep. 473; The Liverpool Packet, 2 Sprague 37; The Connestoga, 2 Wall. Jr. 116.

Reference is made to two cases where counsel fees were allowed, but it is a sufficient answer to those cases to say, that they were decided before the Act of Congress under consideration was passed. They do not, therefore, furnish the rule of decision in the case before us.

This decision would seem definitely to settle any question of the taxation of attorneys' fees as costs in excess of the amounts named in the statute. It is difficult to imagine the English doctrine as surviving after this decision.

But if there was any lingering doubt upon this subject, it was completely dispelled by the decision of this Court in *Oelrichs* v. *Williams,* 15 Wall. 211. This was an action on an injunction bond. The condition of the bond was that the obligor "should pay and satisfy all costs and damages that may accrue to the obligees, or either of them, by reason of said injunction, in case the same shall be denied". The question was squarely presented, therefore, as to whether counsel fees were included in the words "costs and damages". The injunction was in effect for a period of four years, eight months, sixteen days. Doubtless, it presented circumstances of great hardship. Both the master and the lower court allowed counsel fees, paid in securing a dissolution of the injunction, as a part of the

costs and damages covered by the bond. This was reversed. The Court, after referring to *Arcambel* v. *Wiseman, supra,* and other cases, said (p. 231):

> The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant, and assumpsit, damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.
>
> We think the principle of disallowance rests on a solid foundation, and that the *opposite rule is forbidden by the analogies of the law and sound public policy.*

This comprehensive ruling should be accepted, we respectfully submit, as completely settling and disposing of the question of the taxation of counsel fees, as costs, in this country. Such costs may not be taxed in equity cases,

even where the litigation is unjust, on one side or the other, and however large the expense may be. The reasons are given. The parties stand upon a footing of equality. There is no fixed standard, in this country, by which counsel fees can be determined, as there is in England. Some counsel demand much more than others, and more counsel may be employed than are necessary. There is great danger of abuse if it be known in advance that fees, unregulated by law, are to be paid by the other party. Additional litigation would be necessary to determine the fees to be taxed. Counsel fees do not come within the designation of "costs," nor of "damages." Their disallowance rests on a solid foundation, and the opposite rule is forbidden by sound public policy as well as by the analogies of the law.

This Court, in subsequent cases, has assumed, without further re-examination of the question, that this decision has settled the law in this country. In *Tullock* v. *Mulvane*, 184 U. S. 497, the action was upon an injunction bond, which, as before, was conditioned to pay to defendant "all costs and damages." It was again insisted that attorneys' fees were properly allowed as an item of cost or damage upon the bond, and again denied. The Court said (p. 511):

> ... it remains only to consider whether the attorneys' fees were properly allowed by the court below as an element of damages on the bond. That they were not *is settled.*

The Court then refers to *Oelrichs* v. *Williams, supra,* and concludes with the statement:

> It follows from what we have stated that there was error committed in allowing the recovery of attorney's fees as an element of damage upon the bond in question.

The question next came before this Court in *Missouri, K. & T. R. Co.* v. *Elliott,* 184 U. S. 530, and was disposed of briefly in the following statement:

> Having thus disposed of the question of jurisdiction, we come to the merits of the case. It suffices to say, for the reasons given in the opinion in Tullock *v.* Mulvane, before referred to, 184 U. S. 497, that there was error committed by the Kansas City court of appeals in affirming the action of the trial court in allowing, in the judgment by it rendered, attorneys' fees as an element of damage upon the injunction bond contrary to the controlling rule on this subject enunciated by this court, by which the courts of the United States are governed in requiring the execution of such instruments.

The lower court, in its opinion in this case, after referring to some of the cases above cited, among them, *Arcambel* v. *Wiseman, The Baltimore, Oelrichs* v. *Williams,* states that "such refusals (to tax attorneys' fees as costs) were not based upon any lack of power in the court, but because it was not deemed wise policy to allow attorneys' fees to be taxed as costs in ordinary equity cases".

We respectfully submit, however, that it was a lack of "power" to impose attorneys' fees as costs which impelled this Court to decide as it did. This is made entirely plain in *Missouri P. R. Co.* v. *Larabee,* 234 U. S. 459, where the question arose over the imposition of attorneys' fees by a state court in respect of an appeal prosecuted to this Court. The question is there stated by the Court (p. 468):

> First. The question of the *power* of the court to make the allowance for professional services rendered in this court on the former writ of error.

It will be noted that the Court was here discussing the *power* to make the allowance, and not the equitable principles which control some allowance which it has the power to make. The Court held against the existence of the power, as follows:

> There can be no doubt that, tested by the general principles of law controlling in this court, by the *statutes of the United States* relating to the subject, or the rules of this court concerning the same, the award for the attorneys' fees in question was *absolutely unwarranted.* We do not stop to review and expound the settled line of authority demonstrating this result because it would be wholly superfluous to do so, as the principles have been so long the settled rule of conduct in this court, and are so elementary as to require not even a reference to the cases. Some of the cases, nevertheless, we cite: Arcambel *v.* Wiseman, 3 Dall. 306; Day *v.* Woodworth, 13 How. 363, 372; Oelrichs *v.* Spain (Oelrichs *v.* Williams), 15 Wall. 211, 230, 231; Tullock *v.* Mulvane, 184 U. S. 497, 511 *et seq.*

It will be noted that the cases cited above are the same cases to which we have referred heretofore. They are referred to in the opinion of this Court as establishing a settled line of authority demonstrating the lack of *power* to tax counsel fees as costs. The prior interpretation of the Act of 1853 is reaffirmed.

The right and duty of the chancellor in proper cases to make "allowances" for expenses and counsel fees within the rule of *Trustees* v. *Greenough,* 105 U. S. 527, is well recognized, and is not at all in conflict with the views above expressed with respect to the taxation of attorneys' fees and other expenses, as costs, in cases like the one under consideration. It is a general principle that the trust

estate must bear the expenses of its administration. It is also a general principle that where one of many parties having a common interest in the trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself or by a proportionate contribution from those who accept the benefit of his efforts. This rule, however, has, we contend, no application whatsoever to the present case. Its inapplicability to the facts in this record is discussed under subsequent headings.

Decisions of circuit courts of appeal.

The federal courts of appeals have, without exception, followed the statute of 1853, and the rule established by this Court in the foregoing cases, that, in the absence of authorizing statute, attorneys' fees in excess of $20 may not be taxed as costs as between solicitor and client, to be paid by one of the parties to the suit. The decision of the lower court is in conflict with the decisions of circuit courts of appeal of other circuits, now to be referred to.

In *McIntosh* v. *Ward,* 159 Fed. 66, the court of appeals of the seventh circuit held that attorneys' fees could not be taxed as costs in a partnership accounting case. In its opinion the court said, in reference to the allowable items of expense:

> Such allowances were of statutory origin. Our statute of 1853 . . . provides what shall, as costs, "be included in and form a portion of a judgment or decree against the losing party." . . . In our opinion the discretion of a court of equity does not authorize it to require one party . . . to pay to the other, under the name of costs, items paid from the fund for

> services and expenses in administering a suit properly in court, nor any other items not within a fee bill act.

Fraser v. *Cole,* 214 Fed. 556, was a suit by a legatee to enforce his claim against an executor and reach real estate fraudulently conveyed by her. The district court added to the decree an allowance of $1,000 solicitor's fees. The court of appeals for the seventh circuit said:

> No law of Illinois warranted the increase of Grace Fraser's indebtedness by such an addition. . . . Nor can equity in a suit upon a creditor's bill or a vendor's lien bill enlarge the defendant's debt in that way.

Leary v. *United States,* 257 Fed. 246, was a fraud case in which the successful party sought to have his attorneys' fees taxed against the losing party. The court of appeals for the fourth circuit said:

> The costs that can be taxed against the losing party . . . are little more than nominal, and the winner is therefore out of pocket for the fees of his counsel. If this be unjust to the one found to be in the right, it is because the law gives him only the amount of his recovery and the scanty sum allowed as taxable costs.

In *Motion Picture Patents Company* v. *Steiner,* 201 Fed. 63, the district court allowed an attorney's fee of $150.00 in each of two cases because of the vexatious conduct of plaintiff's counsel in the litigation. The court of appeals for the second circuit held that an attorney might be compelled to pay certain costs for vexatious conduct by virtue of Section 982 of the statutes, but that the costs could not be taxed against the client.

In *Marks* v. *Leo Feist*, 8 Fed. (2d) 460, attorneys' fees were taxed as costs in a copyright case. The court of appeals for the second circuit held that while such fees were taxable under the copyright law:

> The general rule, which is subject to some exceptions, of course, is that each party to a litigation must pay his own counsel fees, no matter how unjust the litigation may have been, or how great may have been the *expensa litis* (citing the Arcambel and Oelrichs cases).

We respectfully contend that the decision of the lower court is contrary to the statute, contrary to the decisions of this Court, and contrary to the decisions of federal courts of appeal in other circuits.

Counsel fees incurred after the decree of June, 1910.

We earnestly contend that, for the reasons above stated, the law does not authorize or permit the taxation against petitioner of *any* of the attorneys' fees or other expenses of the Trust Company during the entire period of this litigation. For the purpose, however, of bringing into impressive relief what we regard as one of the glaring errors of the lower court, we desire, for the moment, to lay to one side all other controverted matters, and to direct the attention of the Court to the proceedings in this case following the final decree of June, 1910—the period during which a considerable portion of the Trust Company's liability for attorneys' fees were incurred. The grave injustice of imposing these expenses upon petitioner appears to us to be so plain and obvious that a brief reference to the uncontradicted facts should suffice.

The decree of the lower court, in June, 1910, was against the Trust Company, and, accordingly, it appealed to the

circuit court of appeals. As has been heretofore pointed out, the issue—the personal liability of petitioner for the debt of the Belt Company—was an exceedingly difficult one, and involved in much doubt and uncertainty. The *Boyd Case* (228 U. S. 482, April, 1913) had not then been decided. Finite minds could not tell what the decision in our case would be. The circuit court of appeals recognized the serious and difficult nature of the controversy when it permitted two arguments and handed down two elaborate opinions. This Court held, May 11, 1914, that the nature of the case was such as to warrant the grant of its writ of certiorari, in case an appeal did not lie. The decree of the circuit court of appeals was affirmed by this Court; the Chief Justice and one Associate Justice dissenting.

Upon what conceivable principle can petitioner be condemned to pay the Trust Company's attorneys' fees and other expenses, involved in its appeal to the circuit court of appeals, and involved in petitioner's appeal to this Court, to determine this liability issue, which the Trust Company itself injected into the litigation in 1905, in its answer to the intervening petition of petitioner? What warning was there in the books of text writers or in the decisions of the courts, saying to petitioner, in effect: "If you resist the Trust Company's appeal to the circuit court of appeals, or if you appeal from that court to the Supreme Court, you do so at your peril of being mulcted for the attorneys' fees and other expenses of the Trust Company, in the event that you are unsuccessful"?

What becomes of the guaranty, declaratory of the public policy in the jurisdiction where the litigation was carried on, that "The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice

should be administered without sale, denial or delay" (Const. Mo., Art. II, Sec. 10).

The right of free access to the courts is fundamental in our theory of Government. In *Straus* v. *Victor Talking Mach. Co.*, 297 Fed. 791, 798 (circuit court of appeals, second circuit), it is said: "Free access to the courts must neither be denied nor penalized."

In *Missouri Pacific R. Co.* v. *Larabee*, 234 U. S. 459, the right of a state to impose attorneys' fees upon the losing party in an appeal to this Court was denied on the ground that if that were permitted, "the right to freely seek access to the Supreme Court of the United States would cease to exist."

In *Wetmore* v. *Mellinger*, 64 Iowa, 741, it is said:

> The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts.

The imposition of the Trust Company's expenses incurred following the final decree of June, 1910, can only be justified upon the assumption that petitioner, instead of resisting the Trust Company's appeal to the circuit court of appeals, should have filed a confession of error, and permitted a perfunctory reversal of the decree; and, further, upon the assumption that petitioner should have refrained from prosecuting an appeal from the circuit court of appeals to this Court, although this Court stood ready to issue its writ of certiorari if the appeal did not lie. Such an assumption passes the limits of reason. Petitioner would have betrayed its stockholders if it had taken any other course than the one it pursued. Upon what theory should it now be penalized?

III.

The fact that complainant sought unsuccessfully to charge the Trust Company with the duties and obligations of a trustee, does not entitle it to the taxation of costs as between solicitor and client.

The complaints charged that the Trust Company at all times dominated and controlled the Belt Company and the other corporations officered by it, and that by reason of such domination and control, the Trust Company assumed towards them the position and obligations of a trustee. In the Cambria bill, it is alleged that the Trust Company did "assume the position of trustee and agent in managing and disposing of the bonds, stocks, funds, and other assets of said railroad companies, and auxiliary companies, in trust and for the use and benefit of the parties who might become concerned or interested therein; . . . including particularly creditors thereof and your orator" (Rec. II, 6). The Trust Company in its answer to the Cambria bill denied, as above stated, that it assumed the position or the obligations of a trustee (Rec. II, 42).

The issue was thus made by the pleadings. On the one hand, it was alleged that the Trust Company has assumed the position and relation of a constructive trustee, and, on the other hand, this was emphatically denied. The master found that the Trust Company did not thus assume the position and obligation of a trustee, and his finding was approved by the district court.

In these circumstances, the court of appeals held, erroneously, we contend, that the Trust Company was entitled to the taxation of costs as between solicitor and

client, or that an allowance should be made in its favor by analogy to the law giving trustees their disbursements in the execution of their trusts.

The law is plain, we respectfully submit, that the rule imposing attorneys' fees as costs in favor of a trustee has no application. The reason is that there is no trustee, no *cestui que trust,* and no fund that is being handled or administered. The parties therefore occupy the position of ordinary litigants.

The applicable rule was thus stated in *Perry on Trusts,* 6th Ed., 1911, sec. 896:

> But where plaintiffs bring a bill against defendants for the purpose of creating a trust fund—as if they bring a bill to convert defendants into trustees under a constructive trust, or to compel the defendants to hold certain property in their hands for plaintiffs—the defendants can have costs only as between party and party, if the plaintiffs fail; for the suit in such case turns out to be between strangers.

In *Lewin on Law of Trusts,* 12th Ed., p. 1267, it is said:

> But if plaintiffs take proceedings for the purpose of creating a fund, of which the defendants would be trustees for the plaintiffs, if the plaintiffs succeeded, but the plaintiffs fail, the defendants are entitled as against the plaintiffs to costs only as between party and party.

In *Tiffany & Bullard on Trusts and Trustees,* p. 714, it is said:

> As these costs taxed between solicitor and client are termed trustee's costs, it follows that they will not be taxed in a case where that relation or character does not exist.

It is likewise the rule that where a trustee disclaims his trust, he is entitled only to his costs as between party and party. (*Godefroi's Law of Trusts*, Third Ed. (London, 1907), p. 28; *Daniell's Chancery Practice*, Ed. 7 (1901), Vol. 1, p. 1011; *Mohun* v. *Mohun*, 1 Swanston's Reports (1818), 201; *Bulkeley* v. *The Earl of Eglington*, 1 Jur. (1885) 994; *Norway* v. *Norway*, 2 Mylne & Keen's Rep. (1834), 278; *Heap* v. *Jones*, 5 W. R. (1856), 106; *Bray* v. *West*, 9 Simons Rep., 429.)

The same considerations apply to so much of the intervening petition of petitioner as complains of the Trust Company's action with respect to the Union Terminal bonds. A complete answer to the Trust Company's claim for indemnity is found in the fact that the intervenor sought to impose upon the Trust Company the duties and obligations of a trustee with respect to the use of the Union Terminal bonds and their proceeds. It invoked the provisions of the mortgage itself, and the implications thought to arise from the terms of the mortgage, to establish this relationship, and so to make the Trust Company a trustee with respect thereto.

The Trust Company, although a trustee in the mortgage of the Union Company, in its answer denied the existence of any such trust relations, either by law or the express terms of the mortgage, and specifically denied that any duty rested upon it to see that, as said bonds were sold, the proceeds were used in the construction, completion and equipment of the railroad. This defense was sustained by the master (Rec. II, 876).

We have, therefore, on the part of the intervenor, an assertion of a trust relation with respect to the disposition of the bonds and their proceeds, and, on the part of the

Trust Company, a denial that any such trust relationship existed. The master found this issue in favor of the Trust Company, and thereby it was established that no such trust relation existed, or ever had existed.

In other words, the intervenor sought to hold the Trust Company to the duties and obligations of a trustee, in respect of the disposition of the bonds, or their proceeds, and failed to establish its claim in that behalf. The trustee relationship not being established, the authorities, referred to above, hold that there is no ground for a claim of indemnity.

IV.

The litigation conducted by the Trust Company for its own benefit with respect to the collateral security, does not entitle it to the taxation of costs as between solicitor and client.

The Trust Company, on March 31, 1899, the day before the receivership of the Gulf Company, took from the Belt Company, or received from it, the collateral security in question, consisting of stocks, etc.—everything, in fact, which the Belt Company had at the time, which could be used as collateral. All of this, or its proceeds, the Trust Company proceeded to hold as security for the debt which it alleged the Belt Company owed to it. When this litigation came on, on September 6, 1900, receivers were appointed of all the assets of the Belt Company (Rec. II, 29), of every kind and nature. Later a receiver was appointed for the Northern Townsite Company (Rec. II, 914), whose stock was a part of the collateral in question; and a receiver was also appointed for the Central Improvement

Company (Rec. II, 162, 163), whose stock was also a part of the same collateral. A receiver was also appointed for the Elevator Company (Rec. II, 162).

The litigation between the Cambria Company, the Belt Company and its receivers, on the one hand, and the Trust Company, on the other, concerned solely the question of debt or no debt as between the Belt Company and the Trust Company. As this should be determined, the collateral or its proceeds automatically would remain with the Trust Company or return to the Belt Company or its creditors, the Cambria Company.

It cannot be contended that the Trust Company, in litigating the issue of debt or no debt, was acting in the interest of the Belt Company, which was the pledgor of the collateral. It was acting adversely to the Belt Company, as well as to petitioner, which was the owner of the stock of the Belt Company. *It was acting solely in its own interest, to protect its own individual claim.*

Nor was it seeking to protect the collateral security itself, for it needed no protection. It simply remained throughout the litigation as the pawn or pledge to be awarded to the successful party when the litigation should end. The only dealing by the court with the collateral during the entire litigation was the sale by the Trust Company, under orders of the court, of certain Northern Connecting bonds and coupons, for which $40,001.25 was realized and held by the Trust Company in special deposit until the final decree, in which it was ordered to be applied upon the Trust Company's debt (Rec. II, 907). That part of the collateral which possessed value, consisting of the property of the Central Improvement Company and, in lesser degree, of the Northern Townsite Company, was be-

ing administered by the receivers of those properties, under the direction of the court (Rec. II, 914).

The Trust Company performed no services whatsoever for the benefit of the pledgor, or for the benefit of the collateral itself. It was performing no duties as pledgee or trustee. Its services were rendered, and its efforts expended, in protecting its own interest. In these circumstances, there is, we respectfully submit, no rule of law which permits the Trust Company, as trustee or pledgee, to impose its disbursements for counsel fees upon its adversary.

It is, of course, the ordinary rule that a pledgee has a lien on the property for any expenses, including attorneys' fees reasonably incurred by him in keeping and caring for the property pledged, protecting it against liens, taxes, assessments, etc. But our contention is that it has no application whatsoever to the facts in this case.

When we examine the reason of the rule which allows a pledgee attorneys' fees for the protection of pledged property, it becomes clear that the Trust Company does not come within it. The foundation of the rule is that the pledgee, after a sale of the pledged property, must credit the pledgor with the net amount realized by him from the proceeds. If he has been put to expense in order to protect the property pledged, for illustration, if he has been compelled to pay an incumbrance to prevent a foreclosure, or forced to defend the pledgor's title for the benefit of the pledgor, the gross proceeds must be reduced to the extent of the expense incurred in the doing of one or all these things, because done on behalf of the pledgor and for his benefit. The pledgee has the property in his possession; the pledgor is not in position to defend it against adverse claims or to protect it generally. The pledgee, therefore,

is authorized, in law, to act for the benefit of the pledgor, as his quasi-agent, in doing what the pledgor would have done had he been in possession of his property and in position to defend it.

Where, as here, suits are undertaken by the pledgee which are of no benefit to the pledgor, the reason for the rule ceases, and the rule itself has no application.

The rule and the reason for it are recognized and set forth in *Work* v. *Tibbits,* 87 Hun 352, 34 N. Y. Supp. 308.

Other decisions to the same effect are:

Wolf v. *Am. Trust & Savings Bank,* 214 Fed. 761 (7th Circ.);

Smith v. *Equitable Trust Company,* 215 Pa. 413, 62 Atl. 591;

Willard v. *White,* 56 Hun 581, 10 N. Y. Supp. 170.

V.

It is contrary to both reason and authority to base an allowance of counsel fees in this case upon the assumption that the Trust Company uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid.

The lower court sought to justify the imposition of costs as between solicitor and client upon the assumption that "the Trust Company in the course of litigation uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid." This, we contend, is clearly erroneous, and the error is susceptible of plain demonstration.

We insist, in the first place, that no fund was uncovered and brought into the constructive possession of the court,

within the meaning of the rule relied upon; and, furthermore, we insist that the case is governed by established principles which prohibit the allowance of counsel fees in the circumstances shown in this case. Before coming to a discussion of these questions, we call attention to the following considerations:

The decree of the lower court, which this Court affirmed, did not order the distribution of any fund to creditors. It merely awarded a personal judgment against petitioner, for the amount of the Belt Company's debt, with the return of the collateral upon payment of the debt, and with a sale of the collateral upon a failure to pay the debt. It was a personal judgment, which has long since been paid in full, in favor of the Trust Company, and this judgment did not inure to the benefit of any one else.

At no time did the Trust Company assert any claim except its own. There can be no pretense that it was acting for the benefit of any creditor. Its claim that petitioner was liable for the debt of the Belt Company is stated in its answer to the amended intervening petition of petitioner (Rec. II, 311), and is asserted solely in its own behalf. No mention is made of other creditors. It is in the nature of a legal claim, as distinguished from an action in equity. The suits in state courts upon the same cause of action (Rec. II, 502) were actions at law, triable by jury (R. S. Mo. 1919, sec. 1398).

Not only was the property of the Belt Company not a trust fund, in any substantial sense, but it was not in the possession of any court at the time the Trust Company asserted its claim in 1905, nor has it been in the possession of any court since that time. The property of the Belt Company, as appears from the Trust Company's answer (Rec. II, 295) was sold in November, 1901, at foreclosure

sale, and was purchased by petitioner, which ever since that time has had exclusive possession thereof. Manifestly, the stock of petitioner, which was issued in exchange for the stock of the Belt Company in the reorganization (if that be regarded as a "fund"), has never been in the possession of any court.

The lower court conceives that its decision with respect to the discovery and administration of a fund is supported by *Trustees* v. *Greenough*, 105 U. S. 527, and decisions of that character. Those cases hold, in general, that where one litigant, at his own expense, has either created, preserved or protected a fund, and others were entitled to claim, and did claim, the results of his labors, it was not fair that the persons who have taken the risk and cost and expense of the litigation should bear all the costs, but those who share in the fruits should bear their pro rata share of the expense. The rule goes no further than where meritorious results have actually been achieved, those who, by inaction, seek to await the result and escape all expense if the case be lost, but if successful, to share the actual benefits by receiving their portion of this success, should not be allowed to do so without contributing their share of the expense (*Buell Case*, 201 Fed. 762, 768).

The lower court's ruling is in direct conflict with the applicable authorities.

The total inapplicability of this rule to the case at bar is manifest, for several reasons, which we now point out:

(a) In this case, the court did not take charge of, administer, preserve or distribute any fund. It awarded a money judgment, in favor of the Trust Company and against petitioner, which has long since been paid in full. The rule of the *Greenough* case, which permits the making

of an allowance to counsel, does not apply. This, because the result of the litigation was "a general personal judgment, without segregating a fund in kind, and bringing its corpus into a court of equity for distribution."

This rule is stated clearly and emphatically by the Supreme Court of Missouri in *Johnson* v. *United Rys. Co.*, 247 Mo. 326, 350, 152 S. W. 362, the jurisdiction where this litigation was carried on. There, an action in equity was brought in behalf of complainant and other creditors to subject to the payment of their debts certain property which the debtor had transferred in fraud of creditors. There was a money judgment for complainant, and his motion for an allowance of attorney's fees was denied. The court held that the rule of the *Greenough* case had no application, saying:

> With cases of that ilk eliminated, there is left to consider a doctrine of equity, viz., that a trust fund of right should bear the expenses of its own administration. According to that rule, it has been held that where a transaction has been ripped up or a conveyance set aside for fraud and an estate has been uncovered and recovered, which, in equity, belongs to creditors, and that estate is held in the hollow of the chancellor's hand to be administered and distributed, attorney's fees may be allowed as part of the trust administration. White *v.* University Land Company, 49 Mo. App. 450; Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157; Central Railroad, etc. *v.* Pettus *et al.*, 113 U. S. 116, 28 L. Ed. 915; Woodward *v.* Mastin, 106 Mo. loc. cit. 364, 365, 17 S. W. 308. Agreeably thereto are an array of other cases industriously collated in Mr. Gillian's brief *pro se*. But it seems to us their doctrine does not apply here. This because the power of a court of equity is flexible enough to measure out relief in cases of this kind by a gen-

> eral personal judgment without segregating a fund in kind, and bringing its corpus into a court of equity for administration. Accordingly, here the judgment was a general money judgment against Railways Company. It stopped short at that point. It administered no fund. It took this form apparently by consent of the parties; at least, no one took exception to that feature. In such fix, the case falls within the doctrine of the general rule, viz., that in Missouri one litigant cannot be compelled to pay the attorneys' fees of another, either in equity or at law. Pickel *v.* Pickel, 147 S. W. 1059, not yet officially reported. It appears that Johnson contracted that Mr. Gilliam on top of a named percentage might have all attorney's fees the court allowed. That friendly turn added no virtue to movent's position. In that aspect it dealt with a bird (not in hand, but) in bush. We hold the motion well ruled.

This rule applies squarely to the case under consideration. Here, there was a general money judgment against petitioner. The decree stopped short at that point. It administered no fund. The case therefore falls within the doctrine of the general rule, in federal courts as well as in the state courts of Missouri, that one litigant cannot be compelled to pay the attorney's fees of another, either in equity or at law.

(b) Even where a creditor sues in equity for the benefit of himself and all intervening creditors, and obtains a decree for complainant and such creditors, *and the complainant and such creditors receive the full amount of their debts, with interest and taxable costs,* the complainant is not entitled to an allowance for solicitor's fees out of the surplus otherwise payable to the debtor.

In this case, the only creditor was the Trust Company. It did not sue for the benefit of other creditors who might come in and assert their claims. The Trust Company's debt became merged in a personal judgment, and that judgment, with interest, has been paid, and the taxable costs have been paid. Upon what theory of law is the Trust Company entitled to impose the burden of its counsel fees upon the surplus of the trust fund (assuming there was a trust fund), belonging to petitioner?

The authorities deny the validity of a claim of this nature. One such authority is *Huff* v. *Bidwell*, from the fifth circuit, 195 Fed. 430, where it is held:

> Where a judgment lien creditor sues in equity for the benefit of himself and all intervening creditors, and obtains decree for complainant and such creditors, and the defendant's property condemned and sold to satisfy debts exceeds the amount of debts and interest and costs, the complainant is not entitled to an allowance for his solicitor's fees out of the surplus otherwise payable to the debtor after full payment of all debts and costs.

The court said (p. 431):

> In creditors' suits, the underlying principle upon which those who do not appear as plaintiffs are charged with a proportionate part of the solicitors' fees is that the plaintiffs represented, and were suing for, the others; and this agency is generally shown by the appearance of the other creditors in court propounding their claims and claiming to share in the result of the suit. Lamar *v.* Hall & Wilberly, 129 Fed. 79, 83, 63 C. C. A. 521; Farmers' Loan & Trust Company *v.* Green, 79 Fed. 222, 24 C. C. A. 506; Hand *v.* Railroad Company, 21 S. C. 162. But the plaintiff in this case in no sense represented

> Huff, the defendant. The suit was not brought for his benefit. There was no just reason for seizing more of his property than would pay his debts, principal and interest, and the costs of suit. The property having been sold for a sum in excess, the proceeds necessarily came into court; but it was never the purpose of the suit to accomplish more than the collection of the debts and costs. *If no creditors had intervened, if the suit had been brought by the plaintiffs to enforce and collect their judgments only, is there any known principle upon which Huff could have been made responsible for the plaintiffs' solicitor's fees?* The intervening of the creditors may in such cases oblige them to contribute to the payment of the fee; but such interventions impose no obligation on the defendant who is sued. On principle, it seems to us that this fee cannot be added to Huff's indebtedness.

The sentence which we have italicized has accurate and precise application to this case. Here, no other creditors did intervene. The Trust Company sought to enforce and collect its claim only. Is there, therefore, any known principle upon which petitioner can be made responsible for the Trust Company's solicitors' fees?

In 20 Cyc. 825, the rule is thus stated:

> Upon a conveyance by a debtor being set aside as fraudulent, at the suit of a creditor, and a sale of the property being ordered, the creditor's attorney may be allowed a fee out of the proceeds; but such fee should be paid out of that part applicable to the demands of creditors, and not out of such balance as may come to the debtor after the liquidation of the debts proven and passed.

The foregoing quotation is cited and followed in *Pickel* v. *Pickel*, 243 Mo. 641, 665, in a case where, at the

suit of a wife, a conveyance by a husband was set aside as fraudulent as to her rights of maintenance.

To the same effect are: *Waggener* v. *Mars,* 27 S. C. 97, 2 S. E. 844, 846; *Miller* v. *Kehoe,* 107 Cal. 340.

If there had been in this case a fund in the possession of the court for administration and distribution (we insist there was not) the utmost limit of recovery by the Trust Company and other creditors (assuming there were others who intervened, although, in fact, there were not) would be the full amount of their respective claims, with interest, diminished by their proper proportion of any allowance made for counsel fees. The amount distributable to the Trust Company, plus its pro rata share of the allowance of counsel fees, might equal, but could not exceed, the amount of its claim, with interest. In other words, the Trust Company would pay its proportion of counsel fees out of its own distributive share; and the same would be true of other participating creditors.

The result is the same, in principle, where, as here, the Trust Company was the only creditor. The amount awarded it in this case was the full amount of its claim, with interest, and, accordingly, on both principle and authority, the Trust Company should pay its own counsel fees out of the proceeds of its judgment.

Certainly, there is no equity in requiring petitioner to pay out of its share of the trust fund (assuming, as before, that there was one), the expenses of the Trust Company's counsel, who rendered no service whatsoever for petitioner, and whose activities were wholly in conflict with its interest.

(c) Not only was the Trust Company awarded a money judgment, which has been paid, and not only does the Trust

Company seek to impose its claim for counsel fees upon the part of the trust fund (if there was one) remaining after the only creditor in the action has been paid in full, but the fact remains that the Trust Company's effort in this litigation was solely made in its own behalf, and in an endeavor to protect its own selfish interest; and the rule applies that in such cases there can be no allowance of counsel fees (*Groves* v. *Sentell,* 153 U. S. 465, 486; *Hauenstein* v. *Lynham,* 100 U. S. 483, 490; *Pike* v. *Cincinnati R. Co.,* 179 Fed. 97, 103; *Riddle* v. *Hudgins,* 58 Fed. 490, 494; *Boothe* v. *Coal Co.,* 72 Wash. 679; *Attorney General* v. *Ins. Co.,* 91 N. Y. 57; *Savage* v. *Sherman,* 87 N. Y. 285).

VI.

The statement in the opinion of the court of appeals that the entire litigation was vexatious, is entirely unwarranted and wholly unjust for the reasons, first, it finds absolutely no support in the record; secondly, it finds no support in the opinion and mandate of this Court (240 U. S. 166); thirdly, the record, as it stands, shows affirmatively the complete good faith of petitioner and the others associated with it during the entire litigation; and, fourthly, petitioner was wrongfully denied the right, when its good faith was challenged, to introduce evidence in its own behalf upon that issue.

It is greatly to be regretted that the court of appeals, in its third and last opinion, has felt impelled to characterize "the whole litigation" as of a "vexatious character." Many facts stand out in striking challenge to this extraordinary statement. They point out conclusively the error into which the court has fallen, due, doubtless, to the length

and complicated character of this litigation, with its accumulation of pleadings, issues, testimony, briefs, and collateral matters.

1. Neither the special master, the district court, the court of appeals in its first two opinions, nor this court has held, or even intimated, that the whole litigation, or any part of it, was trivial, insincere or vexatious. (We are not unmindful of what the court of appeals said in its second opinion and will deal with that later under its appropriate heading.) Nowhere in the entire litigation has that issue been made. It was sought to be made in the court of appeals at the reargument in 1913 (210 Fed. 722), but that court declined to entertain it.

2. The opinion of this Court in this case and its mandate (Rec. I, 465), which naturally superseded the opinion and mandate of the court of appeals (*First National Bank* v. *Chicago Trust Co.*, 207 U. S. 61, 66), contain no intimation that the litigation, or any part of it, was unjustified or unwarranted.

3. The record, as it stands, affirmatively shows the good faith of petitioner and those associated with it on its side of the litigation, and this will be pointed out in due course.

4. The district court, in its first opinion in 1923 (Rec. I, 691, 699), while disclaiming the expression of any opinion of its own upon the good faith of the litigation, erroneously said that the court of appeals had found that the Cambria suit was wholly baseless and unwarranted. This was the first time that any court had ever intimated that the good faith of petitioner or any of those associated on its side of

the litigation was questioned by it, and the intimation was entirely erroneous, as we point out later. Thereupon petitioner and the Cambria Company in December, 1923 (Rec. I, 33, 44) sought to file in the lower court a petition "for leave to introduce testimony proving that this litigation was instituted and conducted on the part of each of the complainants in entire good faith"; and this petition was wrongfully denied by the district court on the same day on which it was presented.

This petition was signed by four counsel who are officers of this Court, as well as of both lower courts, and was duly verified by one of them. It set out in detail the history of the institution and conduct of this litigation, from beginning to end, and asked leave to make proof, by oral and documentary evidence, of each and every statement therein contained. This petition appears in the record (Rec. I, 34-44). It is quite likely that this error would have been rectified later by the district court, but for its revised opinion, in 1926 (Rec. II, 704), denying the right to a taxation of costs as between solicitor and client, in view of which the investigation sought by the petition was doubtless regarded as unnecessary.

It is quite unnecessary to argue that if we are correct in any of the foregoing statements, the charge of instituting and continuing vexatious litigation will be promptly disapproved.

We regard the matter as of such importance that we are constrained to ask the indulgence of the Court while we point out, as briefly as possible, some of the features of the case bearing on this question.

There was ample justification for the filing of the Cambria bill and the ancillary bills.

The names of Louis C. Krauthoff and Frank Hagerman are signed to the bill of the Cambria Company, filed in September, 1900, and it is verified by the latter. The name of Thomas R. Morrow is signed as counsel to the ancillary bill of the Belt Company and its receivers, filed in 1901. These three gentlemen, in their lifetime, were accomplished and distinguished members of this Court, as well as of the lower courts, and stood foremost among the leaders of the bar of the State of Missouri. As is well known to some of the members of this Court, they were men of unquestioned integrity, and deserved and received the confidence and respect of both bench and bar. There is a strong presumption, which we feel the court of appeals might very properly have indulged, that lawyers of ability, character and standing, such as these gentlemen were, did not institute this action for purposes of vexation, or, reverting to the standard definition of a "vexatious suit" (*Bouvier's Law Dictionary, Rawle's Third Edition,* Vol. 3, p. 3399), "maliciously and without probable cause." To indulge such a presumption of honesty and upright conduct is but a small tribute to the memory of honorable and distinguished members of the bar. If, at this late day, any court is to impute unworthy motives to them, it should only be after the formality of a hearing, where those who may desire to speak for them may be accorded an opportunity so to do, and after the introduction of testimony so cogent and compelling as to lead to no other conclusion. Fortunately, however, the record itself speaks in their vindication.

The Cambria Company bill, filed in September, 1900, was an ordinary creditor's bill, expressed to be in behalf

of the complainant and other creditors, based upon an unsatisfied judgment for $100,000.00 against the Belt Company. Its allegations have been summarized in the preceding statement. It invoked the rule of the *Geddes* case, 254 U. S. 590, and sought to sift the transactions between the Belt Company and the Trust Company covering a period of some ten years, during which the latter, through interlocking officers and directors, was in a position to control, and, in fact, did control, the former, and was in a position to impose, and did impose, such bargains and transactions as it deemed to be in its interest. The filing of bills of this character is an everyday occurrence. The Cambria Company owed a duty to its stockholders to put forth every reasonable effort to collect its judgment against the Belt Company. The accounting proceeding offered the only available opportunity to achieve this result. We do not stop to argue that the filing of this bill under these circumstances was not a vexatious suit, but, on the contrary, the usual and ordinary procedure, dictated by the most obvious business considerations, for the purpose of collecting a debt judicially established to be due and owing to it.

It is intimated by the court of appeals (210 Fed. 717) that "the Cambria suit was in reality the suit of the Southern Company." There is nothing in the record, we respectfully submit, to support this statement, which we consider most unfair. We desire, if we may do so without impropriety, to refer to the rejected offer of proof in the district court (Rec. I, 36). If the evidence there sought to be introduced had been admitted, we are entitled to assume that the court's error would have been rectified.

The ancillary bill of the Belt Company and its receivers prayed for an accounting between the Belt Company and

the Trust Company, in substantially the same manner and form as the bill of the Cambria Company. It was filed pursuant to specific authority of the district court (Rec. I, 29). That court, on being advised of the "past dealings and relations" between the Trust Company and the Belt Company, felt that there should be an accounting between them. The court's authority to file a suit for an accounting was, under the circumstances, equivalent to a direction to do so.

The Trust Company itself apparently felt that an accounting between the companies was inevitable. It knew that if it sued to collect its notes or its open account, it would be met with a demand for an accounting. This is a fair inference from the facts, even without recourse to the affidavit (Rec. II., 1025).

In 1900 the Trust Company filed its answer to the Cambria bill, consenting to an accounting (Rec. II, 48). In November, 1901, it entered into a stipulation (Rec. II, 89), providing that an accounting should be had and expedited, and in its answer to the ancillary bill, the Trust Company offered to account as the court might desire (Rec. II, 155). The special master, in February, 1905, after the Trust Company's account had been presented by it, ruled that there should be an accounting (Rec. I, 14). In his final report he recognized the propriety of an accounting between the parties. He said (Rec. II, 760) that "the relations of the Belt and Trust Companies were exceedingly intimate, and of such character as not only to warrant, but perhaps to exact, the most scrutinizing investigation of any questionable transactions between them, at the instance of an interested party."

The court of appeals in its opinion refers with apparent criticism to the filing of the first amended and supplemental

ancillary bill. The fact is, as above stated (Rec. I, 15), that this pleading was filed at the request of the Trust Company, which had taken the position that, having submitted its account to the master, it devolved upon the complainant to surcharge and falsify the account (Rec. II, 1023). The bill was filed to satisfy this demand (Rec. I, 15). The court of appeals also refers, with apparent disapproval, to the filing of the second amended and supplemental ancillary bill. This pleading, as above stated, was filed by stipulation between the parties (Rec. II, 391), providing that the amended pleading and the answer should be filed simultaneously. This was after the taking of testimony was completed, and in order to conform the pleading to the proof (Rec. II, 1023). This is the usual and ordinary practice, and ought not to give rise to adverse criticism.

We have heretofore dealt with the charge of fraud and the allegations concerning the existence of trust or fiduciary relations, to which we beg to refer. We are wholly unable to see the slightest ground for criticism in connection with the filing of the ancillary bill or the amended ancillary bills.

Petitioner was fully justified in filing its intervening petition.

The petitioner's intervening petition was filed by agreement with the Trust Company, embodied in a stipulation (Rec. II, 164-166). Its counsel knew the nature of the claim to be asserted by petitioner, and was, for obvious reasons, anxious to have the petitioner a party to the action. The amended intervening petition was also filed by agreement, expressed by stipulation (Rec. II, 267-269). It will also be noted that the Trust Company expressly consented in the stipulation that the claim against it on account of its disposition of the Union Terminal Company bonds should be

litigated in this action; otherwise it is improbable that this claim could have been included in the intervening petition. Petitioner's claim, as above stated, was based upon the fact that it was the purchaser at foreclosure sale of the properties of the several companies, and thereby acquired the equitable title to the collateral held by the Trust Company, or the properties represented thereby. This claim was sustained by the special master and by the district court with respect to lands of Central Improvement Company, which were by far the most important and valuable item in the controversy. We respectfully invite counsel to point out any fact or circumstance indicating, directly or remotely, that this intervention was malicious or without probable cause, or that it constituted a vexatious suit or proceeding.

The evidence fully warranted the demand made for an accounting.

Aside from the order of the district court providing for an accounting, the stipulation consenting to an accounting, the Trust Company's offer to account, and aside from the master's ruling that an accounting should be had, and his further statement that by reason of the relations of the parties, a scrutinizing investigation of any questionable transactions was appropriate, there was, we earnestly and confidently contend, full and complete justification, arising from the plain and uncontroverted facts in the record, for the demand made upon the Trust Company for an accounting. The evidence adduced in the accounting proceeding is not in the record. The master's report, reviewing the pleadings and evidence (Rec. II, 579-888), is too voluminous to be analyzed in the limited space of this brief. We must, therefore, content ourselves with referring to but two of the large number of items involved in the accounting, the De Goeijen

item and the Stilwell contract, as representative of the general character of the proceeding. We feel that the Court will find no difficulty in reaching the conclusion that these two items, independently of all other considerations, afforded ample justification for the proceeding. They should, however, be viewed in the light of the evidence tending to prove the Trust Company's control over the Belt Company and its subsidiaries, which may be briefly summarized as follows:

The Trust Company's domination and control of the Belt Company and its subsidiaries.

There was substantial and persuasive testimony tending to prove the domination and control by the Trust Company over the Belt Company and its subsidiaries during the entire period covered by the accounting. This is summarized in the master's report (Rec. II, 593-608). Without going into detail, which space does not permit, it is entirely clear, we respectfully submit that there was ample justification for charging the existence of such domination and control as the complainants did in their bill; in fact, a finding in their favor would have been fully supported by the evidence.

It there appeared that the Trust Company for a number of years had been engaged in the business of organizing companies (593, 594). It had organized some forty corporations (597), including the Belt Company and its subsidiaries, all of which were regarded as Trust Company enterprises (593). A. E. Stilwell was at the head of the Trust Company, and the dominating and controlling figure in all these companies (593, 595, 596, 598, 602, 604). He said these companies were creatures of the Trust Company and were managed by it (596). The officers and directors of

the Trust Company were at the same time the officers and directors of the Belt Company and its subsidiary companies (597). When these companies were organized, the Trust Company would prepare the incorporation papers and pay the expense of incorporation, and the Trust Company's officers would decide who would be selected as officers in the newly incorporated company (598). The officers of all these companies were in the same building in Kansas City, Missouri, and were "like one family of officers and clerks (594). They were represented by the same counsel (594). The securities belonging to the Belt Company and its subsidiaries were kept in the custody of the Trust Company, and in the same boxes with the securities of the latter company (595, 599). The same was true of its stock and bond ledgers, transfer books and minute books (602, 605). The officers of the Belt Company and its subsidiaries were accustomed to take their orders from Stilwell or his confidential clerk, Cone, with regard to financial transactions (595, 604, 602, 605). Stilwell, as the president of the Trust Company, was the moving spirit (598). He would be asked which of the subsidiary companies he preferred should owe the Trust Company with respect to some particular transaction, and he would decide accordingly. Discharge from the service would be the penalty for disobedience (595). Stilwell always looked after the interests of the Trust Company first, before that of the railroad or that of any of the other companies (607).

When a meeting of Belt stockholders came on, the Trust Company would secure proxies from the non-resident shareholders so as to have a majority present at the meetings, and these proxies would usually run to Stilwell, and he, as such proxy, would vote the stock at these meetings.

Stilwell instructed his secretary, Cone, to keep writing to stockholders until he had a majority. The statements which were presented at these meetings were balance sheets, showing assets, liabilities, earnings and expenses, and the net result in surplus, but in those statements there would be no specifications showing the amount in detail, the amount of commissions or interest, or of other charges by the Trust Company; and in the statements sent out to financial publications or to stockholders these matters would not appear in detail in any of those statements (603, 604). Stilwell was a heavy stockholder in the Trust Company, as were his associates, Martin and Taylor, and they retained their holdings largely as permanent investments. They also owned stock from time to time in the Belt Company and other railroad companies promoted by the Trust Company, but these securities would be sold from time to time (600, 601).

The Belt Company never actively opposed any policy that was announced or established by the Trust Company. The Trust Company's officers would instruct as to what minutes should be placed on the minute books of the Belt Company and its subsidiaries (604). This was the case on one occasion in July, 1899, when the Trust Company's officers gave instructions that certain minutes should be placed on the minute books of the Belt Company, whereby a large number of shares of stock in various companies were turned over to the Trust Company as collateral security to the Trust Company's claim against the Belt Company (604). The vice-president of the Belt Company objected, in July, 1899, to turning over to the Trust Company a large amount of stocks and bonds of the Belt Company's subsidiaries, but he was overruled by the Trust Company's officers (605).

Whether the foregoing evidence, and much in addition which might be referred to, actually established the domination of the Trust Company over the Belt Company and its subsidiaries, as we think it did, is not important now. It is referred to for the purpose of showing that there was ample proof in the record that it was quite within the power of the Trust Company to control the other companies as it wished. We now proceed to point out that there was ample evidence tending to prove that such power was actually exercised by the Trust Company to the financial detriment of the Belt Company and its subsidiaries.

The DeGoeijen item.

One of the items in the Trust Company's account, and challenged in the accounting proceeding, is referred to in the evidence as the De Goeijen item of $89,333.33 (Rec. II, 682 *et seq.*). This was approximately 25 per cent. of the entire indebtedness claimed by the Trust Company, which amounted, at that time, to about $360,000.00 (Rec. II, 668). It appeared without contradiction that this item had been for a long time prior to March 31, 1899 (the day preceding the receivership of the Gulf Company) carried on the books of the Trust Company as an indebtedness of Mr. De Goeijen (whose solvency was then doubtful), and on that day (Rec. II, 688) it was arbitrarily, and without consideration, charged to the Belt Company, thus increasing its apparent indebtedness to the Trust Company in that amount. It was believed by the complainants at the time of the institution of this litigation, and there was obvious justification for the belief, that the Trust Company, on the eve of the receivership of the Gulf Company, had merely dumped this uncollectible debt back on the Belt Company; and accordingly,

in the accounting suit, this item of indebtedness was challenged.

Not only did the complainants feel justified in challenging this item, and in asking that it be eliminated from the account, but the Trust Company itself and its counsel deliberately and after full investigation reached the conclusion that the complainants were fully justified in their contention, and that the Trust Company had no right to charge this account back on the Belt Company. This is a matter of record, about which there can be no question or controversy. Mr. Mecartney became chief counsel for the Trust Company in 1904, and, in a written report upon this litigation made to the directors of that company, dated December 1, 1904 (Rec. I, 540), after stating the facts with respect to the De Goeijen item of $89,333.33, he said that the Belt Company should be credited with this amount. His language was: "This item must be allowed." This was the deliberate opinion of the chief counsel for the Trust Company four years after the institution of the action. Twenty-five per cent. of complainants' claim was, in his opinion, not even debatable; it was not to be litigated; it was to be conceded and allowed. Other counsel for the Trust Company (Rec. I, 512) had been of the same opinion.

We have, then, a claim in the accounting suit amounting to $89,333.33 which complainants' counsel felt was a just and meritorious claim. The Trust Company's counsel also felt that it was a just and meritorious claim, and so stated in writing to his principal. In the face of this fact, how can the court of appeals say that the whole litigation was vexatious? Where a complainant asserts, and the defendant concedes, that complainants' claim to the extent of 25 per cent. is just and meritorious, is it not a strange and unusual proceeding to characterize the action as a vexa-

tious suit, involving, as vexatious suits do, "malice and want of probable cause"? Is it malicious to sue a defendant for what it admits to be due? Is there not probable cause for a demand when defendant concedes it to be just?

True, the De Goeijen item was finally disallowed by the master (Rec. II, 692). It is interesting to follow the process by which this extraordinary result was brought about. The explanation is really very simple (Rec. I, 401). (This is from the testimony of Mr. Mecartney, at the time chief counsel for the Trust Company, given in his suit for fees against the Trust Company. His evidence was at first excluded by the master, but was afterwards admitted) (Rec. I, 678, 679). Mr. Frank B. Wilcox had formerly been auditor for the Trust Company. He was called by the complainants to testify in 1905. He was on the witness stand testifying for them when the Trust Company approached him to induce him to testify in its behalf, and, in particular, to give some explanation of the De Goeijen item which would relieve the Trust Company from the necessity of recrediting the amount to the Belt Company.

Mr. Wilcox told the junior counsel for the Trust Company (Rec. I, 401) that he was willing to give testimony which would completely overcome the complainants' claim with respect to this item, but he demanded compensation for his services. His terms were one-half of one per cent. of the amount to be saved the Trust Company, or a total of $446.66. This proposition was communicated by telephone to the chief counsel for the Trust Company, in or near Chicago, one Sunday morning. The latter replied over the telephone that he thought it would not look well to make a contract with a witness to testify on an exact percentage basis, but he directed his junior counsel to close the deal with Mr. Wilcox if the latter would accept $450.00

instead of $446.46. Naturally, Mr. Wilcox accepted, since he was to be paid $3.34 more than he had asked.

Mr. Wilcox afterwards testified in behalf of the Trust Company, in fulfillment of his percentage contract (augmented by a small bonus for the sake of appearances), to a secret understanding, not evidenced in any record, paper, document or memorandum (Rec. 11, 692), to the effect that while the Trust Company had in fact assumed and agreed to pay off the $89,333.33, this assumption was conditioned upon the payment being made to the Trust Company by Mr. De Goeijen as and when the latter should remit the money for that purpose. There was no testimony to the contrary, and the master accepted this explanation.

Whether the De Goeijen item was rightly disallowed is not, of course, the question here. The important fact is that the complainants in good faith believed that it should be allowed; and this good faith is made clear and unimpeachable by the fact that the Trust Company, no doubt with the natural reluctance to be expected under the circumstances, was compelled formally to concede and admit that the complainants' claim was well founded. This item, it will be remembered, represented 25 per cent. of the entire claim asserted by the complainants. In itself, it would fully justify the accounting proceeding. How can complainants' action challenging this item be characterized as vexatious?

The Stilwell contract.

In June, 1889, Stilwell, who was vice-president, general manager and member of the executive committee of the Trust Company, made a contract with the Suburban Company, the predecessor of the Belt Company, which, for

convenience, we will refer to as the Belt Company, by the terms of which he agreed to organize a company to construct a double track railroad for the Belt Company for a distance of some four and one-half miles in Kansas City, Missouri, including right of way, depots, etc. (Rec. II, 654). The contract price was to be $450,000.00 par value of bonds of the Belt Company and $900,000.00 par value of stock; both stock and bonds to be delivered to the Trust Company in escrow and finally delivered upon completion of the contract (Rec. II, 655). The contract itself was assigned to the Trust Company, which thereupon organized The Kansas City Construction Company, with a capital of $300,000.00, to do the work of construction (Rec. II, 657). The Construction Company entered upon its contract and, in May, 1890, had complied therewith in part only (Rec. II, 659), but had expended on construction the sum of $292,000.00, which was all the money that it had (Rec. II, 656, 662). Much yet remained to be done in acquiring right of way for tracks, lands for sidings and yard purposes, and certain depot work (Rec. II, 662).

As the Construction Company had no further funds, something had to be done. The Trust Company was in complete control of the entire situation and could do anything that it pleased. All the officers of the Construction Company were stockholders and directors of the Trust Company; and of the six directors of the Belt Company, five of them were either directors or officers, or both, of the Trust Company, and all were directors and stockholders of the Construction Company (Rec. II, 660).

Ordinary business integrity, as well as the interest of the Belt Company and its stockholders, demanded that the Construction Company comply with its construction contract. Obviously, the Construction Company was not en-

titled to the $450,000.00 of bonds and $900,000.00 of stock until this should be done. But the Trust Company found a way to get the full consideration for the complete performance of the contract, while leaving the contract itself unperformed. The Belt Company and the Construction Company, pursuant to authority granted at board meetings where the officers of the Trust Company were in complete control (Rec. II, 661), entered into a solemn contract whereby the Belt Company accepted the uncompleted railroad as a full compliance with the contract, and released the Construction Company from any further liability thereunder, and whereby the Trust Company was called upon to release to the Construction Company the $450,000.00 of bonds and $900,000.00 of stock deposited in escrow. The Construction Company willingly accepted this welcome relief from its financial difficulties, received the bonds and stock as specified in the contract, and distributed them to its stockholders, who, presumably, were officers, directors and stockholders of the Trust Company, since the master states that "the names of the incorporators and of the board of directors were largely persons interested in the Trust Company" (Rec. II, 657). At the time of this transaction, the stock of the Belt Company, amounting in the aggregate to 10,000 shares, was held as follows: Trust Company, 2,446; Trust Company, trustee for C. E. Grannis, 554; Trust Company, trustee, 4,000; E. L. Martin, trustee, 1,000; and one share each standing in the names of five directors (Rec. II, 661). It does not appear who the beneficial owners of the stock were, outside of 2,446 shares standing in the name of the Trust Company.

It necessarily followed that the cost of completing the railroad, which the Construction Company should have borne under its contract, had to be paid by the Belt Com-

pany. This ran into large figures, as set forth in Rec. II, 220-223, and amounted, in the aggregate, to a greater sum than the Trust Company's claim against the Belt Company.

In the ancillary bills it was claimed that this additional cost was foisted upon the Belt Company by the Trust Company through its domination over both the Belt Company and the Construction Company. The Trust Company, while not seriously controverting the facts, pleaded laches and the statute of limitations. The master, after having found against the theory of domination and control, sustained the plea.

These facts, which we have recited from the master's report, evidence, we contend, a ruthless exploitation of the resources of the Belt Company. No one can for a moment suppose that such a program of spoliation could have been put through without the Trust Company's corporate ascendancy over the other two companies. We are not now arguing that the master should have decided differently than he did, although that argument might well be forcefully made; but we do vigorously contend that the Belt Company and its receivers would have been unfaithful to the interests they represented if they had failed to challenge a transaction of this nature.

Will anyone for a moment contend that an action brought to compel restitution under these circumstances was trivial, insincere or vexatious? We feel certain that the court of appeals could not have understood the situation as it actually existed, and as it is disclosed in this voluminous record. Had it done so, it is inconceivable that it would have felt called upon to characterize the litigation as it did.

The litigation which occurred after the final decree of June, 1910.

The only party that appealed from this decree was the Trust Company; and substantially the only issue raised by it on its appeal, and subsequently by us on our appeal to this Court, was the question of the liability of petitioner for the debt of the Belt Company. The Central Improvement Company matter was incidental to this issue. If the petitioner was required to pay the Belt Company's debt, that automatically decided the Central Improvement Company matter. The liability issue, it will be remembered, was one that the Trust Company itself had injected into the case in 1905. If it had refrained from introducing this issue into the case, its appeal would have been limited to the less important item of the lands of the Central Improvement Company.

It seems to us unthinkable that the Trust Company's appeal, substantially for the purpose of determining the liability issue, or our subsequent appeal to this Court upon the same issue, can be characterized as vexatious on our part. Obviously, no one will be heard to urge that the petitioner should have confessed error in the proceeding in the court of appeals, or that it should have refrained from taking its appeal to this Court.

It should be wholly unnecessary, we respectfully submit, for us to be called upon to argue the good faith on our side of this litigation following the decree of the district court. But what are the facts?

(a) The district court in its final decree decided the liability issue in favor of petitioner, and also awarded it the Central Improvement Company lands. Its decree upon these two issues, in and of itself, effectively dispels and refutes

any imputation of bad faith or improper motives, even though the decree was afterwards reversed upon appeal. It is said in *Crescent City* v. *Butchers' Union,* 120 U. S. 141: * * * "the judgment or decree of a court having jurisdiction of the parties and of the subject matter, in favor of the plaintiff, is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal."

If the unthinkable intimation or suggestion should be made (nowhere has it been made) that the district court was actuated by improper motives in thus rendering its decree, and that these motives are to be imputed to petitioner, the case just cited gives the answer, in the following language (p. 159):

> "* * * It is equally true and equally well settled in the foundations of the law that neither misconduct nor demerit can be imputed to the court itself. It is an invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly."

If there were nothing more, the decree of the district court in favor of petitioner is a complete and sufficient justification for all that it did following its entry in June, 1910. But there is much more.

(b) The court of appeals handed down its first opinion (201 Fed. 811) in October, 1912. There was no suggestion in it that the matters decided were trivial or lacking in substantial merit. On the contrary, that court, realizing the difficult nature of the issues involved, and being desirous of affording the fullest opportunity to test its conclusions, adopted the unusual procedure of permitting a reargument of the entire case, in January, 1913. After nearly

a year's deliberation, it handed down its second opinion. Here, again, as we shall presently show, there was no finding that the litigation was frivolous or vexatious. True, it said in its opinion that the averment that the Belt Company was not indebted to the Trust Company "has been *adjudged* untrue," and that "it has *become* clear that the Cambria Company has no cause of action against the Trust Company." But this is quite another matter, and is discussed later. The fact that the court of appeals permitted the reargument ought to be sufficient evidence that it regarded the issues as serious, important and difficult. It is not in the habit of granting rehearings where litigation appears on its face to be vexatious.

(c) Petitioner appealed from the court of appeals to this Court. The Trust Company filed a motion to dismiss. Petitioner countered with an application for certiorari.

This Court held, May 11, 1914, that the nature of the case was such that if it should appear that an appeal did not lie, the writ of certiorari would be granted, saying:

> The motion to dismiss is hence postponed to the hearing on the merits; and, *being of opinion that the nature of the case is such as to authorize the granting of the writ of certiorari which is applied for,* in the event it develops on the hearing there is no jurisdiction to review the same, the application for the writ of certiorari is therefore also postponed to the hearing.

It is unnecessary to point out that this Court, particularly at that time, issued its writs of certiorari very sparingly, and only in cases where grave questions were involved or where the public interest was directly affected. It did not issue its writ to review cases utterly lacking in merit, or of a vexatious character.

Finally, the case was heard and decided in this Court, and the decree of the court of appeals was affirmed. The Chief Justice and one of the Associate Justices dissented, as appears from the following statement (240 U. S. 166, 178):

> The Chief Justice and Mr. Justice Van Devanter are of opinion that, upon the finding of the master, the decree should be reversed, and therefore dissent.

Two Justices of this Court felt that the case of petitioner was a meritorious one. Surely, there is no necessity for petitioner to apologize for advocating a cause that received their support. To stigmatize such litigation as "vexatious" involves processes which we fail to understand.

The two injunction suits.

We desire to make a brief reference to the two injunction suits, reported in 146 Fed. 337 and 171 Fed. 43. In the opinion of the court of appeals (28 F. (2d) 240) they are referred to as "the two unwarranted injunction suits"; and it is added that "they furnish additional proof, if it were needed, of the vexatious character of the whole litigation."

We are prepared not only to argue, but to demonstrate, that the injunction suits were neither unwarranted nor are they additional proof, or proof in any degree, that the entire litigation, or any part of it, was vexatious.

(a) Both injunctions were duly granted by the district court of the United States for the western district of Missouri, in a case of which that court had jurisdiction, both of the subject matter and of the parties. The injunctions

were granted only after the Trust Company had been accorded a full hearing. One was granted by Honorable John F. Philips, then district judge for the western district of Missouri, and the other by Honorable Smith McPherson, then district judge for Iowa. In both cases it was the court, in the exercise of its judicial functions, after hearing in due and orderly course, that granted the injunctions. True, the injunctions were afterwards reversed by the court of appeals. But the action of the court in granting the injunctions, applying the rule of *Crescent City* v. *Butchers' Union*, 120 U. S. 14, "is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal." To characterize the injunctions as vexatious and unfounded is to impute misconduct and demerit to the court itself, in defiance of the "invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly." This should be a complete answer to the court's criticism of the injunction suits; but there is another answer.

The principles of law for which petitioner contended unsuccessfully in the court of appeals in those two cases were, we respectfully submit, fully and completely adopted by it in 1921, in *Burke Construction Co.* v. *Kline*, 271 Fed. 605.

It is true that the *Burke* case was afterwards reversed by this court (260 U. S. 226), but that only serves to emphasize the difficult nature of the questions involved, and the unfairness of penalizing parties because their counsel may be unable to predict with absolute certainty what view an appellate court will take in so delicate a matter as the dividing line between federal and state jurisdiction.

The two injunction suits merely illustrate a situation which occurs in everyday practice of the law, when one party feels that his chances are best in a federal court, under the rules and decisions that obtain there, and the other party feels that his client will fare best in the state court, under its rules and decisions. Each one strives to have the case determined in the jurisdiction of his preference. Petitioner sought an adjudication in the federal court; and the Trust Company was striving just as hard to secure an adjudication of the cases it had brought in the state court. Each party was well within its rights in seeking the forum of its preference.

No court has found that any part of this litigation was baseless and unwarranted.

We challenge the statement contained in the opinion (28 F. (2d) 239): "This court characterized the Cambria Company suit as 'baseless' and 'unwarranted'."

We strenuously insist that the court of appeals in its first two opinions made no finding whatsoever reflecting upon the *bona fides* of the institution and prosecution of this action. In its first opinion (201 Fed. 811), the facts are stated at page 816, in plain language and without the use of unnecessary emphasis. It said:

> The master found that the evidence did not support the claim of the Cambria Company, and recommended that its bill be dismissed for want of equity. * * * The report of the special master was in all things approved and confirmed, and a decree entered in accordance with the findings and recommendations of the master.

Upon the reargument, counsel for petitioner endeavored with much earnestness in brief and argument to controvert

the conclusions of the court stated in the first opinion. Substantially the only issue dealt with was the liability issue. As the criticism by counsel of the first opinion of the court had been respectfully earnest and strenuous, so the second opinion of the court was emphatic and positive in support of the conclusion reached in its first opinion. The conclusions reached by the court in both opinions were substantially the same; the difference between them is largely in the emphatic language employed in the second opinion reinforcing its first conclusion. In the second opinion (210 Fed. 714), in reciting the facts to show that there was no evidence of laches on the part of the Trust Company, the court expanded the simple statement above quoted into the following:

> On September 6, 1900, the Cambria Company commenced the suit here in hand against the Belt Company and against the Trust Company to enjoin the latter from selling its collateral and applying their proceeds to the payment of the debt of the Belt Company, a suit which it founded on the averment, which has been *adjudged* untrue, that the Belt Company was not indebted to the Trust Company, and on other allegations so baseless that it has *become* clear that the Cambria Company had no cause of action against the Trust Company. (Italics ours.)

This, we respectfully submit, is no more than saying that in the decree in the lower court it was *adjudged* that the bill of the Cambria Company should be dismissed for want of equity. There is here no independent finding made by the court. There could not be, since the evidence was not brought to that court.

Again, the court says (p. 717):

> It (the Trust Company) gave notice of its sale of its remaining collaterals on September 1, 1900, and was enjoined from proceeding in the baseless suit of the Cambria Company.

Again, it is said (p. 718):

> By the Belt Company's consent to a judgment against it in favor of the Cambria Company, it laid the technical foundation of the Cambria Company's unwarranted suit, which prevented the Trust Company from selling its collaterals, and held the issue of the Belt Company's indebtedness to it suspended for more than eight years.

In both these quotations, the court of appeals is not making an independent finding of its own; it is merely reciting the *adjudication* in the district court, that the bill of the Cambria Company was without equity.

In the nature of things, it could not have made a finding that the Cambria Company suit was wholly baseless and unwarranted, except in the sense stated. The evidence in the case was not taken to that court. It said (201 Fed. 816): "The evidence has not been brought to this court." And it states (210 Fed. 723): "it would be unwise and might be unjust" to adjudicate any issue in the absence of the evidence.

Finally, it is entirely clear from the opinion itself that the court did not intend to characterize the suit as baseless and unwarranted. It had been expressly asked to do so, and it declined in plain and unambiguous language. Counsel for three stockholders of the Trust Company had petitioned the court "to adjudge" that "certain of the litigation" had been "commenced and prosecuted in bad faith," and the court was asked, thereupon, to give

appropriate directions in the decree touching the taxation by the district court of the Trust Company's disbursements (210 Fed. 722); but the court declined to entertain the petition. It declined "to adjudicate" as requested. It said (p. 723): "It would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders." Three reasons were given: (1) The question came into the suit for the first time at the rehearing; (2) no evidence had been taken relative to it; and (3) the evidence upon the issues of the case had not been brought to that court.

Does not this conclusively prove that the court of appeals did not in fact pass upon or adjudicate any question touching the good faith of the institution and prosecution of the action? Is it not entirely clear that the court declined even to express any opinion upon the question, for the three reasons stated? The reasons themselves exclude the possibility of an adjudication, or an opinion or a characterization. How, therefore, can it now be plausibly claimed that the court of appeals decided that the suit was baseless and unwarranted, or even characterized it as such? We respectfully submit that the court of appeals in its third opinion has completely misconceived the scope and effect of its second opinion, and that its criticism is entirely unjustified.

The opinion of this Court is controlling, and it contains no intimation that the litigation was vexatious.

In the opinion delivered by this Court, the history of the litigation is stated, the relations of the parties are defined, and the entire matter is reviewed, as it was in the court of appeals, and the decree of the latter was affirmed. What was the decree of that court which was affirmed?

It is found in the concluding paragraph of its opinion (210 Fed. 723, 724), where the district court is directed to enter a specific decree, the details of which are stated at length. Petitioner is required to pay the debt of the Belt Company "and the costs of this suit." If it fails to do so, then certain property may be sold in order to pay "the debt and the costs" out of the proceeds of the sale. The proceeds of such sale shall be applied in the payment of the debt "and of the costs after as well as before the decree." "The decree should adjudge that the Trust Company may recover its costs down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may opportion those costs between them, but not as against the Trust Company, which should be permitted to pursue either or both of them until its costs are paid."

This is the decree which this Court affirmed, for reasons stated in its opinion. Nothing is said by this Court or in the proposed form of decree which warrants an imputation of bad faith. The decree, we contend, carries ordinary costs as between party and party, and no more. If this Court had intended that costs should be taxed in accordance with rules obtaining in some foreign jurisdiction, or in some unusual and unprecedented manner, it would have said so in plain and direct language. If it had thought that the litigation was trivial or vexatious, and that the parties should be penalized on that account, we may be sure that we would not be left to conjecture as to its intention. Where this Court finds that either parties or counsel have overstepped the bounds of propriety, and for that reason need to be rebuked, it is its custom and practice to say so in direct and unambiguous language.

Petitioner respectfully prays that the judgment and decree of the circuit court of appeals be reversed, and that the decree of the district court be affirmed; and that the lower court's characterization of this litigation as vexatious be disapproved.

October 4, 1929.

Respectfully submitted,

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SAMUEL W. MOORE,
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PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 22.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

GUARDIAN TRUST COMPANY,
Henry C. Flower, Receiver.

Respondent.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

The main purpose of this reply brief is to point out some of the errors in the statement of facts contained in respondent's brief. While it seems improbable that these matters will enter into the decision of the case, yet we are reluctant to allow misstatements of fact, which conceivably may prejudice the case, to pass by unchallenged.

It will be noted that, throughout respondent's brief, there are numerous statements which purport to be statements of fact taken from the record, but which are without any supporting references to the record, and for which the record itself, we contend, affords no justification. In so far as these statements are outside of the record, their accuracy is by no means admitted.

Counsel is completely mistaken in his assertion that the court of appeals found that the Cambria suit was vexatious.

At the very outset of respondent's brief (p. 2), the erroneous and misleading statement is made that the circuit court of appeals, upon a former appeal, found that the Cambria suit was the suit of the Southern Company and "that it was a baseless and unwarranted action, filed for the ulterior purpose of wrongfully depriving the Trust Company of the collateral pledged to it as security for the debt of the Belt Company." This is repeated frequently throughout the brief.

It is entirely plain, we respectfully submit, that no such finding was made by the court of appeals. The record itself clearly so states, in plain and unambiguous language, as we now proceed to point out.

The first time that any claim was asserted by any one that this litigation was vexatious and that for that reason the ordinary rule of costs as between party and party should be departed from, was made after the first decision of the court of appeals in favor of the Trust Company (201 Fed. 811), and over twelve years after the suit was instituted. The Chicago counsel for three stockholders of the Trust Company filed a petition in the court of appeals in December, 1912 (Rec. II, 1006), asking that court "to embody in its decree of reversal a special finding that the entire litigation has been trivial, wanton and oppressive"; and further asking the court, upon making this special finding, thereupon either to direct the lower court to ascertain and decree the payment by petitioner of the Trust Company's disbursements in the litigation, consisting of attorneys' fees, solicitors' fees, stenographers' fees, etc.; or, in

the alternative, to incorporate in the decree a provision permitting the Trust Company to institute thereafter an independent action or actions against petitioner to recover such disbursements. The primary purpose of this petition, as clearly appears on its face, was to secure from the court of appeals a "special finding" that the litigation was vexatious.

This Court might naturally infer from the statement in the brief, above quoted, that this petition filed by the counsel for the three stockholders had been granted by the court of appeals, and that the "special finding" had been made as requested. But the facts are precisely to the contrary. The court of appeals specifically declined to make the special finding requested by counsel for the three stockholders, or any finding, special or otherwise, upon the subject. It declined to entertain the petition, or to pass upon it one way or the other. That this was the court's action is so clear as to be beyond the realm of controversy (210 Fed. 723). This was the only occasion on which the question arose in the court of appeals.

The court of appeals gave three unanswerable reasons for its action (210 Fed. 722, 723): *first,* that the petition came too late, being presented for the first time after the first decision of the court, and shortly prior to the reargument in 1913; *secondly,* that there was no evidence before the court bearing upon the issue of good faith, and, obviously, it could not pass upon that issue in the absence of evidence; and, *thirdly,* the evidence upon the main issues in the case had not been brought to the appellate court, and, manifestly, the court could not determine the character of the litigation in the absence of the evidence upon the merits of the case. The court very properly said that "it

would be unwise and might be unjust" to adjudicate the issues tendered by the petition of counsel for the three stockholders under those circumstances; and, very naturally, it declined to do so. It is in the face of this record that respondent now contends that the requested special finding, which the court refused to make, was actually made.

But the court of appeals did not stop there. It felt that there should be an end of the litigation, which was then thirteen years old. Not only did it decline itself to adjudicate the issue of the good faith of the litigation raised at that late day and without any evidence upon which it could act, but it did not propose to allow the district court to further prolong the litigation by undertaking itself to hear and adjudicate those same issues; and so, in substance, it directed the lower court to refrain from reopening the case for that purpose. This is aptly expressed in the following language (210 Fed. 723):

> . . . as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules, and practice in equity.

We respectfully and confidently contend that no one can read the record referred to above without being promptly convinced that the court of appeals did not, as contended by counsel, find that the litigation was baseless and unwarranted. It said itself, in so many words, that it declined to make a finding of that nature, or any finding whatsoever on the subject. The use of the words "baseless and unwarranted," occurring in other parts of the opinion, can

only refer, as we pointed out in our main brief (pp. 82-85), to the fact that the Cambria bill had been *adjudged* to be without equity. The brief statement in the third opinion to the effect that the court of appeals had previously characterized the Cambria Company's suit as baseless and unwarranted, can only be explained upon the assumption that the court in making that statement had been misled by a superficial examination of the opinion.

The further statement contained in the excerpt from respondent's brief, above quoted, to the effect that the court of appeals had actually found that the Cambria suit was filed "for the ulterior purpose of wrongfully depriving the Trust Company of the collateral pledged to it as security for the debt of the Belt Company," is too obviously due to counsel's zeal to require serious consideration. It can not be pretended that there is anything in the record which lends color to the statement.

Counsel's claim that a plan was formed to harass and annoy the Trust Company by means of this litigation, is purely imaginary.

In respondent's brief, it is intimated that this suit and various other proceedings were part of a general plan to harass and annoy the Trust Company. We confidently contend that the record contains not the slightest support or justification for this unwarranted charge.

1. It is suggested (p. 11) that the appointment of a receiver for the Guardian Trust Company in 1900 was based, to some extent at least, upon the "huge claims" made against it in the Cambria bill. This is erroneous, as the record clearly indicates. The opinion of Judge Thayer, then circuit judge for the eighth circuit, appoint-

ing a receiver for the Trust Company in the Bierce case, in November, 1900, will be found in the record (Rec. I, 437). It is there stated that the bill of complaint was one by minority stockholders of the Trust Company to "correct abuses of administration and to obtain the appointment of a receiver because of the mismanagement of the company's officers and various *ultra vires* acts committed by the directors and managers," leading to a dissipation of the company's assets.

It is interesting to note that these charges of mismanagement and *ultra vires* acts, brought by stockholders against the Trust Company in the Bierce case in 1900, have a direct bearing upon the charges of domination and control and maladministration brought against the Trust Company in this case.

Judge Thayer summarized the proof (Rec. I, 439), which, he said, established with reasonable certainty that the Trust Company had made a practice of organizing other corporations to engage in various enterprises of a highly speculative character; that its funds had been invested in the stocks and bonds of such concerns and losses occasioned thereby, and further losses were imminent; that the officers, directors and employees of the Trust Company generally served as officers and directors of such subsidiary companies, and that such subsidiary companies were mere adjuncts of the Trust Company, and that such outside enterprises were its own adventures. Judge Thayer was referring, in large part at least, to the very activities of the Trust Company complained of in this action and made the basis for the accounting proceedings. He said (Rec. I, 439):

> The proof shows with reasonable certainty that the officers and directors of the defendant company

> have made a practice of organizing other corporations to engage in various enterprises of a highly speculative character; that funds of the company to a large amount have been invested in the stocks and bonds of such concerns which had at the time no market value; that money in considerable sums has been loaned to such companies, sometimes upon their stock as collateral, and on other occasions without any security; that some of these enterprises have proved absolute failures; and that the money invested therein has been wholly lost, while other of such enterprises are in a precarious condition and the outcome thereof is doubtful and uncertain. The fact that officers, directors and employees of the trust company have generally served as officers and directors of such subsidiary companies and have held stock therein, leads the court to conclude that the moneys of the trust company would not have been used to purchase the stocks and bonds of such concerns and to supply them with capital, except on the theory that they were mere adjuncts of the trust company and that the enterprises which it thus attempted to foster by the means aforesaid were its own adventures.

Judge Thayer furthermore said, as the complainants have said in this case, that there was such an identity of officers and employees governing these corporations that it was impossible to believe that their interests were properly protected in dealings between them. He said (Rec. I, 439):

> Moreover, in some cases, if not in all, there appears to have been such identity in the personnel of the governing bodies of these corporations and the governing body of the trust company that it is impossible to believe that the interests of either were

fairly considered or properly guarded in any of the transactions and dealings which occurred between them.

The appointment of a reciver for the Trust Company in 1900 was far from being any evidence of a conspiracy on the part of any one to harass and annoy it. It affords very persuasive evidence of the Trust Company's domination and control over the Belt Company and its subsidiaries through the interlocking and intermingling of officers and directors, with resulting unfair bargains made by officials dealing with themselves; and of the propriety, and even necessity, of an accounting to determine the real rights and obligations of the parties.

2. Again, respondent refers to the four separate bills for the foreclosure of the mortgages of the Belt line and its subsidiaries, as well as to the foreclosure of the Kansas City, Pittsburg & Gulf and Port Arthur Channel & Dock mortgages and the reorganization plan as part of a general conspiracy against the Trust Company. With respect to the mortgage foreclosures and the reorganization plan (under which the Trust Company was one of the depositaries), the master made an explicit finding (Rec. II, 853), quoted *infra*, holding that there was no evidence whatsoever of actual fraud in any of these proceedings.

The receivership of the Kansas City, Pittsburg & Gulf Company, so far from being any evidence of conspiracy on the part of the complainants, discloses the Trust Company as the aggressor rather than the injured and innocent party. It will be remembered that on March 31, 1899, the Trust Company took or received from the Belt Company the notes and collateral security in controversy. It then knew that on the following day the Gulf Company would default

in the payment of interest then due. Not content with thus stripping the Belt Company of all its available assets on the eve of the receivership, the Trust Company itself precipitated the receivership on April 1, 1899. Its counsel on that day brought a suit in the name of the Belt Company and certain persons interested in the Trust Company, as well as the Gulf Company, against the Gulf Company in the state court at Kansas City, Missouri, setting up the insolvency of the Gulf Company and its exposure to the demands of various creditors, and asking for the appointment of a receiver (Rec. I, 430-436). Midnight receivers were appointed, their personnel consisting of three individuals, two of whom were officers of the Trust Company. It was "a race of diligence for the control of the litigation through receivership" (*Trimble* vs. *Trust Co.*, 244 Mo. 228, 263). Counsel for the Trust Company, who was also counsel for the Gulf Company and for the Belt Company, testified (244 Mo. 244) "I had suit instituted here (Kansas City) to put the Kansas City, Pittsburg & Gulf Railway Company in the hands of a receiver before the New York Committee could get out here and do it. * * * This action was taken on behalf of the Trust Company." The Trust Company itself brought suit in Louisiana, and also in Texas, and had receivers appointed there.

Not only was the Trust Company extremely vigilant in bringing its own suit first, and in securing the appointment of its own receivers in the case of the Gulf Company, but it contemplated taking action to secure the same priority in the appointment of receivers for the Belt Company. Prior to the filing of the Cambria bill, in September, 1900, the Trust Company was taking steps, in its own behalf, to secure the appointment of a receiver for the Belt Company

upon a creditor's bill. The Cambria bill merely anticipated the Trust Company's move. Again, it appears to have been a race of diligence. This is apparent from the offer of proof (Rec. I, 36). As respondent has referred to this offer of proof, and quoted from it in its brief, p. 100, we feel at liberty to do the same. The following appears immediately preceding the excerpt quoted by respondent:

> About the middle of August, 1900, the Belt Company and your petitioner were reliably advised that the Trust Company had itself conceived the idea of procuring the appointment of a receiver for the Belt Company, and that it was then endeavoring to persuade one of the creditors of the Belt Company to institute such an action.

It was only the failure of the Trust Company to get into court first and initiate its own litigation and secure its own receiver for the Belt Company, as it did for the Gulf Company, that enables it now to cry conspiracy against its adversary.

3. Counsel, at page 114, finds additional evidence of wrongdoing on the part of complainants in the fact that they did not appeal from the decree of the district court upon the issue of debt or no debt as between the Belt Company and the Trust Company. The reason why no such appeal was taken clearly appears in the record, and it requires a strong imagination to draw any prejudicial inference therefrom.

When the Trust Company appealed from the decree of June, 1910, which adjudicated that the petitioner was not liable for the debt of the Belt Company, it carefully refrained from assigning as error the soundness of that

adjudication (Rec. II, 916). Its only assignment was that the court erred in "including in said decree" the finding of non-liability. It then had its own suits pending in the state court at Kansas City against the petitioner upon precisely the same cause of action (Rec. II, 502-545). The Trust Company preferred to try the liability issue in the state court. It apparently felt encouraged by the statement contained in the opinion of the court of appeals (171 Fed. 43, 50), to the effect that the liability of petitioner to pay the debts of the Belt Company was not at issue and could not be litigated in the action in the federal court (Rec. II, 894). Accordingly, in taking its appeal, it sought to eliminate the liability issue from the case rather than incur the hazard of an affirmance of the district court's decree.

Petitioner felt confident that the liability issue, which the district court had decided in its favor, was properly in the case, and that the appellate court would so hold, as it did subsequently. If this view were correct, it would follow that the district court's finding of non-liability would be affirmed; and in that event the state of account between the Belt Company and the Trust Company, or the amount of the judgment in favor of the latter, would not be a matter of practical importance. Petitioner's reason for not appealing is stated in an affidavit filed in the court of appeals (Rec. II, 1024). The case was first argued and submitted in the court of appeals in May, 1911 (Rec. II, 948). The contention of the Trust Company there was that the liability issue was not properly in the case, in accordance with its assignment of error to that effect. Sometime after the final submission of the case, the court announced to counsel (Rec. II, 978) that it had reached the tentative

conclusion that that issue was necessarily involved in the case. Thereupon counsel for three stockholders of the Trust Company were permitted to intervene (Rec. II, 971, 985), and, for the first time, to challenge the correctness of that part of the district court's decree holding that petitioner was liable for the debt of the Belt Company. When this took place the time limited by statute within which the complainants could take an appeal on the issue of debt or no debt, had long since passed. Petitioner urged these facts unsuccessfully in this Court, as well as in the court of appeals, as a reason why the Trust Company should be confined to its assignment of error as originally made. Manifestly, the petitioner was placed in an unfortunate position; but its misadventure ought not to be tortured into evidence of a conspiracy to injure and oppress the Trust Company, as its counsel seeks to do.

4. Incredible as it may seem, the Trust Company in its brief (p. 98), after referring to the amount claimed by the Trust Company as being due from the Belt Company, put at approximately $400,000, says: "There is not, and never was, the slightest doubt as to the genuineness of that indebtedness." And it makes the amazing statement (p. 117), evidently based thereon, that the purpose of the litigation, on the part of the complainant, "was to smother the Trust Company with difficulties and expenses until it could no longer sustain the unequal contest".

After the Trust Company had consented to an accounting by answer and by stipulation, as was pointed out in our main brief, the only purpose of which was to challenge the correctness of this debt, and after the master, upon the coming in of the Trust Company's account, and upon a consideration of the evidence submitted by complainant,

had ruled that there must be an accounting, the whole purpose of which was to determine the question of debt or no debt; after the court had overruled a motion in the nature of a demurrer for want of equity (Rec. II, 565, 567), and after the Trust Company in view of the evidence adduced was compelled to confess two items of the account, and after the master upon the evidence determined a third one adversely to the Trust Company, and after the Trust Company had escaped from serious consequences by successfully pleading the statute of limitations, we are now solemnly told by counsel that there never was any question about the genuineness of the indebtedness, fixed at the sum named; and, based upon that figment of the imagination, the Court is informed that the purpose of this litigation was to smother the Trust Company with expenses until it should succumb in the unequal struggle.

Instead of assuming this extraordinary attitude, the Trust Company might well appreciate that it had been liberally favored by fortune in receiving payment in full of its judgment against the Belt Company. We have no desire to reargue those issues, but in view of counsel's statement above quoted, it may assist the Court if we point out a few pertinent facts and circumstances, in addition to those contained in our original brief.

The gravamen of the action, as above stated, was the charge that the Trust Company dominated and controlled the other companies to their disadvantage. The extract from Judge Thayer's opinion, above quoted, presents the situation with a considerable decree of accuracy. The master had already found in this case that there was a domination and control exercised by the Trust Company, but on final analysis he held that it was not sufficient in amount

or extent to come within the rule as he understood it. He said (Rec. II, 643, 644):

> The Trust Company was the central and important and controlling corporation of the aggregation, known as the Stilwell companies, and which, in large measure, was influential in bringing into existence all the corporations, whose operations are involved in complainants' bill, and which were substantially financed by it.
>
> If there was any dominating control exercised in the controverted transactions between the Trust Company and any of these other companies, by reason of the mutuality of the officers and directors representing the companies, so dealing with each other, it is evident from the proofs in the record, that such domination must have been on the part of the Trust Company, and not on the part of the subordinate companies.
>
> From the foregoing statements of the witnesses, Cone and others, it cannot be questioned that A. E. Stilwell was the influential and dominant personage, who, more than any other person connected with it, outlined the policies of the Trust Company, and likewise, with E. L. Martin, and other associates, *practically determined those of the railroad companies interested in this accounting.*

Can anyone doubt that with this finding as a basis, the master might well have concluded that the unreasonable and excessive charges of the Trust Company against the Belt Company and its subsidiaries should be eliminated from the accounts, or reduced to fair and equitable amounts? Had he done so, it is too plain for argument that his finding would have been supported by substantial evidence, and hence unassailable.

The master pointed out (Rec. II, 644) that the Trust Company "may have received, and did, in fact, receive large compensation for its services, in the way of commissions, trustee fees and bonuses".

Again he said (Rec. II, 645):

> . . . it is evident from the testimony of E. L. Martin and others, that there was at all times manifested a friendly disposition to deal "liberally" with the Trust Company.

In respect of the charge that the Trust Company had taken $350,000 of Union Terminal bonds, issued for the purpose of building the railroad of that company, and had used those bonds to apply on the indebtedness of the Belt Company in the construction of another road (Rec. II, 887), the master intimated that "the respondent might be held liable therefor to other parties".

On the charge of extravagance in the cost of construction and the issuance of bonds, the master said (Rec. II, 852):

> It may be properly suggested that there has been produced in this cause considerable testimony tending to show that all the roads forming the Belt System were extravagantly built, and were bonded largely in excess of their actual cost.

As to the charge of excessive trustees' fees, commissions, bonuses, etc., he said (Rec. II, 705):

> There may rightly be a difference of opinion as to whether such charges were reasonable at all times.

As to the charges made by the building department, the master said (Rec. II, 708):

> It is possible that some of the charges for the work done may have been higher than it was necessary to pay for the same work on the outside.

The Belt Company in 1896 entered into a contract, set out in the record (Rec. II, 69), for the construction of another railroad, called the Kansas City & Northern Connecting Railroad. Its duties under this contract were those of a general railroad construction contractor. Complainants contended in this case that the Trust Company, through its control over the Belt Company, wrongfully caused it to enter into this construction contract. The result of the contract was a large loss, which the Belt Company was compelled to bear. It appears from the master's report (Rec. II, 669) that a large part of the $360,000 owing by the Belt Company to the Trust Company on March 31, 1899, was made up of this deficit. It was contended by complainants that this construction contract was *ultra vires* and beyond the corporate capacity of the Belt Company. To say the least, this was a debatable question, and the finding might well have been against the Trust Company.

With respect to the Stilwell contract, respondent's counsel does not deny that the Belt Company sustained an enormous loss because it accepted an uncompleted railroad in satisfaction of a contract for a completed road, the Trust Company being in complete control of both companies and it and its friends being the beneficiaries of the transaction. He is content, however, to point to the statute of limitations and to characterize the assertion of this claim by complainants as an effort to smother the Trust Company with expenses until it should become exhausted. But was the statute of limitations a bar to a recovery in this case? We thought not, for the reason that neither the statute of limi-

tations nor the doctrine of laches should be applicable during a period when the Belt Company was under the domination of officers of the Trust Company, and while it was caused to act in the interest of the latter. This, of course, is not now a live question, since it has been foreclosed by the decree. But it must be admitted that it was a real question in the case. The evidence, as we have heretofore stated, clearly warranted a finding that such domination and control actually existed, and that, therefore, the claim was not barred.

Equally unsatisfactory is respondent's answer to the De Goeijen claim. True, the master, after holding that Wilcox's testimony disposed of the item in favor of the Trust Company, also held that it was embraced within the general terms of the settlement between the reorganization committee and De Goeijen. But this was a disputed issue. Petitioner did not think it was included within the very general language of the document, and evidently counsel for the Trust Company agreed with that contention in 1904, when, after a thorough investigation, his conclusion was (Rec. I, 563, 564): "This item must be allowed." This, it may be added, was also the view entertained by prior counsel for the Trust Company, as well as by Mr. Mecartney and his associate (Rec. I, 512).

Complaints of charges of fraud come with poor grace from the Trust Company.

We have pointed out in our main brief (p. 11) that the master did not regard the complainants' action as one involving charges of actual fraud, and also that the Trust Company itself, when the matter was fresh in its mind, put itself on record, in a statement verified by one of its

counsel, that no charges of actual fraud had been made. To this may be added the statement of counsel for the three stockholders (Rec. II, 961), "that the entire charge of 'domination' and resultant fraud and unfairness is based solely upon the averment (as to community of directors); that therefore and thereby the entire transactions between the two companies . . . were constructively 'fraudulent'." Their characterization of the intervening petition (Rec. II, 957) is equally free from charges of fraud. Nevertheless, the brief of respondent now complains that it was charged with fraud, and intimates that such charges are evidence of a desire to oppress and injure it.

It will be noted, however, that the Trust Company, at the very inception of this litigation, itself set the example of making wholesale charges of fraud and fraudulent conduct against its adversaries; charges which were not subsequently sustained. In its answer to the Cambria bill, filed in November, 1900 (Rec. II, 33) the Trust Company, while admitting the justice of the Cambria's claim, nevertheless insisted (Rec. II, 35) that the suit was not instituted in good faith, but, on the contrary, that the Belt Company, the Philadelphia reorganization committee and the petitioner were acting collusively for the fraudulent purpose and design of hindering and delaying and defrauding the creditors of the Belt Company.

It was also alleged that the four actions for the foreclosure of mortgages on the properties of the Belt Company and its subsidiaries were based upon the false and fraudulent pretense that there had been a default in the payment of interest, and for the fraudulent purpose, design and intent by said parties to cut off and defeat unsecured creditors, and not for the purpose of enforcing payment of the

mortgage bonds (Rec. II, 36, 37); and that the action of the Provident Life & Trust Company of Philadelphia in instituting the foreclosure suits was fraudulent and for the purpose of hindering and delaying unsecured creditors of the Belt Company. It was charged that the Philadelphia committee, the Belt Company and the petitioner "wrongfully and wickedly" conceived the plan of escaping the payment of the unsecured debts of the Belt Company by means of said foreclosure suits, and the Cambria suit simultaneously instituted (Rec. II, 41). These allegations are repeated throughout the answer (Rec. II, 43, 44, 45); again, in the answer of the Central Improvement Company, represented by the same counsel (Rec. II, 77, 78, 79, 83); and again in the Trust Company's answer to the ancillary bill (Rec. II, 115, 116). The Trust Company made the same allegations of fraud in the Bierce case (Rec. I, 447), and in the Provident Life & Trust Company foreclosure suit against the Belt Company (Rec. I, 599).

The Trust Company even went so far as to allege that an answer not then in existence, but which it was supposed the Belt Company might or would file at some time in the future, would be, if filed, collusive and fraudulent, for the purpose of defrauding its own creditors. In that respect, after noting the failure of the Belt Company to file an answer, it said (Rec. II, 116):

> If it should file any such answer, the same will be collusive and fraudulent, for the purpose of carrying out the purposes of said suit in hindering, delaying and defrauding the creditors of the said Kansas City Suburban Belt Railroad Company.

However, this anticipatory allegation of fraud was stricken out by the court (Rec. II, 161).

Manifestly, the Trust Company went to the extreme limit in charging actual, purposeful and intentional fraud on the part of all its adversaries. Its charges were couched in vigorous and emphatic language, and included the Provident Life & Trust Company, the complainant in the four foreclosure suits, the Cambria Company, the Philadelphia committee, the Belt Company and petitioner.

It also charged that the reorganization plan and agreement were fraudulent (Rec. II, 866). The master devotes four pages of his report to a discussion of these charges of fraud (Rec. II, 866-870) holding that they were unfounded. They were made, as he points out, notwithstanding the fact that the Trust Company was a depositary under the reorganization plan, and that it cooperated with the reorganization committee and used its influence, by correspondence and otherwise, to induce bondholders and stockholders to deposit their securities with the committee; and that it deposited its own stocks and bonds in a substantial amount, and in that way benefited from the plan (Rec. II, 870).

But the Trust Company's charges of fraud were not sustained. The master made specific findings as follows (Rec. II, 852, 853, 854):

> The foreclosure sales were legally made, and the Trust Company, though a party to the foreclosure proceedings, has not at any time objected to the regularity thereof, or the sufficiency of the amounts received for the properties sold.
>
> There is no evidence in the record showing actual frauds either at or in the inception of the reorganization scheme, or in any proceeding thereunder; including the foreclosures of the mortgage liens on the properties sold and the conveyance to the Southern Company.

These findings of the master were approved by the district court; and while the master's conclusion upon the liability issue has been overturned, his finding with respect to the absence of actual fraud was not criticized or modified.

It thus appears that petitioner and those associated with it in the litigation were subjected to repeated and reiterated charges of actual and intentional fraud, and that these charges were not sustained. If the respondent's contention with respect to the taxation of costs between solicitor and client is correct, petitioner would be entitled to charge against the respondent its disbursements for attorneys' fees and other expenses incurred in this litigation. It is unnecessary, perhaps, to say that petitioner does not feel that, under the law as it exists in this country, it has any excuse or justification for putting forward a claim of that character.

The Trust Company, as pledgee of the collateral security, performed no services for the benefit of the Belt Company, as pledgor.

Respondent contends in its brief (p. 38 *et seq.*) that the Trust Company, as a pledgee, was engaged in defending the title of the Belt Company as pledgor, and that it is entitled to be compensated therefor through an allowance of counsel fees and other expenses. It needs but a brief consideration of the record to discover that there are no facts upon which such a claim can properly rest.

As we have pointed out in our main brief (p. 21), substantially all the collateral which the Trust Company received from the Belt Company had, with the exception of the Central Improvement Company stock, been sold, either prior to the inception of the litigation or very shortly thereafter, and

the proceeds applied by the Trust Company upon the indebtedness in question. In these instances, therefore, after such sales were made, there was no pledged collateral whose title needed defending. The proceeds of the sale of the collateral remained as a bookkeeping credit, to be applied in the reduction of the Trust Company's account or otherwise, as the rights of the parties might appear on final hearing. The Central Improvement lands were in the hands of its own receiver, who at all times was a party to this action, and were being administered by him, who presumably gave them all the protection needed. The stock was of no value, aside from the lands. There was, therefore, no pledged property for the Trust Company to protect. There was no property whose title had to be defended by it in the interest of a pledgor.

But if the collateral security had remained intact in the hands of the Trust Company throughout the litigation, as it did not, the Trust Company could not claim that it was defending the title of the Belt Company, as pledgor, within the rule which gives the pledgee an allowance for so doing, for the simple reason that the Trust Company was not acting for the benefit of the pledgor, as a quasi or emergency agent; but, on the contrary, it was acting solely in its own interest, to serve its own individual purposes. It is not intended to criticize the Trust Company for so doing, but, undoubtedly, it had no thought of benefiting the Belt Company, or of benefiting anybody except itself. The attitude of the Belt Company in the litigation was that the Trust Company had wrongfully acquired the collateral to secure an indebtedness that had no existence, and that, therefore, it or its proceeds should be returned; and this the Trust Company denied. The attitude of petitioner was that the collateral or its proceeds had passed to it with the

foreclosure of the old companies; and this the Trust Company denied. It was an ordinary, everyday litigation, where each party strives to the best of its ability to protect its own interest. It is little less than absurd to suppose that, under these circumstances, the Trust Company was acting for the benefit of the Belt Company, as a quasi or emergency agent, to protect its interest.

The proper execution of the mandate of this Court.

To the authorities cited in our main brief (p. 24 *et seq.*), we desire to add the following statement from *Second Daniell's Chancery Practice, Fifth Edition, page 1411:*

> When costs are ordered to be taxed simply, it means as between party and party. If the costs are to be taxed as between solicitor and client, or if any costs, charges, and expenses, not strictly costs of suit, are to be allowed on the taxation, or any variation from a taxation as between party and party, is to be allowed, it should be expressed in the decree.

October 24, 1929.

Respectfully submitted,

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RESPONDENT'S BRIEF

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CHARLES ELMORE
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No. 22.

In the Supreme Court of the United States

October Term, 1929.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GUARDIAN TRUST COMPANY, *Respondent.*

STATEMENT AND BRIEF FOR RESPONDENT.

JUSTIN D. BOWERSOCK,
ROBERT B. FIZZELL,
JOHN F. RHODES,
Attorneys for Respondent.

SMITH-GREVER, LAW PRINTERS KANSAS CITY, MO

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In the Supreme Court of the United States

October Term, 1929.

No. 22.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GUARDIAN TRUST COMPANY, *Respondent.*

STATEMENT AND BRIEF FOR RESPONDENT.

STATEMENT.

The pertinent facts and proceedings involved in this case, so far as they affect the substantial rights of the parties, have been three times set forth and determined by the United States Circuit Court of Appeals for the Eighth Circuit, and appear in 201 Fed. 811, 210 Fed. 696, and 28 Fed. 2d, 233. The facts so found by the court form the basis of the present proceeding, which

seeks to have a proper taxation of costs paid out by the respondent in defending the litigation. On the merits, the final decision has been in favor of respondent. It remains to determine whether the District Court had power, under the facts resulting in such decision, to allow the respondent certain extraordinary costs.

We contend that all the facts essential to sustain that power have been found by the Circuit Court of Appeals upon the former appeal; that such finding as to the facts is final and conclusive upon the parties hereto, and that the petitioner is not entitled to relitigate them in this proceeding. The Circuit Court of Appeals found, we submit, the following facts:

That the Southern Company caused the Cambria suit to be filed and that such suit was in fact the suit of the Southern Company;

That it was a baseless and unwarranted action, filed for the ulterior purpose of wrongfully depriving the Trust Company of the collateral pledged to it as security for the debt of the Belt Company;

That the bills filed by the Belt Company and its receivers were also filed at the instance and for the benefit of the Southern Company and that such bills were in fact the bills of the Southern Company.

We believe that the decisions of the Court of Appeals, the bills and petitions filed by the Cambria, Belt and Southern Companies, and the report of the master will be all of the voluminous record which this court need to examine. However, in order that the court may have the whole picture before it, we are giving what we believe to be a fair resume of the facts disclosed by the record upon which the Court of Appeals acted and upon which the power of the District Court depends.

THE FACTS.

The Guardian Trust Company was organized as a Missouri trust company in 1889. The Company was a flourishing institution and during the period from 1889 to 1900 played a large part in financing various railroad and other enterprises in and around Kansas City, Missouri.

The enterprises financed by and through the Trust Company, and whose affairs are involved in this proceeding, were Kansas City Suburban Belt Railroad Company, Consolidated Terminal Railway Company, the Union Terminal Railroad Company, Kansas City and Independence Air Line, The Kansas City Suburban Belt Railroad Company (a consolidation of Kansas City Suburban Belt Railroad Company and Consolidated Terminal Railway Company), Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, Northern Townsite Company, The Port Arthur Channel & Dock Company, Kansas City, Pittsburg & Gulf Railroad Company and Kansas City and Northern Connecting Railroad Company.

The Kansas City and Independence Air Line and the Union Terminal Railroad Company were subsidiaries of the Kansas City Suburban Belt Railroad Company. The three functioned as a unit, were generally referred to collectively as the "Belt Company," and owned and operated a belt line or terminal system in Kansas City and its environs, from Grandview in Jackson County, Missouri, to the stockyards in Argentine, Kansas. The Port Arthur Channel & Dock Company owned and operated a similar terminal system at Port Arthur, Texas. The Kansas

City, Pittsburg & Gulf Railroad Company owned and operated a trunk line from a connection with the Belt Line at Grandview, to a connection with the Dock Company's road at Port Arthur.

The Central Improvement Company, also a Belt Company subsidiary, held the title to valuable terminal lands appurtenant to the Belt Line. The Missouri Elevator and Terminal Company owned grain elevators along the Belt Line. Fairmount Amusement Company, which operated an amusement park known as Fairmount Park, had been organized to promote passenger traffic on the Belt Line. The Kansas City and Northern Connecting Railroad Company was formed to build a connecting road between the Belt Line in Kansas City and the town of Pattonsburg, Missouri, to provide certain northern railroads with an entrance into Kansas City. The Northern Townsite Company held title to certain townsites on this proposed road to Pattonsburg.

With all these companies the Guardian Trust Company had had, up to 1900, a continuous course of dealing, extending over a period of years, resulting in thousands of transactions involving millions of dollars. All of the railroad companies named had issued bonds, totaling many millions of dollars. The Trust Company was corporate trustee in the railroad mortgages securing the bonds. The securities of the railroads had been marketed by them through the agency of the Trust Company, it receiving a commission for its services. It had, furthermore, advanced money to them for pressing needs, and acted as their banker and fiscal agent.

John W. Gates, of Chicago, had purchased heavily of the securities of the railroad companies mentioned. Gates also purchased stock in the Trust Company, but his interest in the railroad was much greater than in the

Trust Company. In 1899 Gates and Stilwell, president of the Trust Company, became involved in a bitter personal controversy, and Gates sought, but without success, to oust Stilwell from the control of the Trust Company. Thereafter Gates was bitterly antagonistic toward the Trust Company. (Rec. V. 2, p. 672.)

On April 1, 1899, receivers were appointed for the Kansas City, Pittsburg & Gulf Railroad Company. Gates and his associates, heavily interested in the bonds of the company, organized themselves into a bondholders' reorganization committee to reorganize the finances of the company. It was recognized that any new or successor company must acquire the Port Arthur Channel & Dock Company properties and the Belt Line properties in Kansas City, in order that the new company might have one continuous line of road from Kansas City to the Gulf.

To this end, in November, 1899, the committee promulgated a plan of reorganization whereby it proposed to organize a new company, to be called the Kansas City Southern Railway Company, and offered the bondholders and stockholders of the Belt Company and the Dock Company securities of the new company in exchange for their holdings in the old companies. The plan contemplated, also, the payment of the floating debts of the old companies. At this time the Belt Company was a solvent going concern. Pursuant to the proposals, the holders of substantially all of the outstanding stocks and bonds of the Belt and Dock companies deposited their securities in exchange for new securities of the proposed company. (See 201 Fed. 813.)

On March 19, 1900, the Gulf Company properties were sold at foreclosure to Max Pam, Gates' personal attorney. Pam on the same day conveyed the property to the Kan-

sas City Southern Railway Company, which had been incorporated a few days before. On April 1, 1900, the Southern Company demanded the resignations of the then officers and directors of the Belt Company, and from that date the Belt Company was wholly in the control, and functioned as a part, of the Kansas City Southern Railway Company.

The Trust Company had, during the years of its close association with the Belt Company, made large loans to the Belt Company, represented by the notes of the latter, often secured by the pledge of stock or bonds of the Belt's subsidiary companies. Between September 23, 1898, and November 27, 1899, the Belt Company executed promissory notes to the Trust Company totaling over $700,000. (Rec. V. 2, p. 752.) At the time of the Gulf Company foreclosure and sale, the indebtedness of the Belt Company to the Trust Company was about $400,000. As security for this indebtedness the Trust Company held miscellaneous securities of the Belt Company subsidiaries (Rec. V. 2, p. 755), the most valuable of which were 1120 shares of stock (being substantially all) of the Central Improvement Company. This company owned terminal lands worth over $200,000.

On September 1, 1900, the indebtedness of the Belt Company to the Trust Company being in default and unpaid, the Trust Company gave written notice to the Belt Company that unless the debt were paid in the meantime, it would on September 7, 1900, proceed to sell, under the terms of the pledge, the securities pledged with it, for application on the debt.

On September 6, 1900, the Cambria Steel Company, a Pennsylvania corporation, appearing by Frank Hagerman and L. C. Krauthoff, filed a suit at law in the Federal Court in Kansas City, against the Belt Com-

pany, on an open account for steel rails furnished. The fact was, though no reference to it was made in the suit, that the Cambria Company held the same sort of collateral for its debt as did the Trust Company. (Rec. V. 2, p. 672.) The Belt Company, through an associate of Mr. Pam (who was then counsel for the Kansas City Southern Railway Company) waived summons and confesssed judgment, on the same day. At the same time, on the same day, execution was issued against the Belt Company, and at the request of the attorneys of the Cambria Company, was returned *nulla bona*, without any attempt being made to have the execution satisfied.

On the same day, in the same court, and appearing through the same attorneys, the Provident Life and Trust Company, a co-trustee in the Belt, Union Terminal, Air Line and Consolidated Terminal mortgages, filed four separate bills for the foreclosure of those mortgages. As a preliminary to these suits, the Kansas City Southern Company, then holding all of the bonds issued by said railroad companies, as the result of the Reorganization Plan, had, under powers given in the mortgages, removed the Guardian Trust Company as co-trustee in the mortgages. These foreclosure suits were later consolidated, and were consummated by a foreclosure sale, the Kansas City Southern being the purchaser at the sale. At about the same time, and in the same manner, through a foreclosure suit in the Federal Court in Texas, the Kansas City Southern acquired the properties of the Port Arthur Channel & Dock Company.

The Trust Company was a party to the Belt foreclosure suits, and before the decree was entered, it asked that the Southern Company be made a party, and asked leave to file an amended supplemental answer asserting that the Southern Company, as the successor of the Belt

Company, and by virtue of its agreement to pay the Belt indebtedness, was liable to the Trust Company for the Belt indebtedness to it. The court denied leave to file such answer, but on condition that the complainant should file a stipulation that the decree should be without prejudice to the claim of the Trust Company against the Southern Company. The last paragraph of the foreclosure decree expressly saved and reserved to the Trust Company the rights to plead and insist in any other present or future litigation that the Southern Company was liable to it for the Belt indebtedness. (See findings to this effect in *Central Improvement Co.* v. *Cambria Steel Co.*, 201 Fed. 811, 815.)

On the same day (i. e., September 6, 1900), in the same court, and appearing through the same attorneys, the Cambria Steel Company filed its creditors' bill, based upon the confessed judgment against the Belt Company procured on that day (upon a petition that day filed, as above set forth), naming as defendants the Belt Company and its subsidiaries, and the Guardian Trust Company. (Rec. V. 2, pp. 3-20.) With the filing of this Cambria bill on September 6, 1900, the present litigation began.

The allegations of the bill will be noted more in detail in a later connection. However, the bill asserted that the Trust Company organized, dominated, controlled and manipulated the Belt Company and its subsidiaries pursuant to a fraudulent scheme and design for the exploitation and wholesale fleecing of those companies and the investors in their securities; that the Trust Company, as trustee in the railroad mortgages, and as trustee for and agent of the companies in managing and disposing of their stocks, bonds and other assets, committed flagrant breaches of trust, resulting in millions of dollars of loss to said companies; that the Trust Company had failed

to account for, and had converted to its own use, some $7,000,000 of securities of the Belt Line companies; that the Trust Company caused to be formed the Elevator, Amusement, Central and Townsite Companies, with the fraudulent intent and purpose of defeating the creditors of the railroad companies, by the diversion of assets rightly belonging to those companies; that the Trust Company wrongfully and fraudulently charged to the Belt Company a loss of over $300,000 incurred by the Trust Company in constructing the Pattonsburg road; that for the purpose of hindering, delaying and defrauding the creditors of the Belt Company in the collection of their respective demands, and particularly the Cambria Company in the collection of its judgment, the Trust Company made various false and unfounded claims and demands against the Belt Company, and caused the Belt Company to go through the form of executing a number of pretended promissory notes, aggregating about $500,000, to the Trust Company, and for the pretended purpose of securing the payment of said pretended notes, caused the Belt Company to deposit with the Trust Company various named securities of the Belt subsidiaries.

The bill further alleged that the Trust Company was totally insolvent; that it had outstanding a large number of matured obligations, the holders of which were pressing for payment, and that it was wholly unable to meet such demands; that it was threatening to sell the notes which it fraudulently caused the Belt Company to go through the form of executing, and the collateral pretended to be pledged as security therefor—all to the end that the creditors of the Belt Company might be hindered, delayed and defrauded; that the property of the Elevator, Amusement, Central and Townsite Companies in equity belonged to the Belt Company, and that it is necessary

for the protection of the creditors of the Belt Company that receivers be appointed for said companies.

The bill prayed (a) that an accounting be taken of the various transactions and dealings between the Trust Company and the Belt Company, or by the Trust Company as trustee and agent of and for the Belt Company, and that the Trust Company be required to pay the balance found to be due the Belt Company, plus all losses incurred in transactions by the Trust Company with the property of the Belt Company; (b) that the Trust Company be decreed to hold the pledged securities of the Belt subsidiaries in trust for the creditors of the Belt Company; (c) that the property and assets of the Elevator, Amusement, Central and Townsite Companies be declared to be in equity the property of the Belt Company and chargeable with the debts of the Belt Company; and (d) that a receiver be appointed for the Belt Company and its property and of the property of the subsidiary companies; and that the Trust Company be enjoined from selling or disposing of the Belt Company notes and collateral.

After the bill was filed, and on the same day, the Belt Company entered its appearance in the cause (Rec. V. 2, p. 28), and on that day, upon inspection of the bill and without notice to the Trust Company, the court granted the injunction prayed for and appointed receivers for the Belt Company. (Rec. V. 2, p. 28.)

On the same day, September 6, 1900, the court appointed receivers for all of the Belt subsidiary companies.

It may also be stated that shortly thereafter, on October 23, 1900, Gates and his associates, appearing by the same attorneys who filed the Cambria bill, filed their bill for the appointment of a receiver for the Guardian Trust Company, asserting, as one of the grounds for the ap-

plication, the predicament of the Company occasioned by the huge claims made against it in the Cambria bill. A receiver was appointed, but was discharged two years later.

On November 5, 1900, the Trust Company answered the Cambria bill. (Rec. V. 2, p. 33.) The answer, after denying the allegations of fraud and misconduct contained in the bill, alleged that the Cambria suit against the Trust Company and the Provident Life and Trust Company suit for the foreclosure of the Belt mortgages, were fraudulently and conclusively brought, pursuant to a fraudulent scheme of the Belt Company and the Kansas City Southern Railway Company to defraud the creditors of the Belt Company, including the Trust Company; that there had in fact been no bona fide default in the payment of the Belt mortgages; and that the Belt Company and the Southern Company induced the Cambria Company to bring this suit, under an agreement to indemnify it from loss and expenses in connection therewith and to see that its debt was fully paid. The answer asserted that the Trust Company never, until the filing of the bill of complaint, had any knowledge or information that there was any claim or pretense in any quarter that it owed the Belt Company anything, or that the Belt Company did not owe it the amounts specified in the promissory notes executed by the Belt Company. It denied that any request had been made by the Belt Company for an accounting (as alleged in the bill) and denied that the Cambria Company ever had any information or belief that such a request had been made; and denied that the complainant in good faith desired an accounting.

On December 3, 1900, the Cambria Steel Company replied to the answer of the Trust Company merely by as-

serting that the answer was very uncertain, evasive and insufficient in law to be replied unto. (Rec. V. 2, p. 95.)

The receivers of the Belt Company filed an ancillary bill of complaint on November 20, 1901, through attorneys who also represented the Kansas City Southern Railway Company. (Rec. V. 2, p. 97.) This bill substantially repeated the allegations of the Cambria bill, except that in many instances the charges of fraud and breach of trust on the part of the Trust Company were enlarged upon. It alleged in addition to the allegations contained in the Cambria bill, that the Trust Company, while acting as agent for the Belt Company, took out of the earnings and assets of the Belt Company large sums of money which it pretended to expend for and on behalf of the Belt Company, but which in fact it did not expend for the Belt Company, and for which it never accounted; that the Belt Company furnished to the Trust Company large sums of money for the purchase of property to be held by the Elevator Company, the Amusement Company, the Townsite Company and the Central Improvement Company, and that the Trust Company, though often requested so to do, had never accounted for the same; that certain shares of stock of the Central Improvement were, though belonging to the Belt Company, issued to the Trust Company, and it disposed of the same, without accounting therefor to the Belt Company; and that $350,000 was furnished by the Belt Company to the Trust Company to be expended in fitting up Fairmount Park, for which the Trust Company never accounted.

Upon the filing of this ancillary bill, the Cambria Steel Company practically disappeared from the case.

On February 27, 1905, the Kansas City Southern Railway Company filed an intervening petition in the cause. (Rec. V. 2, p. 166.) This petition contained many of the

allegations of fraud and breach of trust on the part of the Trust Company, made in the original and ancillary bills. It alleged, in addition to these allegations, that the Trust Company, while acting as agent and trustee of the Kansas City Northern Connecting Railroad Company, had taken 1130 of the first mortgage bonds of the Connecting Company, owned by the Belt Company, and worth $845,415:00; 16 second mortgage bonds of the Connecting Company, owned by the Belt Company, worth $7,200.00; 6250 shares of stock of the Connecting Company, owned by the Belt Company, worth $37,500.00. The petition also alleged that on or about July 20, 1899, the Trust Company took from the Belt Company 3920 shares of stock of the Connecting Company which it claimed to hold as collateral security for an alleged indebtedness from the Belt Company to it, and disposed of said stock for $19,885.71. The Southern Company asserted that the Trust Company was indebted to it in connection therewith in the sum of $995,415.00 and alleged that the lands of the Central Improvement Company and all the collateral held by the Trust Company for the alleged indebtedness of the Belt Company to it passed under the after acquired property clause of the Belt Company mortgage.

In its answer filed March 7, 1905, to the intervening petition of the Southern Company, the Trust Company, after putting in issue the allegations of said petition, asserted that the Southern Company, as the successor of the Belt Company, and by reason of the agreement made by it to pay the Belt Company debts, was liable to the Trust Company for that indebtedness. (Rec. V. 2, pp. 186, 200.)

On March 22, 1905, the Belt Company receivers filed an Amended and Supplemental Ancillary Bill. (Rec. V. 2,

p. 202.) This bill fixed the amount which the Trust Company, while in domination and control of the Belt Company, took out of its earnings and assets, which it pretended to, but did not, expend for and on account of the Belt Company, and for which it never accounted, at $500,000. The bill enumerated a great list of other claims against the Trust Company, not mentioned in the previous bills, totaling more than $4,000,000 in amount. They were based upon charges of conversion, breach of trust, falsification of accounts and if we understand rightly plain stealing. Apparently the bill attacked every transaction between the Trust Company and each and all of the railroad and subsidiary companies from the organization of the respective companies down to that date. Among other things, the bill claimed that all commissions and trustee's fees charged by the Trust Company for its services, as agent, in disposing of the securities of the railroad and subsidiary companies, were unlawfully collected, and that the Belt was entitled to credit therefor. This on the theory that the Trust Company absolutely dominated and controlled said companies, and used them and each of them as its own instrumentality or dummy for its own benefit and profit, and that the Trust Company occupied a fiduciary relation to said companies, and that contracts with said companies for compensation were unlawful.

Many of the transactions attacked in this bill occurred more than ten years prior to the filing of the original Cambria bill, and more than 15 years prior to the filing of the bill in which the charges were, for the first time, made.

On May 1, 1905, the Kansas City Southern Railway Company filed its amended intervening petition in the cause. (Rec. V. 2, p. 269.) This petition set up, in ad-

dition to the allegations contained in prior bills, a cause of action against the Trust Company arising out of its breach of duty as a trustee under the Union Terminal Railroad mortgage dated February 1, 1893. The petition alleged that the Trust Company, unmindful of its duties as such trustee, sold the bonds of said company to innocent purchasers for value, and unlawfully and improperly diverted the proceeds of said sales from the purposes for which they were intended, and unlawfully and improperly used said proceeds to diminish from time to time the alleged indebtedness from the Belt Company to it; that bonds of the Union Company of the par value of $1,350,000 and of the actual value of $1,215,000 were thus diverted by the Trust Company from the uses and purposes for which the bonds were issued, as the Trust Company at all times well knew; and that after the completion and equipment of the Union Company, and when there was no occasion or necessity for a sale or disposition of said bonds, the Trust Company in violation of its duties as trustee, fraudulently sold and put afloat additional bonds of the Union Company.

In its answer, filed May 20, 1905, to the amended intervening petition of the Southern Company, the Trust Company, among other allegations, renewed its assertion that the Southern Company, as the successor of the Belt Company, and by reason of its agreement to pay the Belt indebtedness, was liable for the indebtedness of the Belt Company to the Trust Company. (Rec. V. 2, pp. 293, 311.)

On November 16, 1907, the Kansas City Southern Railway Company and the Belt Company and its receiver jointly filed a supplemental bill in the cause (Rec. V. 2, p. 477). The new matter alleged concerned three suits filed in the Circuit Court of Jackson County, Missouri,

two on March 15, 1905, and one on July 2, 1906, by the Guardian Trust Company against the Kansas City Southern, and which had been set down for trial on the docket of that court on December 2, 1907. The first two suits had been brought against the Southern Company by the Trust Company, on the Belt indebtedness to it, on the theory that the Southern Company was liable for that indebtedness as the successor of the Belt Company and by reason of an agreement to pay that indebtedness as a part of the plan for the reorganization of the Gulf, Dock and Belt Companies. The third suit was brought by the Trust Company against the Southern Company on certain indebtedness owing to the Trust Company by the Kansas City, Pittsburg & Gulf Railroad Company, on the theory that the Southern Company, as the successor of the Gulf Company, was liable for that indebtedness. The bill sought to have the prosecution of these three state court suits enjoined. It alleged that by reason of the prior institution of this action and the filing of the various bills and the various proceedings therein, the federal court had acquired a prior and superior equitable jurisdiction over all the parties to the proceeding and all the issues therein involved; that by the injunction issued at the outset against the sale of the collateral held by the Trust Company, as well as by its subsequent proceedings, the court took possession of and impounded the notes in question, and had assumed possession and jurisdiction over the notes, bonds, assigned accounts and other property held by the Trust Company as collateral to its pretended indebtedness against the Belt Company; and such property was alleged to be within the exclusive jurisdiction and control of the federal court.

On the day upon which this bill was filed, the court

granted a temporary restraining order against the further prosecution of the state court suits (Rec. V. 2, p. 554). On February 22, 1908, this injunction was made permanent (Rec. V. 2, p. 561). A motion to dissolve the injunction having been denied (Rec. V. 2, p. 567), the Trust Company appealed from said action of the court to the Circuit Court of Appeals for the Eighth Circuit (Rec. V. 2, p. 569). The Circuit Court of Appeals reversed the lower court and dissolved the injunction. See *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 171 Fed. 43 (1909) (Rec. V. 2, p. 573).

This was the second attempt to enjoin the two state court suits based upon the Belt indebtedness. In August, 1905, the Southern Company had filed a bill to enjoin the prosecution of the suits, and obtained an injunction. The order granting the injunction was reversed by the Circuit Court of Appeals in May, 1906. See *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 146 Fed. 337 (C. C. A., 8th).

The issues raised by the foregoing bills and the answers thereto were referred to a Special Master, appointed by the court on November 7, 1900 (Rec. V. 2, p. 94). Between January, 1903, and October, 1904, over 8,000 pages of testimony were taken, all on behalf of the complainants. In December, 1904, the Trust Company unsuccessfully moved the Master to require the complainants to close their proofs. Subsequently, such a rule was granted, and the complainants were given until March 15, 1905, to complete their case, and the Trust Company from March 15, 1905, to April 15, 1905, to introduce its proofs. But March 15, 1905, came and went, and the complainants were still introducing evidence. The entire ledger account between the Trust Company and the Belt Company, and each

and every item thereof, over 6,000 in number, from the first day the companies transacted business together, in January, 1887, until the filing of the suit, a period of thirteen and a half years, were scrutinized and attacked.

In addition, the ledger accounts of the Trust Company with all the constituent and related companies were gone into, including every transaction with the Air Line, the Union Terminal, the Consolidated Terminal, the Central Improvement Company, the Elevator Company, the Second Street Company, the Amusement Company, the Northern Connecting Company, the Townsite Company, the Gulf Company and the Dock Company. The Trust Company was required to produce its vouchers, musty with age, covering every transaction shown on these accounts. Expert accountants were examined upon these papers, and testified for months at a time. The complainants were by an order of court given access to all of the books of the Trust Company, and for weeks they examined them. The Trust Company complained to the Master and to the court that the processes of the court were being abused in wasteful litigation, but the court declined to interfere. During the year 1905 almost daily hearings were had before the Master. In January, 1906, when the hearings closed, 36,000 pages of testimony had been taken (see Master's report, Rec. V. 2, p. 579). From 10,000 to 12,000 items of account had been scrutinized (Rec. V. 2, p. 580). The stenographer who took and transcribed the testimony was paid $25,000 for his services. The record of the hearing before the Master consisted of 58 volumes. The Master in his report, filed May 21, 1910, over four years after the hearings ceased, and nine and a half years after the case had been referred to him, consumed

nearly 400 printed pages in discussing and deciding the issues involved (Rec. V. 2, p. 575).

The Master's findings of fact were wholly in favor of the Trust Company. The suit had been grounded upon the proposition that the Belt and its subsidiary companies were so dominated and controlled by the Trust Company that their officers and directors were merely agents of the Trust Company, and that the companies were conceived, organized and manipulated by the Trust Company pursuant to a gigantic scheme to defraud investors in their securities. The Master found that there was no scheme to defraud; and that the companies were not organized, dominated, controlled or manipulated by the Trust Company. For thirteen independent reasons, "either appearing on the face of the bills, or practically undisputed in the proofs," the Master found the bills to be wholly without equity (Rec. V. 2, p. 647).

He found that at no time did the Trust Company own a majority, or even a substantial minority, of the stock of any of the companies; that the dealings of the Trust Company with the other companies were in all respects legitimate and proper; that there had been no overreaching or breach of duty on the part of the Trust Company; that its charges for services in marketing the securities of the other companies were not excessive; that its position as trustee in railroad mortgages did not disqualify it from handling those securities, or from receiving the same in pledge; that the transactions between the Trust Company and the other companies were open, a matter of record, and that the bookkeeping was full, complete and accurate as to all entries; that the accounts between the companies had been regularly stated and audited each month by formal certificates exchanged by their respective auditors, "and that the books tallied

to a cent" (Rec. V. 2, p. 648); that all the transactions attacked in the bills had at all times been known to the stockholders and bondholders of the respective companies, and had been expressly ratified by them without a single protest from any of them, and that "there was manifested, throughout many years, the most complete acquiescence in these transactions by the shareholders as a body."

As regards complainants' contentions that the Trust Company concealed the real nature of its dealings with the respective companies, in perpetration of the alleged scheme to defraud, the Master found as follows (Rec. V. 2, p. 671):

> "The record shows that all of those companies employed the voucher system of bookkeeping. The accounting between the companies appears to have been very accurate and correct, and all of the data and information, upon which the complainants predicate the right to an accounting, are shown on the books, both of the Belt Company and Trust Company. For every transaction that took place between those companies, a voucher advising as to the details of such transaction, was given by the Trust Company to the railroad company at the time, with the fullest details. The authority for every entry by the railroad company was in the shape of a letter from an executive officer, attached to a voucher, made up in the railroad company's office. If the Trust Company paid a bill, or a series of bills, for or on account of the railroad companies, the original bill, bearing the receipt of the party who got the money, passed to the railroad company's office and was there fastened to a formal voucher. All the transactions in the record are supported by a voucher, either cash or journal, and, in respect to the journal entries, in cases where the railroad company charged some account of its own, that voucher

was made up with unusual fullness, and spread at large upon the books of the railroad company. From the testimony of all the expert accountants for the complainants and defendants, the Master is convinced that, instead of there being any concealment on the part of either the Belt or the Trust Company, the entries made by both were unusually full of detail, for book entries, and were such as would either reasonably explain the transactions to others or put them on inquiry to find out what was meant by the entries, and from which it would seem, then, that the charge of concealed fraud could not be sustained by the proofs."

The Master further found that all of the transactions complained of occurred long prior to the accrual of the complainants' alleged cause of action; that no attempt was made to excuse the long delay in seeking an accounting; that the transactions attacked were closed, executed and completed transactions, consummated years before the original bill was filed, and that substantially all of the claims set forth in the bills had been barred by the five and ten-year statutes of limitation.

The Master found that the Belt Company was indebted to the Trust Company in the sum of $639,658.86; that the huge claims made by the complainants against the Trust Company and in favor of the Belt Company were unfounded; that the Trust Company was entitled to retain the securities pledged to it by the Belt Company, as against the Southern Company's contention that they passed to it under the after acquired property clauses of the Belt mortgages; but that the Southern Company was entitled to an order and decree requiring the Central Company and its receiver to convey to the Southern Company the real estate standing in the name of the Central Company, it having been purchased, according

to the finding of the Master, with funds furnished by the Belt Company.

The Master, as to the contention of the Trust Company that the Southern Company was liable to it for the Belt Company indebtedness, found in favor of the Southern Company (Rec. V. 2, p. 812-872).

On June 17, 1910, the Trust Company filed exceptions to the Master's report (Rec. V. 2, p. 892). The Trust Company excepted to the finding that the Southern Company was entitled to a conveyance of the Central Improvement Company lands, but did not allege error in the finding that the Southern Company was not liable on the Belt indebtedness. As to this latter matter the exceptions stated:

> "The Master has in said report stated as follows: 'That the Southern Company is not in any way liable for the floating indebtedness of the Belt Company,' whereas the Master should have omitted reference to or recommendation concerning the question of the liability of the Southern for said floating indebtedness of the Belt."

Five reasons were then given why the liability of the Southern was not an issue in the case.

On the day upon which they were filed, the exceptions were by the court overruled; and on June 25, 1910, the court entered a final decree in accordance with the findings and recommendations in the Master's report. Judgment in favor of the Trust Company was rendered against the Belt Company in the sum of $639,658.86; the Southern Company was awarded the Central Improvement Company lands; and the Southern Company was adjudged not liable on the Belt indebtedness to the Trust Company (Rec. V. 2, p. 903).

On August 10, 1910, the Trust Company appealed from said order and decree to the Circuit Court of Appeals for the Eighth Circuit (Rec. V. 2, p. 920). The assignment of errors, however, made no complaint of that part of the judgment relieving the Southern Company from liability for the Belt indebtedness, except to assert that the court erred in including any finding as to that matter in the decree (Rec. V. 2, p. 916).

On May 21, 1911, the Trust Company's appeal came on for hearing in the Court of Appeals at St. Paul. Minority stockholders in the Trust Company, alarmed at the failure of the Trust Company to assign error to the finding and judgment of the lower court that the Southern Company was not liable for the Belt indebtedness, employed Mr. Mecartney of Chicago, a former counsel of the Trust Company, to be present at the argument. Touching the Southern Company, the only argument made by counsel for the Trust Company was that the liability of the Southern Company was not in issue in the suit, and that the lower court had no right to include in its decree any adjudication upon the liability or non-liability of the Southern Company.

On May 26, 1911, Edward A. Shedd, Charles B. Shedd and Robert H. Law, the minority stockholders represented by Mr. Mecartney, filed a petition in the Circuit Court of Appeals for leave to file additional briefs in support of the appeal of the Guardian Trust Company (Rec. V. 2, p. 590). On June 16, 1911, the court entered an order directing the Trust Company, the Southern Company and the Cambria Company to show cause why the prayer of said petition should not be granted (Rec. V. 2, p. 968). On June 21, 1911, the Trust Company filed its return to said order, resisting the application of the petitioners to file additional

briefs (Rec. V. 2, p. 970). The return states: "The question of the personal liability of the Kansas City Southern Railway Company for the debt of the Belt Company is not in issue and cannot be determined upon this appeal." Furthermore, counsel of the Trust Company appeared in person and contested the right of the stockholders to be heard (Rec. V. 2, p. 971).

Upon an announcement by the court that a tentative conclusion had been reached adverse to the Trust Company upon the issue presented in the return (Rec. V. 2, p. 978), counsel for the Trust Company asked and received leave to file additional briefs upon this question and upon the correctness of the Master's finding (Rec. V. 2, pp. 971-3). Later a revised brief was filed on behalf of the Trust Company, which failed, however, to ask for a decree against the Southern Company (Rec. V. 2, p. 974).

On February 19, 1912, the minority stockholders represented by Mr. Mecartney filed a second petition (Rec. V. 2, p. 973). It prayed the court for leave to make an additional assignment of error on behalf of the Trust Company and to file suggestions as to the final judgment, and "that in case this Court finds that the Southern Company is liable for the Belt Company's debts, a final judgment may be rendered here directing the lower court, upon the application of the Trust Company, to enter a decree against the Southern Company for the total amount of the decree formerly entered against the Belt Company, with interest and costs." This petition and the suggestions were allowed by the court to be filed, by order entered on that day.

Subsequently there was a complete reargument of the case before the court, counsel for the Trust Com-

pany still insisting that the liability of the Southern Company was not in issue.

On October 22, 1912, the Court of Appeals filed its first opinion, reversing the decree of the Circuit Court, and holding the Southern Company liable for the Belt debt. It did not however require the Southern Company to pay the debt of the Belt Company, except as a condition to its right to the Central Improvement Company lands and the collateral held by the Trust Company. *Central Improvement Co.* v. *Cambria Steel Co.*, 201 Fed. 811.

On December 21, 1921, the minority stockholders filed their third petition. (Rec. V. 2, p. 1006.) The petition prayed the court as follows:

> "That this court embody in its proposed order of reversal to be entered herein in pursuance of the opinion heretofore filed—
>
> A special finding to the effect that the said litigation commenced by said Cambria Steel Company, and prosecuted by the Kansas City Suburban Belt Railroad Company in the way of an ancillary bill filed in this cause, which issues were raised, and said suits instigated at the instance and request of and prosecuted in reality on behalf of the Kansas City Southern Railway Company, and the said intervening petition filed and prosecuted by said Southern Company were each and all instituted and prosecuted without good faith, and that said entire litigation has been trivial, wanton and oppressive.
>
> That thereupon:
>
> 1. This court direct the lower court upon entering the decree against the said Southern Company, as ordered by the opinion lately filed herein,
>
> (1) To reserve jurisdiction to inquire as to the amount of attorney's or solicitor's fees, stenogra-

pher's fees, expert accountant's fees, and such other expenses reasonably and necessarily incurred by said Guardian Trust Company in making its defenses to such bill and ancillary bill and intervening petition and in asserting its claims herein;

(2) That upon petition or suggestion as to the same being filed in said cause by the Trust Company and upon evidence taken by affidavits or otherwise as the court may direct, the said court make a finding as to the amount of such fees, costs and expenses;

(3) That it thereupon order the same to be taxed as costs in said cause and a further decree be entered against said Cambria Company and Southern Company for said amounts respectively, in favor of said Trust Company, and that it be awarded execution therefor—the said inquiry and taxation of costs not to delay the entry of the said principal decree, as heretofore directed by said opinion, and not to stay the collection of the same in any manner."

In January, 1913, the case was reargued in the Court of Appeals, and on December 2, 1913, the court filed its second opinion in the case. *Central Improvement Co.* v. *Cambria Steel Co.,* 210 Fed. 696.

In said opinion the Court of Appeals reaffirmed its former holding that the Southern Company was liable for the Belt debt, but went further and directed a judgment against the Southern Company for the amount of said indebtedness. The court further held that all the property of the Belt Company then in the possession of the Southern Company was "a trust fund in control of the court," and subject to seizure and sale, and that said property was "charged with a trust in favor of the Trust Company for its debts and costs, and that the

Southern Company now holds that property as trustee for the Trust Company."

Concerning the petition of the minority stockholders that costs as between solicitor and client be taxed against the Southern Company, the court said (210 Fed. 723):

> "A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them, and as the evidence upon the issues tried in this case was not brought to this court, it would be unwise and might be unjust to adjudicate the questions presented by the petition of the stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them, and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules, and practice in equity."

In giving directions to the lower court concerning the terms of the decree to be entered, the opinion concluded (210 Fed. 724):

> "The decree should adjudge that the Trust Company may recover its costs down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may apportion those costs between them, but not as against the Trust Company, which should be permitted to pursue either or both of them until its costs are paid. The District Court should reserve in the decree full

jurisdiction to render such further decrees and take such subsequent proceedings in the suit as equity and good conscience may require."

The Southern Company appealed from the decree to this court, which on February 21, 1916, affirmed the decision of the Court of Appeals. *Kansas City Southern Railway Co.* v. *Guardian Trust Company*, 240 U. S. 166, 36 S. Ct. 334. The opinion of the court deals wholly with the liability of the Southern for the Belt debt, and does not mention the matter of costs; and no reference is made to the stockholders' petition regarding attorneys' fees. The opinion is relatively brief, in view of the issues involved, and concludes: "The case has been so fully discussed below that we think it unnecessary to go into further detail." Chief Justice White and Mr. Justice Van Devanter were of the opinion that upon the findings of the Master, the decree should be reversed, and therefore dissented.

The mandate from this court to the District Court (Rec. V. 1, p. 465), filed April 18, 1916, recited in full the decree of the Court of Appeals, entered December 2, 1913, as follows:

> "These causes came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Missouri, and were argued by counsel.
>
> On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court, in these causes be, and the same is hereby, reversed with costs; and that the Central Improvement Company, H. H. Crittenden, Receiver of Central Improvement Company, in case No. 3489, and the Guardian Trust Company in No. 3490, have and recover against the Cambria

Steel Company, The Kansas City Suburban Belt Railroad Company, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, and The Kansas City Southern Railway Company, their costs in this behalf expended in the respective cases to be taxed by the Clerk of this Court.

It is further ordered that these causes be, and the same are hereby remanded to the District Court of the United States for the Western District of Missouri, as the successor of the Circuit Court for said District, with directions to render a decree for the Trust Company in accordance with the views expressed in the opinion of this Court," * * *.

The mandate concluded:

"On Consideration Whereof, it is now ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, affirmed with costs; and that the said Guardian Trust Company, Central Improvement Company, Cambria Steel Company and Kansas City Suburban Belt Railroad Company recover against the said The Kansas City Southern Railway Company, Twenty Dollars for their costs herein expended and have execution therefor.

And It is Further Ordered, that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Missouri.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the thirteenth day of

April, in the year of our Lord one thousand Nine hundred and Sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Costs of Guardian Trust Co. *et al.*

Clerk	Paid
Printing Record	
Attorney	$20.00
	$20.00"

On April 15, 1916, the Southern Company paid the Trust Company $821,623.28, said sum being agreed upon as an approximation of the amount due on the judgment, and being subject to check and correction thereafter. (Rec. V. 1, p. 129.) The Trust Company gave its receipt for the amount paid, said receipt expressly stipulating, and all parties understanding and acknowledging, that the payment and receipt of said amount should not affect the Trust Company's right to recover costs and attorneys' fees. On final hearing it was determined that the amount paid was in excess of the amount due, by the sum of $6,765.54, and that difference was adjusted between the parties. (Rec. V. 1, p. 130.)

On October 4, 1922, the Trust Company moved the District Court to enter a final decree in the cause pursuant to the decree and opinion of the Court of Appeals and the mandate of this Court. (Rec. V. 1, p. 16.) The Trust Company contended that it was entitled to have the court ascertain solicitor and client costs, and to have them taxed against the complainants.

On June 20, 1923, the District Court filed its memorandum opinion upon the issues raised by said motion.

(Rec. V. 1, p. 691.) The court prefaced its discussion with the following analysis (Rec. V. 1, p. 693):

> "The right to tax costs as between solicitor and client depends upon one, or both, of two theories recognized in the law.
>
> First. Where gross charges of fraud and misconduct have been made and not sustained, and where the main ground of the suit is shown to be false, unjust, vexatious, wanton or oppressive. In other words, where charges amounting to scandal and a misuse of the court are made and not sustained, but found to be baseless and unwarrantable.
>
> Second. Where a fiduciary relation exists between the parties, such as trustee and *cestui que trust*, or pledgor and pledgee, or principal and agent, and where the fiduciary is put to expense in the defense of an unfounded suit brought against him by such *cestui que trust*, or pledgor or principal, especially where charges of gross fraud and misconduct have been made against a fiduciary and have been found baseless and unwarrantable."

The court considered that in view of the findings of the Circuit Court of Appeals, the present case fell within both of the above classifications, and that the Trust Company was therefore entitled to solicitor and client costs. On June 25, 1923, the court appointed a Special Master to ascertain, take and state an itemized account of all costs and expenses paid or incurred by the Trust Company in its resistance of and defense against this litigation, including among other expenses, those for attorneys' fees, stenographers' fees, and expert accountants' fees. (Rec. V. 1, p. 19.)

The Trust Company, pursuant to the order of the court appointing the Special Master, filed with the Special Master its claim for costs as between solicitor and client,

over and above the ordinary party and party costs, in the sum of $319,829.97, all of which had been paid and incurred by the Trust Company in the progress of the cause. (Rec. V. 1, p. 91.) Of this amount, $299,137.30 had been expended in payment of attorneys' fees. The Master, in his report, filed September 15, 1924, found and allowed as costs as between solicitor and client, the sum of $296,520.37. (Rec. V. 1, p. 46, 59.) The Trust Company, and the Southern and Cambria Companies (the latter jointly) filed exceptions to the Master's report. (Rec. V. 1, pp. 94, 106.)

On March 23, 1926, the court filed its memorandum opinion on the issues raised by the exceptions. (Rec. V. 1, p. 704.) The court had, upon reflection, changed the views expressed by it in its former opinion. The court, after a discussion of authorities, came to the following conclusion (Rec. V. 1, p. 714):

> "One cannot escape the conclusion, whatever he may think the law ought to be, that under the statutes of the United States, and the policy announced by its courts from highest to lowest, costs as between solicitor and client cannot be taxed against the losing party, however unjust and expensive the litigation, in the absence of the existence of a fiduciary relation, with the necessary incidents which create an exception of this rule, and that, in this respect, the practice which may prevail in the Chancery Courts of England can have no controlling effect."

It then determined that the necessary fiduciary relationship did not exist in this case, because the Trust Company was defending its own interests in the litigation. (Rec. V. 1, p. 716.) The court therefore held that the exceptions of the Trust Company to the Master's

report, going to the power of the court to tax costs as between solicitor and client, should be sustained. (Rec. V. 1, p. 717.) On May 15, 1926, the court entered a final decree in the cause, taxing in favor of the Trust Company only party and party costs. (Rec. V. 1, p. 128.) This decree, reciting the payment of the judgment by the Southern Company, directed the Trust Company to deliver forthwith to the Southern Company all the collateral security pledged by the Belt Company to secure its indebtedness.

On June 18, 1926, the Trust Company duly appealed from said decree to the United States Circuit Court of Appeals. (Rec. V. 1, p. 132.) On May 18, 1928, said court reversed the decree of the District Court. (Rec. V. 1, p. 749.) The opinion of the court fully upholds the right of the Trust Company to costs as between solicitor and client, and the power of the court to award such costs under the circumstances. (Rec. V. 1, pp. 722-749.) *Guardian Trust Co.* v. *Kansas City Southern Railway Co.*, 28 Fed. (2d) 233. The court directed the following disposition of the case (Rec. V. 1, p. 748):

> "In view of the state of the record, the case must be sent back to the trial court to make the proper allowances for costs 'as between solicitor and client'. The special master's report has been made. Numerous exceptions have been filed thereto by both parties. Doubtless these will have to be passed upon. We see no necessity for the taking of further testimony. The amounts to be allowed are not controlled by what the Trust Company actually expended, and may vary widely therefrom. The allowances should be such as, in view of the facts and circumstances proved in this case which authorize them, will be reasonable and just.

The decree is reversed with instructions for further proceedings in accordance with the views herein expressed."

The case was brought here on certiorari, allowed February 25, 1929. (Rec. V. 1, p. 825.)

ARGUMENT.

I.

The sole issue is the power of the District Court.

The issue before this Court, and the only issue, according to our analysis, is the *power* of the District Court under the circumstances of this case, to reimburse the Trust Company for any of the items covered by its claim for solicitor and client costs.

The District Court properly adopted, and considered itself bound by, the findings of the Court of Appeals. It said (Rec. V. 1, p. 703):

> "This court is passing no new and independent judgment upon the issues already litigated. The Circuit Court of Appeals, as it says, practically tried the case *de novo*, and made distinct findings. This court adopts those findings and bases its action upon them, and them alone. * * * To do otherwise * * * would be to disregard the decision of the Circuit Court of Appeals to a degree amounting practically to contumacy."

The pertinent findings of the Court of Appeals, which the District Court, in its first opinion, thought sufficient to entitle the Trust Company to solicitor and client costs, are commented on by the Court as follows (Rec. V. 1, pp. 698, 699):

> "There is no escape from the conclusion that the Circuit Court of Appeals was of opinion, and in substance so found, that a plan was formed by the then guiding and controlling powers of the Southern Company to despoil the Trust Company of its property. * * * So that, the responsibility of the

> Southern Company is judicially fixed for the initiation of all this successive litigation against the Trust Company, and the objects of that litigation are also clearly defined. The Court then finds that the Cambria suit, so inspired by the Southern Company, was wholly baseless and unwarranted."

In its second opinion, also, the District Court considered itself bound by the findings of the Circuit Court of Appeals, and conceived that those findings conclusively established the nature of the suit, its purpose, and the responsibility of the Southern Company therefor, the only question being the interpretation of the language (in the opinion of the Court of Appeals) "under the principles, rules and practice in equity." (Rec. V. 1, 705.)

The court sustained the exceptions of the Southern Company to the Master's report, because "one cannot escape the conclusion, whatever he may think the law ought to be, that under the statutes of the United States, and the policy announced by its courts from highest to lowest, costs as between solicitor and client cannot be taxed against the losing party, however unjust and expensive the litigation." (Rec. V. 1, p. 714.)

The Southern Company's brief in this Court in support of its petition for certiorari states (p. 15): "The court reversed its former ruling, and held that the law did not permit the taxation of costs as between solicitor and client."

The lower court, therefore, considered it judicially established that this suit was wholly baseless and unwarranted, and that it was brought and fostered by the Southern Company in pursuance of a fraudulent plan and design to despoil the Trust Company of its property. Evidently, therefore, in the opinion of the District Court, all the equities were in favor of the Trust

Company. It was entitled to be reimbursed for its costs and expenses if the court had power to compel reimbursement. But the court considered that no such power existed.

Costs in equity are discretionary. But this is not a case where a court, considering it has power to award costs in its discretion, and in view of the equities denies them. On the contrary, the equities of the case called for the award. Costs were denied because of a presumed lack of power to grant them.

Under such circumstances, if the power actually existed, the lower court should be directed to make the award.

Seibert v. *Minneapolis & St. L. Ry. Co.*, 58 Minn. 58, 57 N. W. 1068 (1894).

The Circuit Court of Appeals has decided that such power does exist. In three separate opinions [201 Fed. 811, 210 Fed. 696, 28 Fed. (2d) 233], it has found and conclusively established the facts which entitle the Trust Company to such costs if the court may award them. If this Court be of the opinion that the District Court, in view of the character of the litigation, the relationship of the parties, and the facts as found by the Circuit Court of Appeals, could properly have decreed reimbursement as to any of the items covered by the Trust Company's claim, the decision of the Court of Appeals should be affirmed, and the District Court should be directed to hear and determine the exceptions to the Master's report going to the particular items claimed as taxable costs, and to award those items found properly taxable.

II.

Reimbursement always awarded to pledgee for defense of pledgor's title.

Solicitor and client costs are properly taxable under various circumstances, shortly to be discussed. However, upon one ground, we believe that the right of the Trust Company to be reimbursed for its attorneys' fees and expenses paid and incurred in this litigation, and the power of the District Court to effect such reimbursement, are so thoroughly recognized and established that no appeal should be necessary to the principles justifying the imposition of such costs under other circumstances.

The Belt Company became indebted to the Trust Company, and pledged with the Trust Company certain collateral, to secure that indebtedness. The Southern Company attacked the validity of the pledge, alleging that the collateral passed to it under the after acquired property clause of the Belt mortgage. The Southern Company sought, by this litigation, to recover the pledged collateral. The Trust Company is entitled to reimbursement for the costs and expenses incurred by it in defense of this litigation.

A pledge is a bailment for the mutual benefit of the parties. The pledgee, in holding, preserving and realizing upon the security is acting for the pledgor as well as in his own interest. Because of this fact, the pledgee is entitled to reimbursement for costs and expenses, including attorneys' fees, reasonably paid or incurred in preserving the collateral and subjecting it to the payment of the debt, even though such reimbursement is not expressly stipulated for. *Gregory* v. *Pike*, 67 Fed. 837, 15 C. C. A. 33 (1895); *Fagan* v. *Thompson*, 38 Fed. 467 (1889); *Ballingale* v. *Hunsberger*, 16 Pa. Super. Ct. 117 (1901).

The pledgee is under an actual duty to preserve the security, using due diligence to that end; and if a third person asserting his own title or right to possession, seeks by legal proceedings to recover the security from the pledgee, the latter is authorized and empowered to defend such suit or suits, to add the cost of such defense to the original debt, and, in case he prevails over the third party, to hold the collateral as security for the repayment of such cost as well as for the payment of the original indebtedness.

Fagan v. *Thompson*, 38 Fed. 467 (1889).
Planters Rice Mill Co. v. *Merchants National Bank*, 78 Ga. 574, 3 S. E. 327 (1887).
Furness v. *Union National Bank*, 147 Ill. 570, 35 N. E. 624 (1893).
Ely-Walker Dry Goods Co. v. *Colbert*, 124 S. W. 705 (Tex. Civ. App.) (1910).
Parker v. *Watkins*, Johnson's Reports 133 (1858).
Sandon v. *Hooper*, 6 Beav. 246 (1843).
Godfrey v. *Watson*, 3 Atk. 517 (1747).
Halsbury, Laws of England, V. 21, p. 238.
Jones, Collateral Securities, 3d Ed., Sec. 400.
Beames, Costs in Equity (2d Ed.) (1840), p. 24.
Daniell's Chancery Practice (1st Ed.) (1837), V. 3, p. 14.

In 31 Cyc. 826, the rule is stated as follows:

"The pledgee has a lien on the property for any expenses, including the attorneys' fees, reasonably incurred by him in keeping and caring for the property pledged, protecting it against liens, taxes and assessments, or otherwise protecting the pledgor's rights, in making sale for the enforcement of the pledge, in collecting choses in action, and other expenses incurred in rendering the pledged property available for the payment of his debt."

The pledgee, in defending the pledgor's title, is really acting as agent of the pledgor. It is well settled that an agent is entitled to be reimbursed for attorneys' fees incurred in defending suits brought against him by reason of acts done in the performance of his duties.

Whitehead v. *Darling*, 5 S. W. 356 (Ky.) (1887).
First National Bank v. *Tenney*, 43 Ill. App. 544 (1891).
Selz, Schwab & Co. v. *Guthman*, 62 Ill. App. 624 (1895).
In re Famatina Development Corporation, Ltd., L. R. (1914) 2 Ch. D. 271.
Williams v. *Lister & Co.*, 109 L. T. R. 699 (1913).
In re Wells & Croft, 15 Reports 169 (1894).
Adamson v. *Jarvis*, 4 Bingham 66 (1827).

The Southern Company had no standing as an intervener, and no interest in the controversy (otherwise than through its representatives and dummies), except upon its claim of title to the pledged assets. Its allegation of ownership free from the pledge constituted a direct attack upon the lien and possession of the Trust Company and a denial of the right of the Belt Company to pledge the collaterals as it had pledged them. And the Trust Company, in defending, was defending the interest of the pledgor as well as its own interest. The Southern Company alleged that it owned the securities and that the Trust Company was indebted to it for taking and retaining them. If so, this must have been for the reason that the Belt Company had no sufficient title to sustain the pledge.

This brings the case squarely within the foregoing authorities, and we can conceive of no reason why the

unquestioned rule established by them should not apply, regardless of the charges of fraud, and of the good or bad faith of the litigation, and of the other relationships of the parties.

It should be noted that the petition of the Southern Company was a petition for the recovery of certain specific items of property pledged to the Trust Company, or the proceeds thereof, on the ground that they belonged to the Southern Company. Its prayer was that the court require the conveyance to the Southern Company of all the real estate and other property standing in the name of the Central Improvement Company; that the Trust Company be required to assign to the Southern Company the account of the Belt Company against the Gulf Company, and to assign to the Southern Company the capital stock of the Northern Townsite Company; that the Trust Company be required to account for and pay over the proceeds of various other assets. (Rec. V. II, p. 185.) The prayer of the amended intervening petition is the same. (Rec. V. II, p. 291.)

All of these properties and assets, or stock representing them, were held by the Trust Company as pledgee of the Belt Company, and were alleged in the petition to belong to the Southern Company. It was an unquestioned attack upon the title of the pledgor. Counsel for the Southern Company, in their last brief thus state the issues under this intervening petition (p. 11):

> "First, was the petitioner the owner of the collateral security, or the properties represented thereby? Secondly, did the Trust Company assume a relation of trust with respect to the use of the proceeds of the Union Terminal bonds; and if so, was that trust violated? Thirdly, did petitioner assume the debt of the Belt Company?"

It stands admitted, therefore, as it must be admitted, that this petition constituted an adverse claim to the pledged property. Under such circumstances, the Trust Company was not only warranted in defending the pledge, but bound to do so, and it was entitled to its outlays in so doing. It is admitted also, that the petition charged the Trust Company, as trustee under the Union Terminal mortgage, with violation of its trust, a charge which will be considered later. The third issue, as to the liability of the Southern Company was, of course, not tendered by the petition.

The fact that the Southern Company at this time owned substantially all the stock and bonds of the Belt Company, is immaterial in this connection. Its petition was not filed as such owner, but as the purchaser of the pledged securities. Even though the attack upon the validity of the pledge be made by the pledgor, the pledgee is entitled to defend, and to be reimbursed for the costs thereof, in the same manner.

Hurst v. *Coley*, 22 Fed. 183 (1884).
Bay Biscayne Co. v. *Baile*, 73 Fla. 1120, 75 So. 860 (1917).
In re Baldwin's Estate, (1900) 1 Irish L. R. 15.
Halsbury, Laws of England, V. 21, p. 238.

If the Trust Company was entitled to reimbursement for its costs and expenses, as the foregoing authorities hold, the District Court had power to make provision therefor in its final decree of May 15, 1926. That decree, reciting the payment by the Southern of the Belt indebtedness, directed the Trust Company to deliver to the Southern Company the security pledged with it by the Belt Company. The court could and properly should have made the order for the delivery of the securities

conditional upon the payment by the Southern Company of the amount expended by the Trust Company in defending the litigation.

Conditional relief of this character has often been granted. See *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 44 S. Ct. 481 (1923); *Page* v. *Rogers*, 211 U. S. 575, 29 S. Ct. 159 (1909); *Meyers* v. *Block*, 120 U. S. 206 (1886).

The power to impose conditions with reference to the granting of injunctions, was commented on by this Court, in *Russell* v. *Farley*, 105 U. S. 433, 437 (1881), as follows:

> "The court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court as a court of equity, and has been exercised from time immemorial."

Relief was conditioned upon the payment of costs in *Dewey* v. *Stratton*, 114 Fed. 179, 52 C. C. A. 135 (1902).

It was held in *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, 28 S. Ct. 406 (1908), that the appointment of a receiver could be conditioned upon the assumption of liability by the plaintiff for the expense of the receivership, in case the assets proved insufficient to meet them.

The court considered that it had no power to make the order for the delivery of the collateral conditional upon the payment of the Trust Company's costs and expenses. Not only did it have such power, but the equities of the case demanded that such a condition be

imposed. Should a pledgee be required by a court of equity to return the pledged property unimpaired to the pledgor, after being forced to expend more than the face of his debt in preventing a third party or the pledgor himself from unlawfully and wrongfully taking the security from him? The fact that the indebtedness was ultimately paid in full by the Southern Company is immaterial. It was not paid until the Trust Company's expenses in defending the unwarranted litigation had been incurred. The lower court did not do equity in decreeing the payment of the debt and the return of the collateral without allowing the Trust Company reimbursement for its proper expenses in preserving the pledge.

This alone should warrant an affirmance of the judgment of the Circuit Court of Appeals.

III.

Before we enter upon a discussion of the various circumstances, under which solicitor and client costs are properly taxable, let us consider two preliminary contentions made by the Southern Company.

(a) The effect of the mandate.

It is first urged that whatever the law may be with respect to the taxation of costs as between solicitor and client, such costs cannot be taxed in this case, because the proper execution of the mandate of this Court on the former appeal required the taxation of costs only as between party and party.

The mandate affirmed, "with costs," the decree of the Circuit Court of Appeals, and directed that the Trust Company have and recover $20 for its costs "herein" expended. "Herein" evidently means "in the Supreme

Court" and the $20 allowed is the docket fee, or attorney's fee, provided by law in all cases. It in no way applies to or affects the costs *below*, which were covered by the decree of the Circuit Court of Appeals, expressly affirmed by the mandate.

The Southern Company in its brief in support of its application for certiorari, cites many authorities to the effect that "costs," as used in the mandate, means ordinary taxable costs, that is, party and party costs.

We concede the soundness of the authorities cited, under the circumstances to which they apply. But how do they help the case of the Southern Company? This Court awarded the Trust Company party and party costs in this Court. But it also affirmed the decree of the Circuit Court of Appeals, which sent the case back to the District Court for a proper determination and taxation of costs according to the rules and practice in equity. The Supreme Court made no determination whatever as to solicitor and client costs. The right to such costs was not before the court except as involved in that decree. It was not mentioned in the assignments of error. It was not touched upon in brief or argument. Neither in the opinion nor the mandate of this Court is there any reference to solicitor and client costs. Furthermore, the claim for such costs had not yet been filed; the question had only been saved for the District Court. Is it not, under such circumstances, rather extraordinary to say that this Court considered, passed upon and denied the claim?

The mandate is, of course, controlling as to the matters regulated by it. But the lower court can pass upon any point undisposed of by the mandate. *Ex parte Union Steamboat Co.*, 178 U. S. 317, 20 S. Ct. 904 (1900); *In re Sanford Fork and Tool Co.*, 160 U. S. 247, 16

S. Ct. 291 (1895); *United States* v. *Pan-American Petroleum Co.*, 24 Fed. (2d) 206 (1927). The mandate of this Court was silent as to solicitor and client costs. If a mandate makes no provision for costs, their taxation is left to the discretion of the lower court. *Murphy* v. *Loos*, 32 Ill. App. 595 (1889); *Brueggemann* v. *Young*, 128 Ill. App. 200 (1906).

The filing of the mandate in the lower court did not terminate the jurisdiction of that court. It still had power to entertain any proper proceedings, not in conflict with the directions of the mandate. *Baltimore Building and Loan Association* v. *Alderson*, 99 Fed. 489, 39 C. C. A. 609 (1900); *St. Louis & San Francisco R. Co.* v. *Barker*, 210 Fed. 902 (1914); *Clark* v. *Chicago, M. & St. P. Ry. Co.*, 105 Fed. 552 (1900); *Sizer* v. *Many*, 16 How. 98 (1853). And costs, on any such subsequent proceedings, may be taxed by the court, in its discretion, even though the mandate contained a direction as to costs. *Mills* v. *Lehigh Valley R. Co.*, 226 Fed. 812 (1915); *Title Insurance Co.* v. *California Development Co.*, 179 Cal. 734, 178 Pac. 857 (1919); *House* v. *Amsdell Brewing and Malting Co.*, 117 N. Y. S. 796, 133 App. Div. 486 (1909).

Some misapprehension is possible of the meaning of the decision in *Kell* v. *Trenchard*, 146 Fed. 245, discussed and quoted on page 21 of the Southern brief in support of the application for certiorari. The court in that case did not decide that after a mandate had gone down directing an equal division of "costs," there could be no allowance made to the receiver. The decision is merely that the allowance to the receiver (apparently made after the receipt of the mandate) did not have to be apportioned between the parties under the order directing costs to be apportioned, and should have been paid out of the fund in the receiver's hands.

If the allowance to the receiver was made after the receipt of the mandate (as it apparently was, though there is no definite statement to that effect), the case is in direct conflict with the Southern Company's contention as to the effect of the mandate in the present case.

The Southern Company's argument fails to take into account the decision of the Circuit Court of Appeals. This Court did not simply reverse a decree of the District Court. It affirmed a decree of the Court of Appeals. That decree reversed "with costs," the District Court decree, and remanded the case "with directions to render a decree for the Trust Company in accordance with the views expressed in the opinion of this Court." (Rec. V. 1, p. 466.) Such a direction had the effect of making the opinion a part of the decree. *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 46 S. Ct. 52 (1925). A mandate or decree may be construed in the light of the opinion, even though there be no such direction. *Ex parte Union Steamboat Co.*, 178 U. S. 317, 20 S. Ct. 904 (1900); *In re Sanford Fork and Tool Co.*, 160 U. S. 247, 16 S. Ct. 291 (1895); *West* v. *Brashear*, 14 Pet. 51 (1840).

The opinion in the Court of Appeals discussed the stockholders' petition for a finding that the litigation was instituted in bad faith, and for a direction to the lower court to find and allow in favor of the Trust Company attorneys' fees and the other expenses mentioned. The court concluded that since the evidence below was not before the court, and since no evidence had been taken relative to the amount of attorneys' fees and expenses which had been paid and incurred, the taxation of such costs should be left to the lower court under the principles, rules and practice in equity. (210 Fed. 723.)

In our opinion this amounted to a direction to the

lower court to tax these costs according to equity practice, and did not authorize the court to pass upon the question whether such costs were properly taxable. But whether this be the proper interpretation or not, certain it is that the decree and opinion of the Court of Appeals authorized and empowered the District Court to award solicitor and client costs. And it was this decree which the Supreme Court affirmed.

The mandate of this Court reads: "It is now ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be and the same is hereby affirmed." And the mandate directs such further proceedings in the cause as according to right and justice, and the laws of the United States, ought to be had, "the said appeal notwithstanding." "The said appeal" is the appeal of the Southern Company from the decision of the Court of Appeals. The mandate means, therefore, that the District Court should proceed as though no appeal had been taken from the decree of the Court of Appeals. *Hawkins* v. *Cleveland, C. C. & St. L. R. Co.*, 99 Fed. 322, 39 C. C. A. 538 (1900); *The Sydney*, 47 Fed. 260 (1891).

In the latter case, the court said with respect to such a situation: "The mandate merely informs the court that the appeal is no longer pending, and directs the court to proceed as it should do in view of that fact." If no such appeal had been taken in the instant case, certainly the District Court would have had power to tax such solicitor and client costs as are properly taxable in equity.

The case of *United States* v. *Pan-American Petroleum Co.*, 24 Fed. (2d) 206 (1927), is a direct authority to

the effect that the mandate in the present case should be considered in conjunction with the opinion of the Court of Appeals: The court in that case said:

> "There is no express order or direction in the mandate for the payment or allowance of any interest to any of the parties to the suit. Neither is this Court prohibited by it from allowing interest herein. Its text leaves the question of interest open and unsettled. But it does require us to examine the opinion of the Circuit Court of Appeals and to proceed in accordance with such opinion, and the law is that in such cases the direction to proceed consistently with the opinions of the appellate courts has the effect of making such opinions a part of the mandate as though at length set out therein. See *Gulf Refining Co.* v. *U. S.*, 269 U. S. 125, 135, 46 S. Ct. 52, 70 L. Ed. 195."

The court then considered the opinion of the Circuit Court of Appeals, construed it as evidencing the Government's right to interest, and thereupon compelled the defendants to pay interest. Here the mandate of the Supreme Court was interpreted in connection with the opinion of the Circuit Court of Appeals under circumstances precisely the same as those existing in the present case.

The case of *Missouri Pacific Ry. Co.* v. *Larabee*, 234 U. S. 459, 34 S. Ct. 979 (1913), disposes conclusively of the contention that the allowance of twenty dollars attorneys' fees in the mandate precludes a further allowance. In that case, the Larabee Flour Mills Company brought mandamus in the Supreme Court of Kansas to compel the Railway Company to continue certain switching service. A peremptory writ issued. A Kansas statute allowed attorneys' fees to the successful plaintiff in a mandamus proceeding. Pursuant to this

statute, the plaintiff filed a claim for damages and attorneys' fees. In the meantime, a writ of error issued from the Supreme Court of the United States to the Kansas Court, to review the judgment granting the writ of mandamus. The judgment was affirmed (211 U. S. 612, 29 S. Ct. 214), and a mandate went down to that effect. The mandate (as in the present case) gave the plaintiff its costs, including an attorneys' fee of $20.00. Thereafter, the plaintiff filed an amended claim for damages and attorneys' fees and included therein a claim for fees incurred in the United States Supreme Court. The Railway Company resisted the claim, one objection being that the mandate, in awarding an attorneys' fee of $20.00, precluded any further allowance of such fees. The Kansas Court allowed fees, covering services in both the state court and this Court. This Court, on writ of error, held the allowance improper in so far as it concerned services in this Court, since a state statute cannot competently provide for fees or allowances in the United States Supreme Court; but the court affirmed the award in so far as it covered services in the state court. In affirming the state court award, this Court necessarily held that the provision in the earlier mandate, taxing as costs an attorneys' fee of $20.00, did not preclude a subsequent and additional award of attorneys' fees in the lower court.

(b) The Act of February 26, 1853.

The second contention is that the Act of February 26, 1853, controls the present controversy, and that therefore no attorneys' fees can be taxed or allowed in this case in excess of $20.00. To sustain this proposition, the South-

ern Company, in its brief in support of the application for certiorari, cities the following cases:

The Baltimore, 8 Wall. 377.
Oelrichs v. *Williams,* 15 Wall. 211.
Tullock v. *Mulvane,* 184 U. S. 497.
Missouri, K. & T. R. Co. v. *Elliott,* 184 U. S. 530.
Missouri P. R. Co. v. *Larabee,* 234 U. S. 459.
McIntosh v. *Ward,* 159 Fed. 66.
Fraser v. *Cole,* 214 Fed. 556.
Leary v. *United States,* 257 Fed. 246.
Motion Picture Patents Co. v. *Steiner,* 201 Fed. 63.

None of the foregoing cases are in point. The nearest is perhaps *The Baltimore,* 8 Wall. 377, and its force is detracted from by several circumstances. The case is an admiralty, not an equity, case. Furthermore, the opinion contains no discussion of the circumstances under which the suit was brought. The attorneys' fee claimed might very properly have been denied, even though the court recognized its discretionary power to grant it. Again, no adequate consideration by the court is given to the meaning of the Act of 1853. Without any discussion, the court merely states that fees and costs are now regulated by the Act.

Oelrichs v. *Williams,* 15 Wall. 211, is relied upon as completely dispelling any lingering doubt as to the meaning of the Act. But the statute is mentioned at no point in the opinion of the court. Indeed, the case involves no question whatsoever, as to the taxing of costs. The action is on an injunction bond. The decision is merely that attorneys' fees, incurred in defending an injunction suit, are not a proper element of *damages* in a suit on the bond. The question is one of interpretation of the

language of the bond, nothing more. It is now, and always has been, perfectly well settled in the Federal Courts (although the prevailing state rule is to the contrary), that attorneys' fees are not a proper element of damages in suits on injunction bonds. But we see no basis for urging that this rule is grounded upon the fee bill of 1853.

Tullock v. *Mulvane,* 184 U. S. 497 and *Missouri, K. & T. R. Co.* v. *Elliott,* 184 U. S. 530, are in the same category. Both are actions on injunction bonds given in the Federal Court. Both are actions at law. In neither is there any mention of the Act of 1853. Indeed, in *Tullock* v. *Mulvane,* in connection with a contention that no federal question is involved in the case, the court takes note of the fact that there is no federal statute regulating injunction bonds in federal court proceedings.

Missouri Pacific Ry. Co. v. *Larabee,* 234 U. S. 459, is even further removed from the issue. This is the case, mentioned above in another connection, where the Supreme Court of Kansas sought to allow attorneys' fees for services in the Supreme Court of the United States, under a state statute giving the successful plaintiff in a mandamus proceeding the right to attorneys' fees. The case held that the state statute could not regulate the practice in this court. The Southern Company, in its brief, states that in this case "the prior interpretation of the Act of 1853 is reaffirmed." But the opinion at no point mentions the Act of 1853.

Furthermore, the action is one at law. All the cases cited by the court (with the exception of *Oelrichs* v. *Williams, supra*) were law actions. There is no discussion of any kind with reference to the power of a court of equity over costs. The sole question in the case is the validity of the Kansas statute in so far

as it applied to the proceedings in this court. This is the express statement of the court, made in framing the issue to be decided:

> "The court placed its action in making the allowances in question, not upon the supposed authority of any act of Congress, nor of any practice of this court or rule thereof sustaining the same, nor upon any principle of general law, but solely upon the theory that a state statute gave the power to make the allowances."

McIntosh v. *Ward*, 159 Fed. 66, is not so obviously beside the point as the cases last mentioned, but we deem it to be no authority for the Southern Company's contention. In the quotation from the opinion of the court, set out in the Southern's brief, certain very pertinent observations are carefully omitted. For example: "And in *Trustee* v. *Greenough*, 105 U. S. 527, it was said that costs as between party and party are confined to the matters allowed by the fee-bill act." The Southern Company cites the case as authority for the proposition that the Act of 1853 controls the allowance of solicitor and client costs; and yet the court cites and discusses, with apparent approval, a controlling decision of the Supreme Court to the effect that the Act governs only party and party costs. The court comments fully upon the broad discretion vested in the chancellor respecting the allowance and apportionment of costs in equity cases; upon the fact that allowances may be made from a fund for services and expenses in conserving and administering the fund; and upon the power, in certain cases, to impose those costs for services and expenses upon the party personally, where the fund proves insufficient to pay them. Pretty clearly, the court does not consider itself

foreclosed as to such matters by the Act of 1853. The case seems to hold, merely, that the circumstances were not such as to justify, on equitable principles, an imposition of the allowances in question upon the defeated party.

In substance, the action was one at law, brought by one partner against the other, for money due. Furthermore, as we read the facts, no question of the allowance of attorneys' fees was involved, but, rather, a sum of $2,000, borrowed by the receiver to pay labor bills, and a sum of $13,005.81, which the receiver took from the assets of the firm as and for his compensation. Nothing is said about attorneys' fees, incurred either by the plaintiff or by the receiver.

The Act of 1853 is not mentioned in *Fraser* v. *Cole*, 214 Fed. 556, *Leary* v. *United States*, 257 Fed. 246, *Motion Picture Patents Co.*, v. *Steiner*, 201 Fed. 63, or *Marks* v. *Leo Feist*, 8 Fed. (2d) 460; nor do any of these cases have any bearing upon the interpretation of the Act.

It must be apparent, therefore, that very little, if any, authority supports the Southern Company's contention that the Act of 1853 is controlling.

On the other hand, the decisions of this court and the lower federal courts conclusively establish that the Act regulates party and party costs only.

It has always been more or less customary, in most states in this country, to allow certain small items of attorneys' fees to be taxed as ordinary costs between party and party. These small items of attorneys' fees were and are allowed at law, as well as in equity, and often in criminal, as well as civil, proceedings. At law, their allowance is not discretionary with the court, but they are taxed, as of course and as a matter of right, in favor of the prevailing party.

That the Act of 1853 dealt with such fees only is wholly apparent from an examination of the prior legislation of Congress, and the other circumstances attendant upon the passage of the bill.

The Act of Congress of September 29, 1789, provided that the fees allowed in the Circuit and District Courts, at law, in equity and in admiralty, should be the same as those allowed in the Courts of the respective states.

The Act of May 8, 1792, fixing the compensation of officers of the courts of the United States, entitled the district attorneys to the fees allowed in their respective states.

The Act of March 1, 1793, fixed the fees of the counsellor or attorney in the District Court, in admiralty proceedings only, as follows: For drawing libel, claim or answer, $3.00; for drawing interrogatories $3.00; for all other services in any one cause, $3.00. The Act provided that in all causes other than in admiralty, such attorneys' and counsellors' fees should be allowed and taxed as are allowed in the courts of the respective states.

The Act of February 28, 1799, fixed the fees to be allowed to district attorneys as follows: For drawing interrogatories, $5.00; for drawing libel, claim or answer, $6.00; and for all other services in any one cause, $6.00.

The Act of March 3, 1847, "for the reduction of costs and expenses of proceedings in admiralty," provided that in cases where the libellant should recover $100 or less, no attorney's or proctor's fee should be allowed or taxed.

The Act of 1853 provided "that in lieu of the compensation *now allowed by law* to attorneys, solicitors and proctors in the United States Courts," the amounts therein specified should be taxed and allowed.

The Act begins as follows:

> *"An Act to Regulate the Fees and Costs to be Allowed Clerks, Marshals and Attorneys of the Circuit and District Courts of the United States, and for other purposes.*
>
> *Be it Enacted by the Senate and House of Rrepresentatives of the United States of America in Congress assembled.* That in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, to United States District Attorneys, clerks of the District and Circuit Courts, marshals, witnesses, jurors, commissioners and printers, in the several States, the following and no other compensation shall be taxed and allowed. But this fact shall not be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with the general usage in their respective States, or may be agreed upon between the parties."

Very evidently, the reference is to the earlier statutes above referred to; and the $20.00 docket fee is made to take the place of the miscellaneous small fees allowed attorneys under the earlier statutes and under the practice of the respective states, adopted by said statutes.

The debates and proceedings in Congress, attendant upon the passage of the Act of 1853, emphasize as the purposes sought to be accomplished by the Act, the following: (1) the establishment of uniformity as to fees throughout all the districts; (2) the abolition of the padding of cost accounts by the unnecessary and fraudulent multiplication of the various proceedings giving rise to fees. Under many of the state fee bills there was no limit on the amount of fees which could be taxed in

any one case; and it was asserted in Congress that in many cases, even those involving small amounts and simple issues, fees had been run up into thousands of dollars. (Congressional Globe, Volume 22, Appendix, p. 207).

The New York statute, often referred to in the debates in Congress, was typical. It allowed the following counsellors' or solicitors' fees: A retaining fee of $5.00; for perusing and signing every bill, answer, plea, demurrer, and all interrogatories and exceptions, $2.50; for perusing and settling decree, $2.50; for preparing every special motion, $2.50; for arguing every plea, demurrer and exceptions, $5.00. See Blake, Practice of the Court of Chancery of the State of New York, 2d Ed. (1824), p. 558; also Walworth, Rules and Orders of the Court of Chancery of the State of New York (1839), p. 193.

Senator Bradbury of Maine, in charge of the fee bill of 1853 in the Senate, thus outlined the evils to be remedied by the Act (Congressional Globe, V. 22, Appendix, p. 207):

> "When this system (as established by the prior Acts of Congress) was adopted, it had the semblance of equality, which does not now exist. There were then but sixteen states, in all of which the laws prescribed certain taxable costs to attorneys for the prosecution and defense of suits. In several of the states which have since been added to the union, no such cost is allowed; and in others the amount is inconsiderable. As the state fee bills are made so far the rule of compensation in the federal courts, the Senate will perceive that totally different systems of taxation prevail in the different districts. In some, the district attorney receives no compensation beyond his small salary and per diem for a large

> portion of his most important services; while in others his fees are enormous, and the amount of cost which the losing party is made to pay the attorney on the other side in civil suits is so large as to be flagrantly oppressive."

The Act does not cover merely the fees of attorneys, but of clerks, marshals, witnesses, jurors, commissioners and printers. And, as stated by the court in *Goodyear* v. *Sawyer,* 17 Fed. 2 (1883), it "mentions the fees due the attorney in the same connection with those due the clerk and marshal, and requires them to be taxed by the same words it requires the fees of those officers to be taxed." This circumstance indicates clearly that the attorneys' fees referred to are those taxable, along with clerk's and marshal's fees, as between party and party. Furthermore, the Act authorizes the fees to be taxed by judge *or clerk*. The Act reads:

> "The bill of fees of clerk, marshal and attorneys, and the amount paid printers, and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trial in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a *judge or clerk* of the court, and be included in and form a portion of a judgment or decree against the losing party."

Certainly therefore the statute cannot refer to those costs which are to be awarded within the discretion of a court of equtiy.

The very fact that the Act does not refer to the $20.00 allowance as an attorney's fee, but as a *docket* fee, is some indication that it is an ordinary item of costs, taxable, like clerk's fees, as between party and party.

This court has held, on numerous occasions, that the

Act of 1853 covers only party and party costs. In *In Re Paschal,* 10 Wall. 483 (1870), the court said:

> "And whilst, as between party and party in a cause, the statutory fee bill fixes the amount of costs to be recovered, as between attorney or solicitor and client a different rule obtains."

Likewise in *Trustees* v. *Greenough,* 105 U. S. 527 (1881):

> "The fee bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client."

In *United States* v. *Waters,* 133 U. S. 208 (1889), it was stated that

> "Both before and since the enactment of the statute of 1853, courts in the exercise of their discretion have allowed counsel fees in many cases, without question when reviewed by this court."

People of Sioux County v. *National Surety Co.,* 276 U. S. 238, 48 S. Ct. 239 (1928), held that under a state statute allowing attorneys' fees to be taxed as costs in actions on insurance policies, such a fee might be taxed in an action brought in the state court and subsequently removed to the Federal Court. The court said:

> "That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by R. S. Secs. 823, 824."

See also to the same effect:

Business Mens' Assurance Co. v. *Campbell,* 18 Fed. (2d) 223, (C. C. A. 8th Cir.) 1927.
National Surety Co. v. *Lyons,* 16 Fed. (2d) 688, (C. C. A. 8th Cir.) (1926).
Cuyler v. *Atlantic & N. C. R. Co.,* 132 Fed. 570 (1904).
Goodyear v. *Sawyer,* 17 Fed. 2 (1883).
Louisiana State Lottery Co. v. *Clark,* 16 Fed. 20 (1883).
Ex parte Jaffray, 13 Fed. Cas. No. 7170 (1869).

These cases state the rule in the following terms:

"It is contended in behalf of the defendant that as the statute of the state requires this allowance to be taxed as costs, it is unenforceable in a court of the United States, as Congress provided for costs in that court, and none other can be taxed in a court of the United States.

In our opinion this applies only to ordinary costs, and not to allowances for attorneys' services." (*Business Men's Assurance Co.* v. *Campbell,* 18 Fed. (2d) 223, 224.)

"Reading the whole statute together * * * in the light of previous legislation and the practice under that legislation, and the law of costs at law, in equity, and in admiralty * * * it is plain that these 'docket fees' * * * are a lump sum substituted for the small fees allowed attorneys and solicitors under the old system." (*Goodyear* v. *Sawyer,* 17 Fed. 2.)

"The fee bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other charges and expenses as between solicitor and client." (*Louisiana State Lottery Co.* v. *Clark,* 16 Fed. 20, 21.)

See also *Beach, Modern Equity Practice* (1894), Vol. 2, Sec. 1015; and *Street, Federal Equity Practice* (1909), Vol. 2, Sec. 2034. The latter treatise discusses the $20.00 docket fee allowed by the Act of 1853, as follows:

> "The ordinary docket fee, or solicitor's fee, of twenty dollars, allowed by statute to be taxed in every cause that comes to a final hearing, is not variable in amount, and when taxable is not dependent on the discretion of the court. This item is therefore taxable as between party and party, and though it represents a solicitor's fee, it is not an item of costs as between solicitor and client, in the sense in which this expression is commonly used."

In addition to the foregoing direct authorities to the effect that the Act of 1853 covers party and party costs only, may be cited the following cases stating in more general terms that costs in equity are not regulated by statute:

Newton v. *Consolidated Gas Co.*, 265 U. S. 78, 44 S. Ct. 481 (1923).
In re Peterson, 253 U. S. 300, 40 S. Ct. 543 (1919).
Stallo v. *Wagner*, 245 Fed. 636, 158 C. C. A. 64 (1917).
In re Schocket, 177 Fed. 583 (1910).
The Gordon Campbell, 131 Fed. 963 (1904).
Tesla Electric Co. v. *Scott*, 101 Fed. 524 (1900).

In *In re Schocket, supra,* the court said:

> "A court of equity in extending an order for the taxation of costs so that it may include charges and expenses properly incurred, seems to proceed rather upon considerations of the substantial equities of the parties than upon ordinary statutory provisions concerning costs. *3 Daniell's Chancery*, (1st Am. Ed.) p. 1586."

Attention may be called also to the fact that the Act, regulating, as it does, party and party costs only, deals merely with costs in the District Court, and makes no provision for costs or allowances for services or proceedings in the Circuit Court of Appeals or the Supreme Court. The act is one "to regulate the fees and costs to be allowed clerks, marshals and attorneys of the Circuit and district courts of the United States."

Inasmuch as the Act regulates party and party costs only (and those costs only in the district court), it has no bearing upon the power of a court of equity to award, in proper cases, costs as between solicitor and client. Indeed, even as to party and party costs, the Act controls only as regards the items of costs mentioned. In many cases items have been taxed as costs which are not provided for in the statute. See to this effect:

In re Peterson, 253 U. S. 300, 40 S. Ct. 543 (1919).

Western Union Telegraph Co. v. *Louisville & N. R. Co.,* 208 Fed. 581 (1913).

Matheson v. *Hanna-Schoelkopf Co.,* 128 Fed. 162 (1904).

Kaempfer v. *Taylor,* 78 Fed. 795 (1897).

Jerman v. *Stewart, Gwynne & Co.,* 12 Fed. 271 (1882).

Spaulding v. *Tucker,* 22 Fed. Cas. No. 13221 (1871).

Jordan v. *Agawam Woolen Co.,* 13 Fed. Cas. No. 7516 (1869).

State statutes allowing attorneys' fees to be taxed as costs in certain cases, have often been given effect in actions brought in the federal courts. This has been done on the theory that where Congress has not regulated the subject of costs, the Federal Courts, in legal

actions, follow the state rule. The cases holding such fees properly taxable are really decisions to the effect that the Act of 1853 does not cover such allowances. The following cases are examples:

National Surety Co. v. *Lyons*, 16 Fed. (2d) 688 (C. C. A. 8th Cir.) (1926).

Globe Indemnity Co. v. *Sulpho-Saline Bath Co.*, 299 Fed. 219 (C. C. A. 8th Cir.) (1924), *Certiorari* denied, 266 U. S. 606.

Michigan Aluminum Foundry Co. v. *Aluminum Co. of America*, 190 Fed. 903 (1911).

Williamson v. *Liverpool & London Ins. Co.*, 141 Fed. 54 (C. C. A. 8th Cir.), 1905.

The Southern Company admits that notwithstanding the Act, allowances for expenses and counsel fees within the rule of *Trustees* v. *Greenough*, 105 U. S. 527, may be made. (Brief in support of application for *certiorari*, p. 32.) But if the Act is to be interpreted in accordance with the Southern Company's contention—that is, as covering solicitor and client costs—it is difficult to sustain the allowance in *Trustees* v. *Greenough*. There is nothing unique about the fees taxed in *Trustees* v. *Greenough*. That case is merely one example of the allowance of solicitor and client costs. So far as concerns the controlling effect of the Act of 1853, the situation in *Trustees* v. *Greenough* is precisely the same as in the present case. *Trustees* v. *Greenough*, and every other case since 1853 in which costs as between solicitor and client have been awarded, establish beyond question that the Act of 1853 has no bearing upon the present controversy.

IV.

The power of the Federal Courts in equity cases.

There being then no statute bearing upon the power of the District Court to allow solicitor and client costs in this case, the power to award such costs is dependent upon general equitable principles.

Article III, Section 1 of the Constitution vests the "judicial power of the United States" in the Supreme Court and such inferior courts as Congress may establish. The distinction between law and equity is referred to in Article III, Section 2. It is elementary that the Constitution vested in the Courts of the United States the common law powers of the English law courts, and the equity powers of the then High Court of Chancery in England.

The following authorities conclusively establish that the equity jurisdiction of the Federal Courts is the same as that possessed by the High Court of Chancery in England at the time of the adoption of our Constitution:

Waterman v. *Canal-Louisiana Bank and Trust Company*, 215 U. S. 33, 30 S. Ct. 10 (1909).
Mississippi Mills v. *Cohn*, 150 U. S. 202 (1893).
Kirby v. *Lake Shore & M. S. R.*, 120 U. S. 130 (1886).
Russell v. *Farley*, 105 U. S. 433 (1881).
Payne v. *Hook*, 7 Wall. 425 (1868).
State of Pennsylvania v. *Wheeling Bridge Co.*, 18 How. 460 (1855).
Fontain v. *Ravenel*, 17 How. 369 (1854).
Story v. *Livingston*, 13 Pet. 359 (1839).
Robinson v. *Campbell*, 3 Wheat. 212 (1818).
Childs v. *Ferguson*, 181 Fed. 795, 104 C. C. A. 305 (1910).
Karns v. *Imlay Rapid Cyanide Process Co.*, 181 Fed. 751 (1910).

Matheson v. *Hanna-Schoelkopf Co.*, 128 Fed. 162 (1904).
Loring v. *Marsh*, 15 Fed. Cas. No. 8515 (1863).

In the rules promulgated by the Supreme Court in 1822, we find the following:

> "Rule 33. In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the practice of the High Court of Chancery in England."

Rule 90, originally adopted in 1842, and revised in 1866, was as follows:

> "Rule 90. In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

Rule 90, though not carried forward into the present equity rules, adopted in 1912, has been expressly held to continue in full force and effect, its omission from the present rules being due to the fact that the rule had become so imbedded in the jurisprudence of the Federal Courts as to make its inclusion no longer necessary. *Individual Drinking Cup Co.* v. *Union News Co.*, 250 Fed. 625, 162 C. C. A. 641 (1918); *Lindley* v. *Denver*, 259 Fed. 83, 170 C. C. A. 151 (1919).

V.

The Federal Courts in equity cases have power to allow solicitor and client costs.

The Circuit Court of Appeals, after reviewing the English decisions dealing with the taxation of solicitor and client costs, concluded that they authorized such costs in the following types of cases:

> (a) Where gross charges of fraud and misconduct have been made and not sustained;
>
> (b) Where the main ground of the suit is false, unjust, vexatious, wanton or oppressive, and so shown to be;
>
> (c) Where a fiduciary relation exists, such as trustee and *cestui que trust*, pledgor and pledgee, or principal and agent, and the fiduciary is put to expense, either in defending an unfounded suit, or in administering or protecting and preserving the trust property or pledged property. (See Rec. V. 1, p. 738, 28 Fed. [2d] 241.)

(a) The English authorities undoubtedly authorize the imposition of solicitor and client costs in the first type of case. See to this effect the following:

> *Ex parte Simpson*, 15 Ves. Jr. 476 (1809).
> *Passingham* v. *Sherborn*, 9 Beavan 424 (1839).
> *Ibberson* v. *Worth*, 1 Jur. (N. S.) 440 (1855).
> *D'Oechsner* v. *Scott*, 24 Beavan 239 (1857).
> *Forester* v. *Read*, L. R. 6 Ch. App. 40 (1870).
> *Kevan* v. *Crawford*, L. R. 6th D. 29 (1877).
> *Fane* v. *Fane*, L. R. 13 Ch. D. 228 (1878).
> *Bruty* v. *Edmundson*, L. R. (1917) 2 Ch. 285.

There is no fiduciary relationship in these cases. Nor is there any fund in court to be administered. The cases seem to evidence a policy for the discouragment of

scandalous and impertinent charges. In *Ex parte Simpson, supra,* Lord Eldon said:

> "There would be much reason to regret that a court should not be armed with the power to protect parties from the expense, and its records from the stain, which too frequently arises from the introduction of irrelevant and scandalous matter."

The English rule does not impose solicitor and client costs in every case where fraud is alleged and not substantiated. The imposition of all costs in equity is of course discretionary. In most of the cases where unproven charges of fraud or misconduct have called forth the exercise of the discretion, the charges have been patently unwarranted and recklessly made or else without bearing on the issues of the case, and inserted with the evident purpose of creating prejudice.

We have found no American case imposing solicitor and client costs upon a plaintiff merely because he has made baseless and unwarranted charges of fraud or misconduct against the opposing party, there being no fiduciary relationship involved. Nor is there any case, we believe, which criticizes or repudiates the doctrine of the foregoing English authorities. It has been held, however, that party and party costs will be denied to the prevailing party in an equity case, where, wholly without foundation, he makes charges of gross misconduct against the other party. *Mayhew* v. *Phoenix Insurance Co.,* 23 Mich. 105 (1871).

It is submitted that, in a flagrant case, a power in a court of equity to discourage reckless and prejudicial charges of misconduct by the imposition of solicitor and client costs upon the offending party, can be exercised to the betterment of judicial administration.

(b) The second type of case in the classification made by the Court of Appeals, is one where the suit is false, unjust, wanton or oppressive. The mere fact that the defendant prevails in the litigation does not fix the suit within this category. In most of the English cases where solicitor and client costs have been imposed in situations of this character, the action was so obviously baseless and unwarranted that bad faith in the institution of the action was reasonably apparent. See

Dungey v. *Angove*, 2 Ves. Jr. 304 (1794).
Simpson v. *Malherbe*, 4 Gifford 707 (1865).
Palmer v. *Walesby*, L. R. 3 Ch. A. C. 732 (1868).
Turner v. *Collins*, L. R. 12 Eq. Cas. 438 (1871).

In *Simpson* v. *Malherbe*, *supra*, the court said:

> "When the court finds that a suit is instituted, not *bona fide* for the direct ostensible purpose, but with a view to some ulterior and improper purposes, its duty is to see that those who are improperly sued in such a manner have justice done to them by a full and proper indemnity against all the expenses which they have unjustifiably been obliged to incur."

On the same basis, such costs have been imposed in England for the making of excessive and frivolous amendments.

Deggo v. *Colebrook*, 1 Atk. 395 (1738).
Rennett v. *Green*, 1 Cox Ch. Cas. 253 (1786).
Masserne v. *Lyndon*, 2 Brown 291 (1788).

As prefatory to a discussion of the American cases dealing with the right to solicitor and client costs in connection with baseless and unwarranted litigation, a brief consideration of party and party costs in such cases may be helpful.

Originally, no costs of any kind were awarded, either at law or in equity. *Day* v. *Woodworth*, 13 How. 363 (1851). "But the plaintiff who made a false clamor, and either failed to try his case, or trying it, failed to sustain it, was amerced heavily, and the fine went to the King as a penalty for his invasion of a court of justice." *Goodyear* v. *Sawyer*, 17 Fed. 2, 9 (1883). The statutes of Marlbridge (1267) and Gloucester (1278), and later statutes, "by constantly increasing severity, sought to discourage false suits by giving a defendant full costs against a plaintiff who failed in his action, and were especially severe on one who discontinued his suit, or was nonsuited for his own default without a trial; these costs to the defendant taking the place of the former fine to the King." *Goodyear* v. *Sawyer*, 17 Fed. 2, 10 (1883). The statute of 17 Richard II, c. 6 (1394), is said to be the foundation of costs in equity. *Beames, Equity Costs*, 4. It provided "forasmuch as people can be compelled to come before the King's council, or in the chancery, by writs grounded upon untrue suggestions, that the chancellor for the time being, presently after that such suggestions be duly found and proven untrue, shall have power to ordain and award damages according to his discretion to him which is so troubled unduly." *Goodyear* v. *Sawyer*, 17 Fed. 2, 10 (1883); *Stallo* v. *Wagner*, 245 Fed. 636, 158 C. C. A. 64 (1917). The statute of 15, Henry VI, c. 4, recited that "divers persons were greatly vexed and grieved by writs of subpoena," and enacted that "surety be found to satisfy the party so grieved and vexed, for his damages and expenses, if so be that the matter cannot be made good which is contained in the bill." *Beames, Equity Costs*, 7. The statute of 4 Anne, c. 16, No. 23 (1706), "for preventing vexatious suits in courts of equity," enacted "that upon the plaintiff's

dismissing his own bill, or the defendant's dismissing the same for want of prosecution, the plaintiff in such suit shall pay to the defendant or defendants his or their full costs, to be taxed by a master." *Beames, Equity Costs, 85.*

Costs at law and in equity, therefore, arose out of and were grounded upon a policy, either for the punishment of a plaintiff who made a "false clamor," or for the protection and indemnification of the party unjustly proceeded against, or both. That the principle has remained predominant in legal actions is proven by the rule that costs at law follow the event of the suit. The losing party pays, and the winner is entitled to recover costs.

In equity, however, costs are discretionary. *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 44 S. Ct. 481 (1923). The court need not award them to the prevailing party. Indeed, it may award them against the prevailing party. The rule, that equity costs are discretionary, means that they are awarded according to the conscience of the court. *Stallo* v. *Wagner*, 245 Fed. 636, 158 C. C. A. 64 (1917). That is to say, they are awarded as the equities of the case may require. *In re Schocket*, 177 Fed. 583 (1910). And what are the "equities" of the case?

If the claim or defense prosecuted or urged is clearly without foundation, this fact will be taken into account in taxing costs. *The Robert Jenkins*, 22 Fed. 797 (1885); *Johnson* v. *Blanchard*, 7 Fed. 597 (1885); *The Boston*, 3 Fed. Cas. No. 1672 (1846); *In re Clark*, 174 Ia. 449, 154 N. W. 759 (1915); *Geer* v. *Finn*, 196 Mich. 738, 163 N. W. 20 (1917).

One making a fraudulent claim will be taxed with costs. *In re Schocket*, 177 Fed. 583 (1910).

An assignee for creditors, with notice of facts which

should put him on inquiry as to fraud in connection with the assignment, is not entitled to his costs. *Hastings* v. *Spenser*, 11 Fed. Cas. No. 6201 (1853).

A party who takes a frivolous appeal, or makes a frivolous exception, for purposes of delay, is taxable with costs in connection therewith. *Chicago Terminal Transfer Co.* v. *Bomberger*, 130 Fed. 884, 65 C. C. A. 64 (1904); *Equity Rule 67*.

One who seeks relief to which he is clearly entitled, but with the ulterior motive and purpose of injuring the other party, will be denied his costs. *The Ellen Holgate*, 30 Fed. 125 (1887); *Corkery* v. *Dorsey*, 223 Mass. 97, 111 N. E. 795 (1916).

A complainant will be decreed his costs though no recovery is had, if he is misled into bringing suit by the misconduct or misrepresentations of the defendant. *Case of Pettit*, 19 Fed. Cas. No. 11047; *Twist* v. *Babcock*, 48 Mich. 513, 12 N. W. 680 (1882); *McCloskey* v. *Kirk*, 243 Pa. 319, 90 At. 73 (1914).

A plaintiff who brings an unnecessary suit, when his claim is admitted and could be adjusted without litigation, is denied his costs. *Wilcke* v. *Duross*, 144 Mich. 243, 107 N. W. 907 (1906); *Allen* v. *City of Detroit*, 167 Mich. 464, 133 N. W. 317 (1911); *McCloskey* v. *Bowden*, 82 N. J. E. 410, 89 At. 528 (1914); *Stafford* v. *Mott*, 3 Paige 100 (1832); *Gates* v. *Parmly*, 93 Wis. 294, 67 N. W. 739 (1896).

The foregoing cases deal with chancery costs as between party and party. They seem to evidence a broad equitable doctrine that a court of equity will exercise its discretionary power over costs to effect, as far as may be, justice between the parties. Unwarranted, unnecessary, fraudulent and oppressive litigation will entail, upon the party responsible therefor, the duty of

indemnifying the injured party, in so far as party and party costs can indemnify.

The American courts also impose solicitor and client costs in such cases.

In *The Apollon*, 9 Wheat. 362 (1824), attorneys' fees were awarded to the plaintiff in a suit in admiralty for the illegal seizure of a ship. Justice Story, delivering the opinion of the court, said:

> "The fifth item, allowing $500 as counsel fees, is, in our opinion, unexceptionable. It is the common course of the admiralty to allow expenses of this nature, either in the shape of damages, or as part of the costs. The practice is very familiar on the prize side of the court; it is not less the law of the court in instance causes, it resting in sound discretion to allow or refuse the claim."

Patterson v. *Ball*, 18 Fed. Cas. No. 10, 823 (1809), was an action brought in the District of Columbia by a foreign executor, the action there being wholly unjustifiable. Upon dismissal of the bill, the defendant was awarded an attorneys' fee, taxable as costs against the plaintiff.

In *The Elizabeth Frith*, 8 Fed. Cas. No. 4361 (1831), it is stated that in an action for seaman's wages, counsel fees will be allowed as costs if the defense is merely vexatious. The case does not involve solicitor and client costs to the defendant in an unwarranted suit, but, rather, solicitor and client costs to the plaintiff in connection with an unwarranted defense. The same principle, however, applies. In *In re Wright*, 16 Fed. 482 (1883), the court said:

> "Where an action has been unreasonably, unjustifiably, or improperly defended, so that unnecessary expenses have been incurred, I have no doubt

> a court of admiralty may, in its discretion, as a court of equity may do in analogous cases, order the costs or any part of them, as may be proper, to be paid personally by the litigating parties."

In *Gulf & S. I. R. Co.* v. *Walker,* 104 Miss. 363, 61 So. 458 (1913), an attorneys' fee was awarded to the defendant in an unwarranted injunction suit, brought to restrain the prosecution of certain actions at law. To the same effect is *Joslyn* v. *Parlin,* 54 Vt. 670 (1881).

Spring Garden Insurance Co. v. *Amusement Syndicate Co.,* 178 Fed. 519, 102 C. C. A. 29 (1910), though not involving precisely the same point, is of value in this connection. There actions at law had been brought in the state court on certain insurance policies. A state statute authorized the allowance of attorneys' fees to the plaintiff in such cases, to be taxed as costs. The actions were subsequently removed to the federal court. This was a suit in equity, by the insurance companies, to enjoin the prosecution of the actions at law. The court held that there was no equity in the bill, that the actions at law on the policies were entirely proper, and that the plaintiff should be required to pay the costs in those actions, including the attorneys' fee provided by the statute.

J. E. North Lumber Co. v. *Gary,* 83 Miss. 640, 36 So. 2 (1904), and *Bank of Philadelphia* v. *Posey,* 130 Miss. 530, 92 So. 840 (1922), hold that upon the dissolution of an injunction, improvidently granted, the defendant is entitled to an allowance for attorneys' fees.

In *O'Neal* v. *Spivey,* 145 S. E. 71 (Ga.) (1928), attorneys' fees were allowed to the plaintiff in an equity case, under a statute allowing them "if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and ex-

pense." The court held that the statute was merely a codification of the common law rule.

North Missouri Railroad Co. v. *Lackland,* 25 Mo. 515 (1857), was a condemnation proceeding, brought by a railroad company to acquire a right of way across defendant's land. After the filing of the Commissioner's report assessing damages, the company changed its proposed route and sought to dismiss the proceeding. The condemnation statute provided that the court should adjudge the costs of the proceeding according to equity. The court held that the company had the right to dismiss only upon indemnifying the defendant for all costs and expenses, including attorneys' fees, both in the trial and appellate courts, incurred by him. *North Missouri Railroad Co.* v. *Reynal,* 25 Mo. 534 (1857), is a companion case to the same effect.

A plaintiff who improvidently and without warrant secures the appointment of a receiver is personally liable for the receiver's costs and expenses, including attorneys' fees, when, upon final hearing or appeal, the appointment is held unwarranted and the receivership terminated.

Beach v. *Macon Grocery Co.,* 125 Fed. 513, 60 C. C. A. 557 (1903).

In re Lacov, 142 Fed. 960, 74 C. C. A. 130 (1905).

In re Wentworth Lunch Co., 191 Fed. 821, 112 C. C. A. 335 (1911).

Myers v. *Frankenthal,* 55 Ill. App. 390 (1894).

City of St. Louis v. *St. Louis Gas Light Co.,* 11 Mo. App. 237 (1881).

Weston v. *Watts,* 45 Hun. 219 (1887).

Hernandez v. *Brookdale Mills,* 232 N. Y. 552, 134 N. E. 568 (1921).

Anderson v. *Marietta National Bank,* 93 Okla. 241, 220 Pac. 883 (1923).

Delcambre v. *Murphy,* 5 S. W. (2d) 789 (Tex. Civ. App.) (1928).

The point is fully discussed by the Circuit Court of Appeals for the Second Circuit in *In re Lacov, supra.* as follows:

> "The question presented for review is whether petitioning creditors are liable for the expenses of a receivership in a case where upon commencing a proceeding against a debtor to have him adjudicated a bankrupt they have applied to the court and obtained the appointment of a receiver of his property, and the proceeding is subsequently dismissed as unfounded; the receiver meanwhile having entered upon his duties, taken charge of the property, and incurred expenses.
>
> There is no express provision in the bankruptcy act, which authorizes the court of bankruptcy to compel petitioning creditors to pay the costs of a receivership under such circumstances, and the power of the court must therefore rest upon its implied authority to require those to bear the expenses of a proceeding, which they have instituted without sufficient cause, and in the course of which they have invoked its assistance and asked it to put its machinery in motion for their benefit, in such a way that expenses will accrue, which must be borne either by them or the adverse party. Courts of equity frequently exercise this power in advance of taking action, and in the absence of any statutory authority. Thus, in granting an injunction, it is common practice to require the plaintiff to give a bond or make a deposit in the registry to secure the adverse party against loss if the process be subsequently vacated. The precise question, however, has been considered frequently and determined by the courts.
>
> In *Knickerbocker* v. *McKindley Coal Co.*, 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54, it was decided that where the property that comes into the possession of the court is insufficient to pay the expenses necessarily incurred by the receiver in its management, the

deficiency may be taxed against the applicant for the receiver.

Couper v. *Shirley*, 75 Fed. 168, 21 C. C. A. 288, was an action to foreclose a mortgage in which, at the instance of the plaintiff, a receiver of the rents and profits of the mortgaged premises was appointed, and subsequently, upon the ground that the defendant was entitled to the rents and profits during the pendency of the action, the court required the receiver to pay them over, without compensation for his expenses and services, to the defendant. Upon an appeal by the receiver the Circuit Court of Appeals said:

'It may be that some provision ought to have been made for his pay, but it is clear to our minds that upon the facts presented in this case the party who improperly procured the appointment of the receiver should have been required, if the receiver was entitled to anything, to pay his expenses and services.' "

This court fully recognized the power of a court to impose upon the plaintiff costs of a receivership improvidently granted, in *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, 28 S. Ct. 406 (1908). In that case, however, the imposition of such costs was denied, on the ground that the application for the receiver was reasonable under the circumstances.

The plaintiff has also been decreed to pay the expenses of a receivership, including attorneys' fees, when the receivership estate has been insufficient in amount to meet such costs. *Buell* v. *Kanawha Lumber Corp.*, 201 Fed. 762 (1912); *Ephriam* v. *Pacific Bank*, 129 Cal. 589, 62 Pac. 177 (1900).

In re Schockett, 177 Fed. 583 (1910), though not precisely in point, is persuasive in this connection. The claimant of property in the hands of a trustee in bankruptcy filed a reclamation petition against the trustee.

The petition was dismissed as fraudulent and wholly unwarranted. The trustee was awarded, as part of the costs, charges and expenses incurred by him in preserving the property during the pendency of the petition. Note the language of the court:

> "The petitioner in reclamation having made application to a court exercising chancery powers in the administration of the bankrupt's assets, seeking a determination of his right to have returned to him specific property held by the trustee for the benefit of the creditors, is justly chargeable for such necessary expenses in the custody of the goods as were occasioned by the proceedings instituted by him, and which would not have been incurred, but for his intervention. To cast upon the property belonging to the creditors the costs of preservation pending the fraudulent claim of an intervener is contrary to equity. I am of the opinion that the court has authority to so extend an order for the taxation of costs against the intervener as to include a direction to tax charges and expenses of custody, as well as ordinary costs. * * * "

A public policy in favor of the imposition of solicitor and client costs against one who instigates an unwarranted and baseless suit, is evidenced by various statutes and rules of court imposing costs and attorneys' fees in certain cases where unreasonable or unwarranted claims or defenses are insisted upon. State statutes are very common providing for the allowance of attorneys' fees in action on insurance policies and on claims against common carriers, not paid or settled within a certain time after the cause of action accrues. In the following cases, statutes of this character were given effect:

> *Chicago & N. W. Ry. Co.* v. *Nye-Schneider-Fowler Co.*, 260 U. S. 35, 43 S. Ct. 55 (1922).

Missouri, K. & T. R. Co. v. *Harris*, 234 U. S. 412, 34 S. Ct. 790 (1913).
Missouri, K. & T. R. Co. v. *Cade*, 233 U. S. 642, 34 S. Ct. 678 (1914).
Farmers & Merchants Insurance Co. v. *Dobney*, 189 U. S. 301, 23 S. Ct. 565 (1902).
Home Life Insurance Co. v. *Fisher*, 188 U. S. 726, 23 S. Ct. 380 (1902).
Iowa Life Insurance Co. v. *Lewis*, 187 U. S. 335, 23 S. Ct. 126 (1902).
Fidelity Mutual Life Assn. v. *Mettler*, 185 U. S. 308, 22 S. Ct. 662 (1901).

The purpose of such statutes is well indicated by the following statement of the court in *Missouri, K. & T. R. Co.* v. *Cade, supra:*

> "Manifestly, the purpose is merely to require the defendant to reimburse the plaintiff for a part of his expenses not otherwise recoverable as 'costs of suit.' So far as it goes, it imposes only compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand. The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle. *2 Bacon Abr. Title Costs.* Numerous cases in the state courts have sustained similar legislation. *Vogel* v. *Pekoc*, 157 Ill. 339, 334, 346, 30 L. R. A. 491, 42 N. E. 386; *Burlington, C. R. & N. R. Co.* v. *Dey*, 82 Iowa 312, 340, 12 L. R. A. 436, *3 Inters. Com. Rep. 584*, 31 Am. St. Rep. 477, 48 N. W. 98; *Cameron* v. *Chicago, M. & St. P. R. Co.*, 63 Minn. 384, 388, 31 L. R. A. 553, 65 N. W. 652; *Wortman* v. *Kleinschmidt*, 12 Mont. 316, 330,

30 Pac. 280. If a reasonable penalty may be imposed for failure to satisfy a demand found to be just, it follows *a fortiori* that costs and an attorney's fee may be. See *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 105, 43 L. Ed. 909, 913, 19 Sup. Ct. Rep. 609; *Farmers' & M. Ins. Co.* v. *Dobney*, 189 U. S. 301, 304, 47 L. Ed. 821, 825, 23 Sup. Ct. Rep. 565."

Title 49, Sections 8 and 16 (2), United States Code Annotated, provides for an allowance of attorneys' fees, to be taxed as costs, in both trial and appellate courts, in certain cases under the Interstate Commerce Act, where the defendant carrier fails, for a stated period, to comply with the order of the Interstate Commerce Commission. *Louisville & N. R. Co.*, v. *Dickerson*, 191 Fed. 705, 112 C. C. A. 295 (1911). The provision was upheld by this court, in *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 35 S. Ct. 328 (1914), in the following terms:

"The contention that the provision for an attorney's fee for services in the suit is invalid as being purely arbitrary, and as imposing a penalty for merely failing to pay a debt, is without merit. The provision is leveled against common carriers engaged in interstate commerce, a quasi public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the act to regulate commerce. *Atlantic Coast Line R. Co.* v. *Riverside Mills*, 219 U. S. 186, 208, 55 L. Ed. 167, 183, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164. One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the payment, without suit, of just demands, does not militate against its validity. *Missouri, K. & T. R. Co.*

v. *Cade*, 233 U. S. 642, 651, 58 L. Ed. 1135, 1138, 34 Sup. Ct. Rep. 678, and cases cited. It requires that the fee be reasonable and fixed by the court, and does not permit it to be taxed against the carrier until the plaintiff's demand has been adjudged upon full inquiry to be valid. In these circumstances the validity of the provision is not doubtful, but certain."

Mangnetto v. *Crankshaw*, 26 R. I. 453, 59 At. 309 (1904), gives effect to a state statute allowing a counsel fee to the opposing party when a demurrer is overruled. *Title 28, Section 824, United States Code Annotated*, provides that if any informer on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, such informer shall be liable to the clerk, marshal and attorney for the fees of such prosecution. *Title 28, Section 819, United States Code Annotated*, provides that if in any suit against officers making seizures under any act regulating duties on imports, the plaintiff is nonsuited, or judgment is passed against him, the defendant shall recover double costs. Statutes and court rules penalize the multiplication of proceedings in a cause, increasing costs unreasonably and vexatiously. *Title 28, Sections 825, 829, United States Code Annotated; Motion Picture Patents Co.* v. *Steiner*, 201 Fed. 63, 119 C. C. A. 401 (1912); Equity Rules 67, 76. Statutes are common imposing attorneys' fees upon or otherwise penalizing, parties taking frivolous appeals. *Wittenberg* v. *Fisher*, 183 Mo. App. 347, 166 S. W. 1106 (1914); *Syndicate Imp. Co.* v. *Bradley*, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60 (1896).

Attorneys' fees (in addition to the $20 fee provided by the Act of 1853) are also allowed the successful party

in patent and copyright infringement cases, under the laws of the United States. *Title 17, Section 40, United States Code Annotated; E. G. Staude Mfg. Co.* v. *Labombarbe,* 243 Fed. 362, 156 C. C. A. 142 (1917).

The foregoing American authorities indicate that in this country, as well as in England, a public policy in favor of the discouragement of and indemnification for litigation which is wholly baseless and unwarranted, justifies a court of equity in imposing solicitor and client costs upon parties offending in that behalf. The statutes, as a matter of course, cannot warrant any action not within their terms; but they certainly represent the extension of a principle already established by courts of equity under similar circumstances.

(c) The third type of case discussed by the Court of Appeals, in which the court considered the pertinent authorities to allow solicitor and client costs, concerned the fiduciary relationships of trustee and beneficiary, pledgor and pledgee, and principal and agent, where the fiduciary is put to expense, either in defending an unfounded suit, or in administering or protecting and preserving the trust or pledged property.

The Southern Company, in its brief supporting the application for certiorari, seeks to explain away all the numerous cases in this third classification, as follows (p. 32):

> "It is a general principle that the trust estate must bear the expenses of its administration. It is also a general principle that where one of many parties having a common interest in the trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself or by a proportionate contribution from those who accept the benefit of his efforts.

> This rule, however, has, we contend, no application whatsoever to the present case."

The implication is that solicitor and client costs are payable only out of a fund, either held by an express trustee or recovered from a constructive trustee. The right to recover such costs is not, however, so limited.

A trustee, guilty of no misconduct and reasonably defending an action brought against him by the *cestui* to compel a conveyance of trust assets, is entitled to an allowance for attorneys' fees, payable out of the trust fund, if one be available. *Fleming* v. *Wilson*, 6 Bush (69 Ky.) 610 (1869); *Clark* v. *Anderson*, 13 Bush (76 Ky.) 111 (1877); *In re Starr*, 103 At. 392 (N. J.) (1918); *Biddle's Appeal*, 83 Pa. St. 340 (1877); *Lycan* v. *Miller*, 56 Mo. App. 79 (1894). He has this right, in the ordinary case, even though the *cestui* prevails in the litigation. *Darby* v. *Gilligan*, 37 W. Va. 59, 16 S. E. 507 (1892).

But if there be no fund out of which such an allowance can be paid, or if, though such a fund exists, the action by the *cestui* is wholly baseless and unwarranted, or recklessly brought, then the allowance of attorneys' fees to the trustee will be taxed as costs against the *cestui* personally. *Minuse* v. *Cox*, 5 Johns. Ch. 441 (1821); *Thome* v. *Allen*, 24 Ky. L. R. 987, 70 S. W. 410, 71 S. W. 431 (1903); *Turner* v. *Collins*, L. R. 12 Eq. Cas. 438 (1871). Or, in certain instances, the fees allowed will be taxed against the plaintiff's share of the trust estate. *Patterson* v. *Northern Trust Co.*, 286 Ill. 564, 122 N. E. 55 (1919); *In re Chenell*, L. R. 8 Ch. D. 492 (1877).

The rule is so stated in *Halsbury, Laws of England*, V. 28, p. 161:

> "And the *cestui que trust* or his solicitor may be ordered to bear the cost of the proceedings personally, if they have been commenced wrongfully or too hastily."

A similar statement appears in the three leading treatises on the law of trusts (two by American authors, and one English). In *Perry, Trusts and Trustees*, 7th Ed. (1929), V. 2, Sec. 894, it is said:

> "The general rule is, that trustees shall have their costs either out of the trust fund, or from the *cestuis que trust* personally (upon the principle that he should be reimbursed all the expenses to which he has been put without his own fault by reason of his being a trustee). If there is a fund within the control of the court, they may have their costs as between solicitor and client. Where there is no fund within control of the court, if the *cestuis que trust* bring the trustees before it to obtain a direction as to the rights of the parties, or the mode of administration, and the trustees are free from all blame or fault, they are entitled to costs against the *cestuis que trust* personally, to be taxed as between solicitor and client."

See also *Hill on Trustees*, (1867) p. 566, and *Lewin on Trusts*, 8th Ed. (1891), V. 3, p. 987, to the same effect.

In a proper suit by the *cestui que trust* against the trustee, to enforce the fiduciary obligation, whether the defendant be an express or constructive trustee, the prevailing *cestui* is entitled to solicitor and client costs. *In re Clark*, 174 Ia. 499, 154 N. W. 759 (1915); *Attorney General* v. *Old South Society*, 13 Allen 474 (1866); *McGaw* v. *Acker, Merrall and Condit Co.*, 111 Md. 153,

73 At. 731 (1909); *Woodworth* v. *Old Second National Bank*, 154 Mich. 459, 118 N. W. 581 (1908); *Madden* v. *Rosseter*, 192 N. Y. S. 113, 117 Misc. Rep. 244 (1921); *American National Bank* v. *Warner*, 176 S. W. 863 (Tex. Civ. App.) (1915).

In *McGaw* v. *Acker, Merrall and Condit Co.*, *Woodworth* v. *Old Second National Bank*, and *Madden* v. *Rosseter, supra*, the allowance was not out of any fund in the hands of the trustee, or of the court, but was imposed personally against the trustee, over and above and in addition to his obligation as a fiduciary.

Cases of the type referred to by the Southern Company, where one who recovers or preserves a fund for the benefit of himself and others is held entitled to an allowance of attorneys' fees out of the fund, are quite numerous. *Trustees* v. *Greenough*, 105 U. S. 527 (1881), is the leading case. There are many other cases of the same type, mostly creditors' and stockholders' bills, a late decision being *Hutchinson Box Board & Paper Co.* v. *Van Horn*, 299 Fed. 424 (C. C. A. 8th Cir.) (1924).

A fund is recovered or preserved in such cases, and attorneys' fees are paid out of the fund. But the existence of the fund, as such, is not the basis of the court's power to award the fees. There is no magic in the word "fund." The mere fact that there is a fund does not empower a court to pay attorneys' fees out of it. The allowance of attorneys' fees in such cases is justified on the ground that the plaintiff, in recovering or preserving the fund, is acting in a fiduciary capacity toward those entitled to share in the fund. That this is the real basis of the doctrine is clearly indicated by the following excerpt from the opinion in *Trustees* v. *Greenough, supra:*

> "As to the point made by the appellants, that the complainant is only a creditor, seeking satisfaction

of his debt, and cannot be regarded in the light of a trustee, and therefore is not entitled to an allowance for any expenses or counsel fees beyond taxed costs as between party and party, a great deal may be said. In ordinary cases the position of the appellants may be correct. But in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust; and where all this has been done; and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings—if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trust*, and to have secured its proper application to their use."

It is to be observed that the term "fund," as used in the foregoing cases, does not refer to a fund in the hands of the court, or a fund being administered by the court. It is a fund in the possession of the defendant. Indeed, in many of the cases, there is no "fund" at all, in the ordinary sense. No particular property is sought to be recovered in many stockholders' and creditors' bills, but a money judgment is asked, and obtained, against defaulting directors or parties to whom property has been conveyed in fraud of creditors. To be sure, the liability of the defendant is, in a sense, a fund, in that it is realized upon for the benefit of the corporation or the creditors. But in none of these cases is there any estate in the process of administration by the court.

There are cases where a fund is in court, in process of administration. Instance the partition cases, and the receivership proceedings and the mortgage foreclosure cases. In all of these, attorneys' fees may be, and in regular course are, allowed, payable out of the fund in court. But the court's power to make the allowance does not grow out of or depend upon the existence of the fund.

In suits to construe or establish wills, brought by trustees or executors, there is, or may be, no fund of any kind in court; yet attorneys' fees are properly allowed and taxed as costs in such cases. *Williams* v. *MacDougall*, 39 Cal. 80 (1870); *Abbott* v. *Bradstreet*, 3 Allen 587 (1862); *Drew* v. *Wakefield*, 54 Me. 291 (1866); *In re* Neil's Will, 172 N. Y. S. 79, 184 App. Div. 507; *Re Davies; Jenkins* v. *Davies*, 64 L. T. R. 824 (1891); Perry, Trusts and Trustees, 7th Ed. (1929), Vol. 2, Sec. 891. The power of the court to award attorneys' fees in all the foregoing types of cases, is an incident of the control of a court of equity over trusts and of its jurisdiction to protect and indemnify trustees. In all of the cases mentioned, the party to whom the award was made was acting in a fidudiary capacity.

Attorneys' fees to the petitioning creditors in involuntary bankruptcy are allowed on the same theory. *In re Mead*, 16 Fed. Cas. No. 9364 (1871); *Ex parte Jaffray*, 13 Fed. Cas. No. 7170 (1869). (These cases arose under the Bankruptcy Act of 1867, which contained no provision for such fees.) Likewise, attorneys' fees incurred by an assignee for creditors are a proper charge in his favor. *Randolph* v. *Scruggs*, 190 U. S. 533, 23 S. Ct. 710 (1902); *Bramble* v. *Brett*, 230 Fed. 385, 144 C. C. A. 527 (1916); *In re Stewart*, 179 Fed. 222, 102 C. C. A. 348 (1910).

The plaintiff in an interpleader suit is entitled to such an allowance. *Louisiana State Lottery Co.* v. *Clark*, 16 Fed. 20 (1883). Also an heir successfully resisting the allowance of a claim against the decedent's estate. *Koelble* v. *Runyan*, 158 N. E. 179 (Ohio) (1927). Likewise an heir, and an administrator, setting aside fraudulent conveyances by the decedent. *Niday* v. *Graef*, 279 Fed. 941 (C. A. C., 9th Cir.) (1922); *Harrison* v. *Perea*, 168 U. S. 311, 18 S. Ct. 129 (1897). And a creditor successfully resisting the claim of a mortgagee to the proceeds of a vessel sold in a mechanic's lien suit. *Shannon* v. *Angelique*, 21 Fed. Cas. No. 12, 705 (1856). A partial assignee of a claim suing to adjust rights between himself and a subsequent assignee is entitled to attorneys' fees out of the proceeds of the claim. *Pickett & Sexton* v. *School District of Kansas City*, 193 Mo. App. 519, 186 S. W. 533 (1916).

Taxpayers who bring a bill to enjoin a municipality from paying a void note, are allowed their counsel fees, taxed as costs. *Frost* v. *Inhabitants of Belmont*, 6 Allen 152 (1863). An attaching creditor whose lien, on the subsequent bankruptcy of the debtor, is preserved for the benefit of the estate, is entitled to an allowance for attorneys' fees. *Receivers of Virginia Iron, Coal & Coke Co.* v. *Staake*, 133 Fed. 717, 66 C. C. A. 547 (1904). In a suit by a surviving partner against the widow and heirs of the deceased partner, for an accounting, attorneys' fees are allowable. *Patrick* v. *Patrick*, 71 N. J. E. 347, 63 At. 848 (1906).

In all the foregoing cases a fiduciary relation exists or is enforced. One party, though generally acting in his own interest as well, at the same time acts as trustee for others. If he performs that office properly, he will not be penalized and put out of pocket by being compelled to pay the cost of the litigation.

From the foregoing discussion it is apparent that the authorities fully sustain the power of the court to tax costs as between solicitor and client in the third type of case considered by the Court of Appeals.

We wish to cite, in addition, on the right to such costs in general, the following:

Canter v. *American & Ocean Ins. Co.*, 3 Pet. 307 (1830).

Beames, Costs in Equity (2d Ed.) (1840), Chap. 10.

Barbour, The Practice of the Court of Chancery (2d ed.) (1875), V. 2, pp. 336-339.

Daniell, Chancery Practice (1st Ed.) (1837), Sec. 4, Chap. 27.

Smith, Chancery Practice (2d Ed.) (1837), V. 1, pp. 697-700.

Street, Federal Equity Practice (1909), V. 2, Sec. 2040.

Turner, Practice and Costs in the High Court of Chancery (3d Ed.) 1804).

The treatises cited discuss the taxation of solicitor and client costs, both in this country and in England. The authoritative nature of the books by Daniell and Smith are well indicated by the following note by this court in *Thomson* v. *Wooster*, 114 U. S. 104 (1884):

> "Reference is made to the 1st edition of Daniell (pub. 1837) as being, with the 2d edition of Smith's Practice (published the same year), the most authoritative work on English Chancery Practice in use in March, 1842, when our Equity Rules were adopted. Supplemented by the General Orders made by Lords Cottenham and Langdale in August, 1841 (many of which were closely copied in our own Rules), they exhibit that 'present practice of the High Court of Chancery in England,' which by our 90th Rule was

> adopted as the standard of equity practice in cases where the Rules prescribed by this court, or by the Circuit Court, do not apply."

Beames, Costs in Equity, *supra*, is relied upon in many of the cases heretofore referred to. In *Goodyear* v. *Sawyer*, 17 Fed. 2 (1883), the author is spoken of as "Mr. Beames, who wrote a little before our equity rules were promulgated of the practice as it was then understood."

There are, in addition, a number of cases which, by analogy, bear upon the issue. In *Burns* v. *Rosenstein*, 135 U. S. 449 (1890), though no statutory authority existed therefor, expense incurred by the plaintiff in preserving attached property, was taxed as costs in plaintiff's favor in a suit for an accounting between partners. This court said:

> "The allegations of the original bill justified the issuing of the attachment. It was right that the property taken under it should be cared for, and as the court found that the plaintiffs were entitled to a decree against the defendants, a judgment for costs properly followed; and we perceive no reason why the plaintiffs should not have been allowed, as part of their costs, a reasonable amount for the expenses incurred in preserving the attached property, and for which they became primarily liable to the officer keeping it."

In re Peterson, 253 U. S. 300, 40 S. Ct. 543 (1919), taxed as costs the compensation of an auditor, though no statute or rule of court made provision therefor. Premiums paid on surety bonds of various kinds have been taxed as costs. *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 44 S. Ct. 481 (1923); *The Walter Adams*, 271

Fed. 358 (1921); *The Hurtsdale*, 171 Fed. 607 (1909); *The John D. Dailey*, 158 Fed. 642 (1907); *Jacobsen* v. *Lewis Klondike Expedition Co.*, 112 Fed. 73, 50 C. C. A. 12 (1901); *The South Portland*, 95 Fed. 295 (1899). In *Western Union Telegraph Co.* v. *Louisville & N. R. Co.*, 208 Fed. 581 (1913), a docket fee of $10 was allowed to plaintiff's attorney on the remanding of a cause to the state court after a wrongful removal; and in *Kaempfer* v. *Taylor*, 78 Fed. 795 (1897), a solicitor's docket fee of $5 was allowed upon a discontinuance. In neither case was there any statutory authority for the allowance.

Cases may of course be found where a requested allowance of attorneys' fees has been denied. This is to be expected, since such an allowance is discretionary, and should be made only in special cases. Most of the cases cited in the brief of the Southern Company, in which solicitor and client costs have been denied, are not at all in opposition to the Trust Company's position. Many of those cases are actions at law, in which admittedly there is no right to allow such costs. *Arcambel* v. *Wiseman*, 3 Dall. 306 (1796), holds that counsel fees cannot be allowed as a part of the damages (apparently on an injunction bond). *Day* v. *Woodworth*, 13 How. 363 (1851), is an action at law for trespass.

(d) The present state of the law upon these three points may be, therefore, summarized as follows:

As to point (a), the English authorities sustain the power of the court in equity cases to tax solicitor and client costs. In the absence of American cases to the contrary, it would seem that the English rule should prevail in the Federal Courts.

As to points (b) and (c), there are ample American authorities to support the principles laid down by the Circuit Court of Appeals.

If this be true, the decree of the Circuit Court of Appeals should be affirmed and the decree of the District Court reversed, for the only question passed upon by the trial court was as to its *power* to act. The case should be remanded with instructions to the trial court to exercise that power in accordance with the rules and practise in equity. There seems to be no doubt that the District Court believed that the facts of the present litigation brought it within the terms of the principle, if the court had the power to apply the principle.

What are those facts?

VI.

Were gross charges of fraud and misconduct made?

The answer to this question is to be found in the bills filed by the Southern Company and by those who were acting in its behalf in the litigation. Only a reading of the bills can give a true picture of the accusations and innuendoes with which they are made up. A few references will suffice to disclose their general character.

The intervening petition of the Southern Company, after alleging the absolute dominion and control by the Trust Company of the acts of the Belt Company and its subsidiaries and associated companies, alleged that the plan and purpose of the Trust Company was to "gather unto the Trust Company all the profits and other advantages," and to "*foist* upon the said railroad companies so utilized any and all losses, burdens or other liabilities" (Rec. V. II, p. 174); that the Trust Company used these companies for its own interests and for its own benefit and advantage instead of their own (Rec. V. II, p. 175); that it took and converted to its own use stocks and bonds belonging to the Belt Company valued at approximately

$870,000 (Rec. V. II, pp. 179-180); that it did not use its control of the Belt Company for the benefit of the stockholders and bondholders of the Belt Company, but for its own interest and in the same manner used its position as trustee under the Belt mortgage "in violation of its trust" (Rec. V. II, p. 182); that "in violation of its duty as trustee in said mortgage and with a view of appropriating to itself whatever of value there was remaining in the possession of said companies," it "contrived the plan of requiring said companies to turn over to it all of the personal property owned by said companies of every nature and description" (Rec. V. II, p. 182); that it caused the Belt Company to pretend to hold a directors' meeting for this purpose (Rec. V. II, p. 183); and that it used its knowledge of the Belt Company to its own advantage "all in violation of its duties as trustee." (Rec. V. I, p. 184.)

It may be that, as stated in petitioner's last brief (p. 11), these allegations charge something "in the nature of constructive fraud." But we respectfully submit that more than a "constructive" fraud is charged when a trustee is alleged to have "foisted" upon others losses, burdens and liabilities which are in fact his own; to have taken and converted to his own use the property of others to the amount of $870,000; to have "appropriated" to himself all the remaining assets of corporations alleged to be in his control, by "contriving" a plan and causing "pretended" directors' meetings to be held; to have misused the knowledge obtained by him as trustee; and all for his own advantage and in violation of his trust. One may be guilty of a "constructive" fraud when he innocently does something forbidden by law. But one cannot *constructively* have a "plan and purpose" (Rec. V. II, p. 173) to "foist" his own debts upon another; he cannot *con-*

structively cause things to be done for his own benefit and advantage; he cannot *constructively* "contrive" to "appropriate" to himself the property of others; he cannot *constructively* "pretend" to hold directors' meetings; he cannot *constructively* misuse knowledge obtained by him as trustee.

We submit that no graver charge can be made against a man than to assert that as trustee he has contrived to misuse his position to his own benefit and to the detriment of his trust. Here is no constructive fraud. It is as if one should charge a court of exercising its functions for its own ends rather than in the interests of the litigants for whom the court holds its power in trust. No relationship has been so jealously guarded by the law as that between trustee and *cestui que trust*.

In its amended petition the Southern Company, for good measure, charges that the Trust Company "unlawfully and improperly" used the proceeds of bonds sold by it as trustee, "wrongfully and unlawfully" refused to use the proceeds properly, and even sold bonds after the railroads were completed and the occasion for such sale had passed, appropriating to itself the avails of such transactions. (Rec. V. II, p. 289.)

So much for the petitions filed directly by the Southern Company. It should be remembered, however, that the Court of Appeals has held upon a former appeal—and was clearly justified in so holding—that the original bill filed by the Cambria Company in this cause was, in effect, the bill of the Southern Company and that the ancillary bill filed by the Belt Company and all the amended and supplemental bills filed by it were filed on behalf and at the instance of the Southern Company. We may properly, therefore, look into these pleadings also in ascertaining what the character of the litigation was.

Even more numerous and more exaggerated were the charges in these bills to the effect that the Trust Company was guilty of active fraud and intentional breach of trust. Some of the allegations are in the exact language used in the Southern Company's petition. (For example, see: Rec. V. II, pp. 5-6.) But there were many others. It was asserted that the Trust Company received $4,000,000 of securities of the Union Company, and accounted for only $865,000 thereof (Rec. V. II, p. 9); that it received $850,000 of securities of the Air Line, and accounted for only $200,000 thereof (Rec. V. II, p. 9); that the Trust Company "went through the form of giving said Belt Company credit" (Rec. V. II, p. 11; "that the act of said Trust Company in undertaking to charge the said loss (on the Connecting Company road) to the said Belt Company * * * was, as to the creditors of the said Belt Company, fraudulent in fact and in law" (Rec. V. II, p. 12); that the Trust Company failed to account for $1,000,000 of securities of the Suburban Company (Rec. V. II, p. 100), $750,000 of securities of the Consolidated Company (Rec. V. II, p. 101), $2,000,000 of securities of the Union Company (Rec. V. II, p. 102), and $800,000 of securities of the Air Line (Rec. V. II, p. 103); that the Trust Company "took out of the earnings and assets of said Belt Company, large sums of money which it pretended to expend for and on behalf of said Belt Company" (Rec. V. II, p. 105); that the Belt Company furnished the Trust Company large sums of money for the purchase of property, for which the Trust Company never accounted (Rec. V. 2, pp. 105-108); that the Trust Company "devised a plan or scheme to resell and unload upon the Belt Company" certain second mortgage Air Line bonds, and "to carry out said plan, caused the Belt Company to enter into a pretended agreement" and

"caused entries to be made upon its books and upon the books of the Belt Company" charging the Belt Company with said bonds (Rec. V. II, p. 252); "that it was the habit and practice of the Trust Company, in the disposition of bonds and stocks of the Belt Company, the Consolidated Company, the Air Line and the Union Company, to make sales of said bonds and stocks at such prices as the Trust Company should decide upon, and then when such sales had been made to credit the Belt Company with a less amount, representing to the Belt Company that the sale so made by the Trust Company as aforesaid, had been made at and for a much less price than the amount or rate at which the sale had actually been made." (Rec. V. II, p. 256.)

All of the bills bristle with similar charges of active misconduct. They contain little else. We dislike to burden the brief with too much detail. But in view of the contention seriously made that only constructive fraud was alleged, we feel constrained to point out some of the more striking allegations of these pleadings which cover more than two hundred pages of the printed record. The charges are repeated in all the bills and hardly a page can be found which does not contain such words as "pretended indebtedness," "pretended notes," "pretended purpose," "go through the form," "contrive a scheme," "appropriate to itself," and innumerable allegations of intentional conversion, falsification of accounts and acts practically amounting to embezzlement. Even a cursory glance through these pages will convince the court that the pleader had no thought of a mere constructive fraud.

Whether or not this court shall say that the federal courts of equity have the power, established in the English Court of Chancery, to tax solicitor and client costs in cases of gross and unsustained charges of fraud,

it would seem impossible for the court to say that gross fraud was not charged.

VII.

Was the main ground of the suit false, unjust, vexatious, wanton or oppressive?

That the main ground of the suit was false and unjust —that is to say, utterly without equity—sufficiently appears from the report of the master itself and from the action of the Circuit Court of Appeals on the former appeals. The master does not say in words that the suit was baseless, but he does say in his report, under the heading, "A Few Controlling Facts," that

> *"There either appear on the face of the bill, or are practically undisputed in the proofs, the following facts which serve to materially distinguish the case at bar from any cited by learned counsel in support of the complaints in the bill."* (Rec. V. II, p. 647.)

He then recites in substance (a) that the action was instituted on behalf of a creditor who became such long after the transactions complained of and that no creditor was before the court whose claim existed before such time; (b) that no excuse was attempted for the long delay in seeking an accounting; (c) that no stockholder had ever complained; (d) that the sole stockholder, when the bill was filed, was the Southern Company which had acquired all the Belt stock in the execution of a plan of reorganization; (e) that no stockholder had been named in the record who, if ignorant of the transactions, did not participate or acquiesce in or approve them; (f) that the transactions were open, not secret and concealed, and

were known or might readily have been known to the stockholders, as they were large transactions, spread over a long period of time, and were set forth in much detail both on the books of the Trust Company and on those of the Belt Company; (g) that the transactions were expressly ratified by the stockholders.

He further recites (h) that the statute of limitations had run against the transactions; (i) that they were fully executed years before the bill was filed and the accounts settled from time to time, the Belt Company giving notes for the balances due; (j) that the bookkeeping was full, complete and accurate, and the accounts were regularly stated and audited; (k) that the Belt stockholders repeatedly re-elected the same directors, this being the strongest evidence of acquiescence on their part in the management, which is now for the first time attacked; (l) that the Belt Company had received benefits and advantages from the transactions which the complainants never offered to return and could not return, and that no fraudulent intent or actual fraud on the part of the Trust Company was shown; (m) that *neither the Trust Company nor the directors in question ever at any time held even a substantial minority of the stock of the Belt Company, so that there was no basis for the charge of "domination."* (Rec. V. II, pp. 647-649.)

This report, confirmed by the District Court, and made the basis of the action of the Circuit Court of Appeals, justifies us in affirming that the suit has been judicially determined to be baseless and unwarranted.

Was it also vexatious, wanton and oppressive? The answer to this question should be found, and may be found, not in any independent proofs, offered by the Southern Company as to its good faith, but in the pleadings, the circumstances under which the suit was filed

and the procedure adopted by the complainants. They speak for themselves.

(a) The circumstances.

First, as to the circumstances. In March, 1900, the Southern Company was formed, by interests hostile to the Trust Company. It bought at foreclosure sale the property of the Gulf Company. It acquired, by deposits made under the Reorganization Plan, substanitally all the stock and bonds of the Belt Company. After April 1, 1900, the Belt Company was but an arm of the Southern Company.

The Belt Company was indebted to the Trust Company on promissory notes executed by it in the face amount of $360,000, on which approximately $400,000 was due. There is not, and never was, the slighest doubt as to the genuineness of that indebtedness. The Belt Company books showed that amount to be due. Prior to the filing of the Cambria bill, no intimation had been made by anyone that the Belt notes were not genuine. In the 36,000 pages of testimony before the Master there was no evidence, nor was there any attempt to introduce evidence, attacking the validity of these notes. The offer of the Southern Company to introduce evidence of good faith in instituting the litigation (Rec. V. 1, p. 33), contained not the slightest suggestion that these Belt notes were not real, bona fide obligations, representing an actual indebtedness, due and unpaid.

The Trust Company held a large amount of collateral to this debt, described in the bill of the Cambria Company (Rec. V. II, pp. 14-15) and elsewhere in the record. It consisted chiefly of stocks and bonds of subsidiary companies which owned properties and possessed rights

essential or important to the Belt System. It would be an advantageous thing to the Southern Company if the Belt assets could be freed from this debt and the collateral or the properties of the companies whose stock and bonds were pledged, secured by the Southern Company at the lowest possible cost. The Belt assets were subject to mortgages, the foreclosure of which might—and very nearly did—put these assets in the hands of the Southern Company without payment of any debts. The stocks, bonds and properties of the subsidiaries presented a more troublesome question.

On September 1, 1900, the Trust Company gave notice that it would on September 7 proceed to sell, under the terms of the pledge, the securities held by it. On September 6, 1900, the day before the proposed sale, six suits were filed to carry out the purpose of the Southern Company. Four foreclosure suits were filed, covering constituent parts of the Belt System, in which receivers were on the same day appointed for the mortgaged property. The Cambria Company filed its suit against the Belt Company, got judgment, had execution issued and returned unsatisfied, all on September 6, 1900, and on the same day filed its creditor's bill, the beginning of the present litigation, against the Trust Company, the Belt Company and its subsidiaries, asking that the sale of the collateral be enjoined. On the same day the injunction was granted, without notice to the Trust Company, and the receivership created in the foreclosure suits was extended over all the assets of the Belt Company generally.

If these suits could be brought to a successful termination, the purpose of the Southern Company would be accomplished. And it required some such suits to accomplish that purpose. A mere contest of the three items

which counsel say were erroneously charged to the Belt Company and therefore justify the litigation, would still have left substantially all the debt to the Trust Company unpaid and the collateral still liable to sale. It was necessary to attack the entire debt and a means was sought for such attack.

An accounting suit by the Belt Company was considered and it is said that a petition was prepared in August, 1900. But it was not filed and no explanation of the change in plan is offered. It may well be considered whether the reason was not that in such a suit no receivership was possible, whereas the Southern Company, desiring to overwhelm the Trust Company with litigation, desired to bring about all the receiverships possible. Certainly the statement, coming from the Southern Company, goes far to substantiate, if substantiation be necessary, the conclusion of the Circuit Court of Appeals that "it is difficult to wink so hard as not to see that the Cambria suit was in reality the suit of the Southern Company" (210 Fed. 717). For instead of the accounting suit, a creditor's bill was shortly filed in the name of the Cambria Company, in which the first act was the appointment of receivers for the Belt Company, to be followed by the appointment of receivers for the Belt subsidiaries.

In its offer of proof as to its good faith, the Southern Company says:

> "Thereupon counsel for your petitioner and for the Belt Company advised the officers of the Cambria Company, which was then a creditor of the Belt Company in a large amount, of the situation as it then existed and pointed out to them certain assets of the Belt Company, then held as collateral by the Trust Company, which would be released and become subject to the demands of creditors if an accounting

> between the Belt Company and the Trust Company were had and should result in substantially reducing or altogether wiping out said alleged indebtedness of the Belt Company to the Trust Company."

In other words, the Southern Company now confesses that it induced a creditor of the Belt Company to obtain judgment against it and proceed by creditor's bill to have receivers appointed.

But though the Cambria Company was willing to be induced to file this bill at the instance of the Southern Company, it was apparently unwilling to undertake the expense and incur the fees incident to the taking of a complete account. An ancillary bill was therefore filed on behalf of the receivers of the Belt Company, a then partner of the counsel for the Southern Company signing the bill as attorney for the receivers. Later replications were filed by the receivers, signed by the firm of which both these lawyers were members. (Rec., V. II, pp. 113, 159, 160.)

On February 2, 1905, the Cambria Company withdraws from active participation in the case, leaving the accounting for which it had asked in its brief wholly in the hands of the Belt Company, its attorney stating that the Cambria Company is practically "out of it until this accounting is all ended." (Rec., V. II, p. 940.) On February 27, 1905, the Southern Company comes into the case. On March 22, 1905, the Belt receivers file an amended and supplemental bill, signed by the counsel of the Southern Company. On May 1, 1905, the Southern Company files an amended intervening petition. On July 6, 1906, said receivers file a second amended and supplemental bill, again by the counsel of the Southern Company.

What was the purpose of all this litigation? The Cambria Company was a creditor of the Belt Company and its claim was undisputed. The latter never contested either suit brought by the former and, indeed, suggested the filing of the suit. The plan of reorganization provided for the payment of floating debts of the Belt Company in a large amount, which must have included this acknowledged obligation. The Cambria Company needed no creditor's bill or accounting to obtain its money, and it knew it. The suits were filed at the instance and for the accommodation of its friend, the Southern Company. They were not brought in good faith to obtain the relief asked for in their bills.

Nor was there any occasion for the foreclosure suits against the Belt properties. The Southern Company held substantially all the stock and bonds of the Belt Company, and the foreclosure decree and sale was, as held by the Circuit Court of Appeals on the former appeal (210 Fed. 704), "in effect by itself as trustee to itself as trustee." These suits were not brought in good faith to obtain the relief asked for therein.

Then the Belt receivers, acting either through the attorneys of the Southern Company or their associates, filed three successive bills, which could be of no possible benefit to anyone except the Southern Company. The creditors of the Belt Company, except the Trust Company, were provided for and the Southern Company was practically the only stockholder. Evidently, the counsel of the Southern Company, having thought it unwise to file an accounting suit against the Trust Company in August, 1900, decided in November, 1901, that the time had come for the application of more pressure.

At last, in 1905, the Southern Company intervened in person and the real purpose of the litigation comes to

light. The Southern Company claims title to all the valuable part of the pledged assets, free from the debt to the Trust Company. There can be no possible doubt that this was the intent from the beginning—to obtain the pledged Belt assets without paying the Trust Company debt. The suit of the Cambria Company, induced by the Southern Company, and called by the Circuit Court of Appeals "the baseless suit of the Cambria Company, a suit based on a judgment to which the Southern Company consented in the name of the Belt Company"—that suit appears as a mere club, used by the Southern Company to keep the Trust Company from enforcing its rights. And the bills for accounting become mere attempts to smother the Trust Company under the weight of ruinous expenses into an abandonment of those rights.

(b) The pleadings.

We submit further that the pleadings themselves conclusively establish the vexatious, wanton and oppressive character of the litigation.

After months of examination by auditors of the books of the Belt Company, the Southern Company induced a creditor to file a bill, demanding an accounting as to all transactions between the Belt Company and the Trust Company, based upon charges of domination and fraud. The creditor chosen was one whose claim had arisen long after the transactions complained of, who had no right to impeach such transactions, as is well understood.

> *Graham* v. *Railroad Co.*, 102 U. S. 148, 153.
> *Porter* v. *Steel Co.*, 120 U. S. 649, 673.

The transactions complained of were not only fully executed before the claim arose, but any claims there-

under were barred by the statute of limitations. The accounting demanded by the creditor was of accounts fully, completely and accurately kept by both parties, and accurately settled from time to time. And the domination and control, which furnish so large a part of the alleged equity of the Cambria bills, is charged against a stockholder who "never at any time held even a substantial minority of the stock of the Belt Company."

The bill was filed, evidently on information furnished by the Southern Company, with all the books of the Belt Company available and thoroughly examined, in spite of the fact that those books showed complete settlement of accounts and a patent absence of any power to control or dominate. Under such circumstances, are we not justified in saying that there was an ulterior motive?

The bills of the Belt receivers are made by the same pattern. They are based on transactions fully executed years previously, ratified by the stockholders and participated or acquiesced in by them; open, not secret; well known, not concealed; spread over a long period of time and set forth on the books in detail; and they were barred by the statute of limitations. The accounts attacked were fully and accurately kept and shown on the books of the Belt Company, and had been settled time and again. The various accusations of domination were directed against a small minority stockholder. The Belt Company had received large benefits from the attacked transactions, but there was no offer to return any part of them. And the books of the Belt Company, in the possession of the receivers or the Southern Company and examined for months, contained the evidence of the falseness of the charges.

No one can reasonably doubt that the Southern Company examined and re-examined those books in an en-

deavor to find grounds for contesting the Trust Company's debt and pledge; that it was utterly unable to find any such grounds within the term of the statute of limitations that would even sustain an argument; that it thereupon went back to the early history of the companies, their organization, the issuance and sale of bonds, their construction contracts—not with the idea of recovering upon an outlawed transaction, but with the purpose of drawing the Trust Company into a ruinous contest.

Evidence may be abundant to show that the various defendant companies were co-operating, that they were all engaged on different parts of the same plan, that there were many transactions between them, that all agreed to what each was doing and each did what the others desired and approved. But this is far from domination or control. It is self-evident, as the master found, that the holder of a small minority of stock, such as the Trust Company was known to be, cannot be guilty of unlawful domination.

The Southern Company, in its last brief, refers to two items that "afforded ample justification for the proceeding" (p. 67): The DeGoeijen item and the Stilwell contract item. The master found in favor of the Trust Company on both items, and the correctness of his finding is not before the court. We understand that the items are referred to in the brief only as proof that the attack upon them was not vexatious. Let us examine these examples, which the Southern Company has picked out as justifying its course.

The findings and conclusions of the master are set out on pages 682 to 694 of Volume II of the Record. The facts are somewhat complicated, but it sufficiently appears that about October, 1897, DeGoeijen purchased of the Belt Company a large amount of bonds for which

he did not pay in cash. The Trust Company was requested to handle the collection from him, and for convenience credited the Belt Company with the full amount on its books and charged against the account subsequent collections made from DeGoeijen. By March 31, 1899, the amount had been reduced to $89,333.33. The agreement between the Belt Company and the Trust Company, was that the latter should pay over to the former only such amounts as were paid by DeGoeijen. As the account was very slow, the Trust Company charged it back to the Belt Company in March, 1899.

If this were the whole story, the point might be well taken that the item deserved investigation. But it is not the whole story. This charge was on the Belt Company books when they were examined by the Southern Company in 1900, and was then known to the Southern Company. It was, however, not included in the charges of the Cambria bill. It does not appear in the ancillary bill filed by the Belt receivers in 1901. It appears for the first time in the amended and supplemental ancillary bill filed in 1905.

The reason for this, as shown by the report, is most enlightening. It seems that in 1899, DeGoeijen filed a claim for a large amount in the Gulf foreclosure suit and that thereafter the reorganization committee and the Southern Company were negotiating a settlement. This settlement involved also the $89,333.33 item, as a claim of the Belt Company against DeGoeijen. In 1900, an adjustment was agreed upon, and in 1902 *the Southern Company and the reorganization committee released DeGoeijen from the debt.* The master says that "the reorganization committee had been more or less pursuing DeGoeijen on this $89,333.33 claim most of the time since it was organized."

He further says: "Stuart R. Knott, then president of these companies (the Southern and the Belt), and who signed the release on behalf of the Southern, was one of the then receivers of the Belt, and a complainant in this cause."

As a final light on this subject, the master says:

> "The Belt Company, having regularly collected interest on these notes from DeGoeijen (Rec. 50-30317), and having shown on its books and on the stated financial reports of the company, that this item of $89,333.33 was due from DeGoeijen (Vol. 51-30785), and DeGoeijen having at all times recognized the obligation, and the Belt Company and its receiver, having, through the reorganization committee, collected, or made a settlement of some kind with DeGoeijen in reference to the matter, it would seem that the complainant is not in condition to now assert that the Trust Company is its debtor on account of said item of $89,333.33, for, in doing the things last mentioned, the Belt Company has placed a construction upon the transaction which shows that it treated DeGoeijen as its debtor, and not the Trust Company."

Now we have the whole story. The Belt Company treated the debt as due to it from DeGoeijen on its books and on its statements, collected interest on it, used it as an offset in settling a claim by DeGoeijen against the Gulf Company (predecessor of the Southern), and then released it, the president of the Southern Company who was one of the Belt receivers signing the release. This was in 1902. Yet in 1905, after having practically collected the debt from DeGoeijen, the Belt receivers set it up as a debt owed by the Trust Company.

And the Southern Company now contends that the charge was not vexatious.

The Stilwell contract item is still less convincing. It is one of the musty items evidencing the diligence of the Southern Company in digging into ancient volumes and the extremity to which it was obliged to go in search of a plausible cause of action. The findings of the master upon this transaction are to be found on pages 649 to 671 of Volume II of the record.

This Stilwell contract was one of the original construction contracts for a portion of the railroad of the Suburban Company, a predecessor of the Belt Company. It was made in 1889, and in 1890 the Suburban Company, though the portion was not completed, accepted an offer to turn over to it the road and materials as they then were at the contract price. This acceptance was authorized at a stockholders' meeting of the Suburban Company, May 9, 1890. Thereafter, for a period of almost fifteen years, no stockholder or creditor or other person raised the slightest question with regard to this settlement, and it stood openly spread upon the records of the Suburban Company, approved and acquiesced in by every interested party.

It remained for the receivers of the Belt Company, at the instance of the Southern Company and through its attorneys, in a suit collusively filed by a creditor whose claim arose years after the transaction was fully completed and closed, to allege in their amended ancillary bill, filed on March 22, 1905, for the first time, that the settlement was fraudulent and should be set aside.

Counsel for the Southern Company ask: "Will anyone for a moment contend that an action brought to compel restitution under these circumstances was trivial, insincere or vexatious?" We unhesitatingly answer yes, if the following circumstances also appear; that the settlement was open and spread on the records of the company;

that it was acquiesced in for fifteen years; that it was an executed transaction closed for so many years that the statutory period had run against it; that the stockholders had expressly ratified it; that no stockholder and no contemporary creditor had objected at any time; that the sole stockholder at the time the action was brought, the Southern Company, had obtained the stock under the terms of a reorganization agreement ten years after the questioned settlement; that the demand for restitution was made without any offer to restore the consideration received; and that the restitution was demanded upon the ground of "control and domination" for which there was not the slightest basis in fact.

In the lower court, the Southern Company relied upon three other items as constituting the justification of its good faith—the three items as to which the master found in favor of the Southern Company. These are referred to on page 15 of its last brief, but apparently are not now urged in that brief as evidence of anything. There is good reason for this. For, as pointed out in our brief in the Circuit Court of Appeals, two of these items concerned events occurring after the filing of the original bill herein, and under circumstances which clearly indicated that they were proper charges against the Belt Company when made, but afterwards were settled by the Belt Company. The Trust Company admitted in its answer that they should be deducted from its debt.

The facts as to these items will be found: as to the $5,600.00 item, on page 365, Record II; and as to the $5,000.00 item, on pages 365-6. The remaining item of $11,250.00 arose in connection with certain Union Terminal Company coupons due August 1, 1899, which were at that time charged to the Belt Company. These coupons were paid by the reorganization committee in July,

1900, and through some error credit was not given. The record does not show how this error occurred (Rec., V. II, 726-7).

We have, then, as the net result, one error, occurring in July, 1900, readily subject to adjustment without suit, and involving a matter of only $11,250.00, which is relied upon as a justification of an accounting, going back at least to 1887, bringing in thousands of accounts and items, charging fraud and fraudulent misuse of funds, and causing ten years of ruinous litigation. It is as if a surgeon should excuse his attempt to amputate a leg by finding a splinter embedded in the flesh.

In view of the foregoing, the Trust Company might safely admit, notwithstanding a mass of unfounded charges made therein, that the Southern Company's petitions, standing alone and unconnected with the previous proceedings, do not on their face show a wanton and vexatious attack. They were, in the main, a direct attack upon the title of the pledgor Belt Company to the pledged property. As found by the master, *"the intervener asserts its claim to be the equitable owner of all said collateral securities as against all parties to this suit."* (Rec. II, pp. 735-6.) They assert, with some degree of plausibility, an equitable claim to certain properties standing in the name of the Central Improvement Company, again indirectly attacking the title of the pledgor. And, based upon these equitable claims, they make certain charges against the Trust Company as trustee under various corporate mortgages. As to some of the Central Company's properties, the decree of the District Court was for the Southern Company, which was reversed upon the point by the Circuit Court of Appeals on the former appeal.

But these petitions do not stand alone. The Circuit Court of Appeals, upon the former appeal, found that the Cambria bill was filed at the instance and for the benefit of the Southern Company, and the facts hereinbefore set out amply sustain that finding. The original and amended bills of the Belt receivers were instigated and fathered by the Southern Company, and it was the sole party in interest so far as those bills were concerned. That company did not simply intervene in the suit in 1905; it started the suit in 1900, and had it carried along and prosecuted for almost five years before appearing in person and openly assuming charge.

The Southern Company adroitly bases its argument of good faith upon these bills alone, entirely ignoring the decision of the Circuit Court of Appeals on the former appeal to the effect that *all* the bills were the Southern Company's bills and *all* the proceedings were the Southern Company's proceedings. That was the decree affirmed by this court. Considered as a part of this consistent whole, these Southern Company interventions become but steps in the effort to obtain the Trust Company's collateral without paying the secured debt.

(c) The conduct of the litigation.

Conclusive as this must be, it is by no means all. The conduct of the litigation shows unmistakably the purpose back of its prosecution. Even if we admit that there were a few transactions which might have warranted an investigation, this would not justify what followed. A complete accounting was demanded. Every item was called in question, running back ten to fifteen years. The Trust Company was forced into five years of defensive struggle. The pleadings alone occupy more than 527

pages of the printed record. The report of the master covers more than 313 printed pages, consisting of long statements of the evidence on each point considered and then short statements of his conclusions, of which the following are examples:

> "In the opinion of the master, however, the legal effect of said consolidation *is immaterial* in this cause." (Rec. II, p. 769.)
>
> "For the foregoing reason, it is wholly immaterial whether said stocks came within the lien of the Belt mortgage or not." (P. 770.)
>
> "The claim of the intervener therefor was barred by the statute of limitations of this State." (P. 811.)

These were in addition to the sweeping condemnation of substantially all the charges in the bill under the caption "A Few Controlling Facts." (Rec. II, pp. 647-9.)

During the first four years of the litigation, some 9,000 pages of testimony had been taken. In 1905 and 1906, 27,000 pages of additional testimony was taken. The master stated in his report (Rec. II, p. 580) that for three years prior to the filing of the report, in May, 1910, he had given a large part of his time to the examination and consideration of this lengthy record. Small wonder, when the typewritten volumes, placed one upon another, made two stacks each as high as a man's shoulder.

Five years of pleading and evidence before the master in this accounting suit, and three years of consideration by the master, covering debits and credits during fifteen years—all resulting in the correction of a single error occurring less than two months before the suit was filed, and all requiring an enormous expenditure of time and money in their defense on the part of the Trust Company.

Nor is this all. In the meantime, two injunctions were obtained against the Trust Company, involving exactly the same matter, which had to be taken to the Circuit Court of Appeals before the Trust Company could obtain relief. (146 Fed. 337; 171 Fed. 43.) On the second appeal, in which the court stated that the transcript was voluminous, comprising 742 printed pages (p. 46), after a significant remark that the issuance of an injunction rested not in the "arbitrary whimsical will" of the chancellor but in his "sound judicial discretion" (p. 50), the court dissolved the temporary injunction, and then went further and directed the dismissal of the bill for want of equity (p. 51). Here is almost four years of additional litigation, harassing and futile of results, extending from somewhat prior to the submission to the master to well along to the time of his report.

There is still one further piece of evidence to which we would refer. After ten years of contest over this accounting, the master filed his report finding against the Southern Company on every point involved in that accounting except the one error of July, 1900. He found for that company as to its liability for the Belt debts and as to a part of the Central Company lands. But as to all the accounting, with the single exception, as to all the fraud, as to all the domination and control, as to all the misuse of funds, as to all the breaches of trust, he found for the Trust Company.

The decree of the District Court confirming the report dismissed the Cambria bill outright; dissolved the injunction against the Trust Company as to the sale of collateral; dismissed the bills of the Belt receivers except as to the three small items hereinbefore referred to; found for the Trust Company against the Belt Company in the amount of $639,658.86; sustained the pledge of

securities collateral to the Belt debt; and taxed one-third of the costs against the Belt Company and its receivers.

Yet neither company sees any occasion for an appeal. After ten years of strenuous litigation, involving hundreds of thousands of dollars, if not millions, they both rest content with this decree dismissing their bills for want of equity. They did not appeal. And this, in spite of the opinion now expressed in the last brief of the Southern Company, that the master was clearly wrong as to two of the items, and that an argument against them might forcefully be made even now. One of these items amounted, as stated by counsel, to 25 per cent of the entire claim of the Trust Company, and the other to a greater sum than the entire claim.

Counsel also argue in this last brief that the evidence before the master established the charge of domination. But at the time of the decree, the same counsel, representing the Belt Company and its receivers, as well as the Southern Company, did not see fit to appeal from an adverse decision. No effort was made, apparently, to induce the Cambria Company to appeal, as it had been induced to file the suit. Its counsel, though utterly defeated, was clearly no longer interested.

There can be but one explanation for this failure to act. The Cambria Company was not concerned about any accounting or any pledge of collateral. The Belt Company and its receivers cared nothing for the indebtedness found against it and the costs decreed to be paid by them. Both and all were interested in obtaining for the Southern Company immunity from the Belt debts and title to the pledged assets. When the decree was entered, granting such immunity and a large portion of the Central Company lands to the Southern Company, all the complainants and interveners were satisfied and

had no desire to risk a reversal as to those matters, by an appeal on the issues presented by their pleadings.

Can there be the slightest doubt that the Southern Company itself decided that no appeal should be taken by any of them?

It is an amazing thing that the Trust Company succeeded in carrying the burden of the combined attack of these associates. Ten years of litigation, with a decision in its favor on the original issues, but adverse to it on those issues which were financially most important, faced with a record in the trial court of upwards of 36,000 pages, the cost of printing which alone was practically prohibitive. It did succeed in appealing, however, by standing upon the face of the master's report, without the evidence, and, after vicissitudes partly appearing in this record, obtained a decree affirming the priority of its right to the pledged property, including the Central Company lands, and holding the Southern Company liable to pay the Belt indebtedness. But, even without the printing of the evidence, it was at a cost that virtually robbed it of the benefit of the victory.

And now it is seriously urged that because the Trust Company, after four years and a half of litigation induced under cover by the Southern Company, consented that that company might intervene and fight its own battle in the open, there has been a waiver of all right to complain that the litigation was wanton and vexatious. It is urged that the liability of the Southern Company, not brought into the case by the complainants, nominal or real, but by the Trust Company itself in its answer to the Southern Company's petition, filed, of course, years after the litigation had been begun, was the main issue in the case and prevents the equitable taxation of costs because it was a simple legal issue between two adversaries acting at arm's length.

The liability of the Southern Company was in no sense the main issue in the case. It came in incidentally and assumed importance only because of later developments. It was not by any means the main subject of controversy in the Circuit Court of Appeals on the former appeal. The first decision of that court does not provide for any money decree against the Southern Company, but only for a decree that the Trust Company might enforce its lien on the pledged property, including the Central Company lands, unless the Southern Company paid the secured debt. Not until the second decision did the question of a judgment against the Southern Company become of moment.

The main object of the Cambria bill was the recovery of the pledged property and its proceeds. The debt and the accounting was only incidental thereto. When the ancillary Belt bill was filed, both that company and the Trust Company were in the hands of receivers, those for the Belt Company having been appointed in a creditor's suit on the ground of insolvency and under a petition alleging the insolvency of the Trust Company. The main object of the bill of the Belt receivers was not to obtain judgment against the insolvent Trust Company or to avoid a judgment against the insolvent Belt Company, but to recover the pledged property and its proceeds. The debt and the accounting were incidental.

The main object of the Southern petition was to recover as equitable owner, the collateral held by the Trust Company and the lands of the Central Company, whose stock was likewise held by the Trust Company. It also charged a breach of trust on the part of the Trust Company as trustee under the Union Terminal Company mortgage. The issue of the Southern Company liability could not have come into the case before it became a party

thereto, and its own intervening petition certainly did not present it. That issue did not appear until the Trust Company's answer to the petition raised it.

(d) Conclusion.

It is self-evident from these circumstances, pleadings and procedure, that this was not a suit bona fide instituted for the purpose of determining the issues originally presented. It is impossible "to wink so hard" as not to see that the purpose was to smother the Trust Company with difficulities and expenses until it could no longer sustain the unequal contest. The report of the master found that the Trust Company had expended $11,499.32 in party and party costs (Rec. II, p. 49), and $296,520.37 in solicitor and client costs (Rec. II, p. 59), not including various items not allowed by the master.

It thus appears that more than $300,000.00 was actually paid out by the Trust Company in defense of this litigation, although its original debt, owed by the Belt Company, was approximately only $380,000.00. The final judgment was, of course, much larger; but the major part of the recovery was for interest during the time that collection was wrongfully prevented and while the Southern Company enjoyed the use of the money.

It is true that a considerable amount of attorneys' fees are included in these costs. But as to the larger items, the fees were not paid until after a contest in court and a judgment rendered against the Trust Company on an allowance made and sustained.

It is true, also, that these costs are startlingly large. But it was the purpose of the Southern Company to make them large—so large that the Trust Company could not carry the burden. And it should not now escape the pay-

ment of such costs, made necessary by its own action, on the ground that it made them large. To permit such a thing would leave the Trust Company, in spite of its victory, substantially without the principal of its debt, and with only the interest during the time the funds were withheld by the Southern Company. Its collateral has been, in effect, returned to it reduced in value by the amount of more than $300,000.00.

VIII.

Were fiduciary relationships involved?

In addition to the matters set out herein under Point II. involving the attack made upon the title of the Belt Company to the collateral held by the Trust Company, there are several fiduciary relationships disclosed in the record which justify the taxation of solicitor and client costs. The attempts to avoid the pledge and obtain the pledged property without cost were so varied and from so many angles, that no one relationship can possibly account for them all. There is a trust relation, however, at the bottom of almost every charge.

Take, first, the intervening petition of the Southern Company in its own name. The attack upon the pledge under the after-acquired property clause of the Belt mortgage, as has been pointed out, challenged the title which the pledgee held in trust for the pledgor and made it incumbent upon the Trust Company to defend that issue. This was true directly as to the stocks and bonds pledged, and indirectly as to the lands of the Central Improvement Company claimed by the petition. The lands themselves were not pledged; but the stock of the company, the value of which depended upon the lands, was pledged,

and the Circuit Court of Appeals held on the former appeal that this stock constituted an interest in the lands prior to the claim of the Southern Company. The judgment of that court was that, if the debt to the Trust Company was not paid, these lands should be sold and the proceeds applied thereon. This petition prayed that the pledged property described therein be conveyed and assigned to the Southern Company not the Belt Company or its receivers. (Rec. II, pp. 185-6.)

The amended intervening petition contained the same attack and the same prayer, with one additional charge—paragraph 13 (Rec. II, pp. 288-90). This paragraph charges a direct breach of an express trust. It is alleged that the Trust Company was named as trustee in the mortgage of the Union Terminal Railroad Company securing an issue of bonds; that "it then became the duty of the Trust Company *under the express terms of said mortgage*" to perform certain acts; that "unmindful of its duties as aforesaid" it diverted and misused $1,350,000 of bonds secured thereby; that this was done "wrongfully in breach of its duty as trustee," and "constituted a breach of trust on the part of the Trust Company." The Southern Company made the allegations solely as owner of all the bonds secured by the mortgage. (Rec. II, p. 290.)

If this is not a suit filed by a *cestui que trust* against a trustee for breach of trust, then it is difficult to explain what it is. The petitioner *claims* to be a *cestui*, and sets up the instrument under which the trustee was acting. It alleges a breach of that trust in the plainest possible language. Even in the last brief of the Southern Company it is said that the claim was *"for alleged breach of trust as trustee in the mortgage made by the Union Terminal Railway Company"* (p. 10).

On the succeeding page (11), however, the Southern Company changes this wording, and indicates its attempted evasion of the effects of its litigation. It there states that the issue was: did the Trust Company "assume" a relation of trust with respect to the use of the proceeds of the bonds? The entire argument of the Southern Company is based upon this attempted distinction.

We submit that in this amended petition, there is a direct charge of breach of trust against an express trustee, and that there is no question of assumption about it. We fail to find the word "assume" in paragraph 13, or any words importing the same meaning. What we find is an allegation that "it then became the duty of the Trust Company under the express terms of said mortgage" (Rec. II, p. 289). Other allegations confirm this, and no word detracts from it.

It is true that the Southern Company interpreted the mortgage as imposing duties which the trustee denied and which the court held not to be imposed thereby. But the *cestui* claimed under the mortgage, charged the trustee under the terms of the mortgage, and relied upon the terms of the mortgage which was charged to have been breached. The *cestui* had no rights to set up, except under that mortgage. It is as if a *cestui* should bring suit against his trustee for failure to invest the trust funds as required by the trust instrument; as if the trustee should answer that the trust instrument did not permit investment; and as if the court should sustain the answer of the trustee. Would the *cestui* be heard to say that he was not suing the trustee as such, but was merely trying to charge the trustee with a duty which the trust instrument did not impose upon him and which the trustee had denied?

We contend that this part of the intervening petition is a suit by a *cestui* against his trustee charging a breach of trust, in which the court has found that there was no basis for the suit. We contend that under the authorities heretofore cited (Point V [c]), the trustee is entitled to the expenses of his defense.

Take, next, the various bills of the Belt Company. They are in the main a mass of indiscriminate charges of domination, misuse of funds and fraud. But they contain many allegations amounting in effect if not expressly, to charges by a *cestui* against his trustee for breach of trust. In the original ancillary bill, there are charges that the bonds of the Union Terminal Company were delivered to the Trust Company "for the use and benefit" of the Belt Company, and no accounting made of the proceeds (Rec. II, p. 102); that the Trust Company had likewise disposed of the stock and bonds of the Air Line, belonging to the Belt Company and delivered by it to the Trust Company (Rec. II, pp. 102-3); that there were delivered to the Trust Company secured bonds and stocks amounting to more than $5,000,000.00, which were sold by it and not accounted for to the Belt Company (Rec. II, p. 103); that the stock of certain corporations, organized for the purpose of holding titles to real estate, and issued to the Trust Company "in trust for the use and benefit of the Belt Company," was misused by the Trust Company (Rec. II, p. 105); that certain shares of stock of the Central Improvement Company, "although belonging to said Belt Company, issued to said Trust Company," were disposed of by the Trust Company without accounting therefor. (Rec. II, p. 106.)

The amended ancillary bill, in addition to all the above, charges that the Trust Company undertook the disposition of stocks and bonds and unlawfully took exhorbitant com-

missions therefor (Rec. II, p. 233-7); that it exacted unlawful and exhorbitant trustee's fees (Rec. II, pp. 237-8); that it converted to its own use stocks and bonds delivered to it for disposition (Rec. II, pp. 238-40). The bill prayed, among other things, that an accounting be taken of the transactions and dealings "by the Trust Company for the use and benefit of and as trustee and agent for the Belt Company." (Rec. II, p. 264.) This does not refer to a constructive trusteeship by domination, for that is covered by another prayer.

The second amended and ancillary bill contained similar charges.

Here again is a specific and express attack upon a trustee, as trustee. The *reason* alleged in some instances is the domination of the trustee over the *cestui*. But the *attack* is a direct attack upon the trustee. This is mingled in with charges going to the validity of the pledge by the Belt Company—itself a ground for the allowance of solicitor and client costs—and with other baseless and scandalous charges. These only aggravate the offense, however, in increasing the difficulty and cost of the defense. The *cestui* cannot avoid the reimbursement of his trustee by including equally unfounded charges against the trustee not connected with the trust.

The Cambria bills, taken in themselves and considered as filed bona fide by that company, do not on their face attack any relationship of a fiduciary nature except the pledge. This has been discussed before. But these bills cannot be so taken and considered. The Court of Appeals decided on the former appeal that all this litigation was fathered and prosecuted by the Southern Company itself for its own ends and according to its own preconceived plan. The pleadings should, therefore, all be considered together and taken as one concerted attack by the

Southern Company against the Trust Company to obtain the pledged collateral.

It cannot seriously be denied that breaches of trust in the following express trust relationships, at least, were directly charged against the Trust Company:

(1) The express trust created by the railroad mortgages executed by the Union Terminal Company, the Belt Company, the Consolidated Company, and the Air Line, in all of which the Trust Company was named as trustee;

(2) The express trust created by the delivery to the Trust Company of the stocks and bonds of the Belt and constituent companies, to be marketed by it;

(3) The fiduciary relationship arising from the pledge by the Belt Company to the Trust Company of the various securities deposited to secure the Belt indebtedness.

The Southern Company urges that the questions presented were not whether the Trust Company misconducted itself as trustee under the mortgages, but whether it *assumed* a relation of trust with respect to the proceeds of the bonds. We submit that there is no uncertainty about this matter in the pleadings. They allege that the Trust Company, as trustee under the various mortgages, conducted itself in a manner to breach the express terms of such mortgages. It would be impossible to state a cause of action, even *prima facie*, upon many of the attacked transactions, without alleging an express trust. And an express trust is alleged.

Where one company, the Union Terminal for example, delivers bonds or stocks to another, the Trust Company in this case, to be sold and the proceeds accounted for, there is no *constructive* trust involved. It is an *express* trust, of which the Trust Company is an *express* trustee. If it does not rightly sell and account for the bonds and

stocks and their proceeds, it violates the terms of that *express* trust and not of any "assumed relation with respect to the proceeds." And so it was alleged in the pleadings.

In such cases, the alleged domination and control do not form the basis of the complaint. There is no cause of action stated for such domination and control. They are merely inducement, by reason of which it is alleged the trusts were violated.

We do not think there is any answer to these contentions.

The Southern Company was also an express trustee for the Trust Company.

There is a further fiduciary relationship shown by the record. There was one situation in which the Southern Company was trustee and the Trust Company was *cestui que trust*. That involved the property of the Belt Company purchased by the Southern Company at foreclosure sale under the plan of reorganization. Upon the former appeal in the case, the Court of Appeals held:

> "The property of the Belt Company was a trust fund. The stockholders of that company were trustees charged with the duty to apply that property to the payment of the claims of the Trust Company and of the other creditors of the Belt Company before they took to themselves any share in or benefit therefrom. When the Southern Company took their stock and gave them $4,750,000 par value of its stocks and bonds for their interest in the property of the Belt Company, *it stepped into their shoes and became a trustee for the creditors of the Belt Company* with plenary notice that the interest of those creditors in the property was at least as much as the value of

the stocks and bonds it was giving for the interest of the stockholders, for the rights of the creditors in the Belt property were prior and superior to those of the stockholders."

It appears, therefore, that the Southern Company, holding in its hands the property of the Belt Company in trust to apply its value in part, at least, to the payment of the debt owed to its *cestui que trust*, the Trust Company, brings a suit in equity against its *cestui que trust* to nullify that trust and free the property from any claim on its part. The *cestui*, so attacked, is forced to protect its interest against this baseless and unwarranted suit by its trustee.

Can it be that the trustee, on being defeated in the litigation, can pay to the wronged *cestui* the bare value of its interest and demand the release of the entire trust property without regard to the cost and expense imposed on the *cestui?* Is it conceivable that a court of equity appealed to by such trustee must or should release the trust property to the trustee without requiring him to do equity by restoring the *cestui* to its original position so far as possible?

In Perry on Trusts, Sec. 900, it is said:

> "So if a trustee alleges in his answer that the *cestui que trust* is largely indebted to him, and after a long investigation it turns out that the trustee is greatly in arrears, he will be decreed to pay costs."

How much more should he be so decreed to pay costs if he initiates a baseless suit against his *cestui* in a wrongful endeavor to defeat the trust!

This, too, is an express trust, not a constructive trust. The Southern Company is not a trustee because of any wrongful act on its part. It is trustee because it held the

stock of the Belt Company and was subject to the liabilities imposed upon stockholders in general by reason of their being stockholders. When they become stockholders, they in effect agree that the property of the corporation shall be applied first to its debts before they take any benefit. They become stockholders with that understanding.

When the Southern Company took their stock "it stepped into their shoes," as said by the Court of Appeals on the former appeal, and "became a trustee for the creditors of the Belt Company." Not a constructive trustee, resulting from some inequitable act, but an express trustee, *as the successor of the former Belt stockholders*, who by subscribing to or buying stock assumed a certain trust relationship to creditors.

We have here, then, a normal case of a trustee suing his *cestui* to defeat the trust, under aggravated circumstances. The principles hereinbefore discussed should certainly be applied.

It is urged by the Southern Company that the Trust Company was acting for the protection of its own interests, rather than in a fiduciary capacity, and hence does not come within the rule. This is true in many of the cases conceded by the Southern Company. In creditors' bills, in stockholders' bills, in partition cases and many others, the moving party is acting in his own interest. Every trustee, defending an attack of his beneficiary, is so acting.

In *Walters* v. *Woodbridge*, L. R. 7 Ch. Div. 504 (1878), a contention similar to the one here urged was answered by the court as follows:

> "Lord Romilly says that the trustee here defended himself against a false charge, and was in the same position as any other person who so defended himself; but it was a charge against the trustee in

respect of acts done by him in the due administration of the trusts."

So, if the trustee is seeking to repudiate his trusteeship, and wrongfully denies the *cestui's* rights, the trustee is not entitled to have the *cestui's* attorneys' fees paid out of the fund, even if there be one; and in such a case the trustee will be personally charged with the *cestui's* solicitor and clients costs.

See to this effect the following cases, previously cited:

In re Clark, 174 Ia. 449, 154 N. W. 759 (1915);
Attorney General v. *Old South Society*, 13 Allen 474 (1866);
McGaw v. *Acker, Merrall and Condit Co.*, 111 Md. 153, 73 Atl. 731 (1909);
Woodworth v. *Old Second National Bank*, 154 Mich. 459, 118 N. W. 581 (1908);
Madden v. *Rosseter*, 192 N. Y. S. 113, 117 Misc. Rep. 244 (1921);
American National Bank v. *Warner*, 176 S. W. 863 (Tex. Civ. App.) (1915).

Viewed in this light, there can be no doubt whatever of the right to solicitor and client costs. Even the contention of the Southern Company that the main litigation concerned solely the debt of the Belt Company to the Trust Company and the liability of the Southern Company therefor, becomes an argument in favor of that right.

The Southern Company, as a stockholder of the Belt Company, occupied the position of trustee of the Belt properties for the Trust Company. In repudiation of that trust, it filed a suit, not only vexatiously denying the *cestui's* rights, but baselessly making huge claims against the *cestui*. The latter answered, affirming the

trust and setting up the validity of its rights. It has been put to large expense in sustaining the trust and to enormous expense in establishing its claim. It cannot be that equity will permit the trustee to return to the *cestui* the trust property or its equivalent—not all of it, but only the part to which the *cestui* is entitled—and leave the *cestui* to pay out of its portion the costs and expenses of establishing and enforcing the trust. It cannot be that courts of equity are without power to remedy such a wrong.

IX.

There was a fund in court.

Although no fund in court is essential to the application of the principles above set forth, there was a fund or funds here present over which the court had jurisdiction and which it was in effect administering.

The Circuit Court of Appeals, in its opinion of May 18, 1928, says (Rec., V. 1, p. 748):

> "We have here a case in which the Trust Company, a creditor of the Belt Company, in the course of the litigation uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid. That fund was represented by the amount which the Southern Company had paid to the stockholders of the Belt Company for their stock pursuant to the reorganization plan."

The position of the Court of Appeals on this point is obviously sound, and this theory alone would be sufficient to justify the allowance of solicitor and client costs to the Trust Company.

The Southern Company, however, attacks this position. (See Sec. V., brief in support of application for certiorari.) It says that no fund was brought into the constructive possession of the court; that the decree of the lower court did not order the distribution of any fund, but merely awarded a personal judgment; and that the Trust Company asserted no claim but its own.

The argument is utterly lacking in substance, because all of the elements insisted upon by the Southern Company are present here. The decree of the lower court did not merely award a money judgment. It reached, and took possession of, and authorized administration upon the fund made available by the Trust Company's litigation. The Circuit Court of Appeals, in its former decision, expressly made the decree a charge upon certain specific described property: the pledged collateral, the Central Improvement Company lands, and the assets of the Belt Company (210 Fed. 723), and ordered that property sold in case of non-payment.

In view of the foregoing, how can the Southern Company contend that no fund was brought into the constructive possession of the court? To be sure, the Southern Company paid the debt, and thereby made it unnecessary for the court to sell the property described; but this cannot alter the fact that the decree authorized a sale of property, at least constructively in its possession.

Furthermore, the stocks and bonds pledged to the Trust Company were certainly in court, by virtue of the injunction against their sale and the appointment of the Belt receivers. The stock of the Central Improvement Company, at least, representing the lands which the Southern Company was endeavoring to secure, had a very substantial value. A part of the costs might properly be chargeable to that fund, now taken over and absorbed

by the Southern Company. But certainly the fund consisting of all the interest of the stockholders in the property of the Belt Company cannot be retained by the Southern Company freed from the burden of these costs.

Nor can that result be accomplished merely by exercising astute action in paying off other creditors, and in thus isolating the Trust Company. As said by the Court of Appeals, "Such action cannot avail to destroy the equitable right of that company to some compensation for its services in this matter." (28 Fed. 2d, 246.)

Central Railroad Co. v. *Pettus*, 113 U. S. 116 (1884), and *Tevander* v. *Ruysdael*, 299 Fed. 746 (C. C. A. 7th Cir.) (1924), are of particular interest upon this point.

The contention of the Southern Company that recovery in this regard must in any event be limited to the amount of the unpaid Belt debts, finds no support that we can find. The following cases would seem to be against the contention:

Tevander v. *Ruysdael*, 299 Fed. 746 (C. C. A. 7th Cir.) (1924);

Planters Rice Mill Co. v. *Merchants National Bank*, 78 Ga. 574, 3 S. E. 327 (1887);

McGaw v. *Acker, Merrall and Condit Co.*, 111 Md. 153, 73 Atl. 731 (1909);

Pickett & Sexton v. *School District of Kansas City*, 193 Mo. App. 519, 186 S. W. 553 (1916);

Madden v. *Rosseter*, 192 N. Y. S. 113, 117 Misc. Rep. 244 (1921);

In re Baldwin's Estate, (1900) 1 Irish L. R. 15.

X.

Counsel fees and costs after June, 1910, are allowable.

The Southern Company contends that under no circumstances is it liable for counsel fees incurred subsequent to the final decree of June, 1910, for the reason that thereafter the only issue in the case concerned the Southern's liability for the Belt debt.

In our opinion the only matter before this court is the power of the District Court to award any counsel fees, and the propriety of the particular items is not in issue. In view, however, of the prominence given the point in the brief of the Southern Company, perhaps a word with respect to it will not be amiss.

There are three answers to this contention, so conclusive that they need only be stated.

1. The decree of the District Court entered in June, 1910, was a single decree, covering the whole case, and must be appealed from *in toto* or not at all. The fees and costs subsequent thereto were incurred in such appeal, and are simply a part of prosecuting and defending the entire litigation.

2. The decree adjudged to the Southern Company the lands of the Central Trust Company, an integral part of the value of the Trust Company's collateral, and that value was not made available to the Trust Company until so ordered by the Circuit Court of Appeals and by this court. The decree of the District Court awarded the Trust Company but a half-loaf.

3. The liability of the Southern Company for the Belt debt was not the only or main issue upon the appeal. The main issue was whether the Southern Company held

the Belt properties in trust and if so what its duties were under the circumstances.

The effort of the Trust Company on the appeal was to have this trust legally determined, and its expenditures were directed to that end. What the Court of Appeals and this court decided was that the trust existed and that the Southern Company must perform in accordance with the terms of that trust. It was not the liability of that company to pay money that was involved, but its obligations as trustee. Not until the decision on appeal were the Trust Company's rights as *cestui* recognized and enforced, and until that time the trustee and the trust property were in court, and the trustee was vigorously contesting the *cestui's* rights.

It is true that very large counsel fees were paid after June, 1910. This goes to the *amount* that should be allowed as costs, rather than to the *power* of the court to allow costs. It may be stated here, however, that these fees were not paid by the Trust Company except upon the final judgments of courts having jurisdiction. The facts in this regard, if they are thought to have any bearing here, can be found in *Mecartney* v. *Guardian Trust Co.*, 274 Mo., 224 (1918), and *Mecartney* v. *Guardian Trust Co.*, 280 Fed. 64 (C. C. A., 8th Cir.) (1922). We refer the court to these cases.

XI.

The situation in England is the same as here.

The Southern Company argues that solicitor and client costs cannot be successfully taxed in this country, for the reason that there is here no fixed standard of fees, as there is in England; that in England attorneys' and solicitors' fees are fixed by law, and are taxed against

the losing party in every case, whether at law or in equity. The fact is that so far as concerns solicitor and client costs in the sense here involved, the situation in England is precisely the same as in this country. Confusion regarding the state of the English law is due to a failure to distinguish between the English terms, solicitor and client costs and solicitor and own client costs.

The English have a system, quite unlike anything in this country, by which the attorney or solicitor in a case may, on motion made in court, compel his client to pay the fees due him for that litigation. This has nothing to do with costs as we understand them. The matter concerns only the solicitor and his client, and not the rights of one party to the litigation against the other. However, these fees which may be thus collected are called solicitor and own client costs, or costs as between solicitor and own client. Any motion or application for such fees is referred by the court to a taxing master, a court official, who fixes the amount to be allowed.

See, as to the foregoing, the Attorneys & Solicitors Act of August 22, 1843, 6 & 7 Vict., Chap. 73; and the Attorneys & Solicitors Act of July 14, 1870, 33 & 34 Vict., Chap. 28.

The Solicitors Remuneration Act of August 22, 1881, L. R. Gen. Pub. St., V. 17, Chap. 44, gives to the Lord Chancellor and others the power to make general orders prescribing and regulating the remuneration of solicitors in connection with non-contentious business. Pursuant to this Act, various remuneration orders have from time to time been issued. The Act concerns only solicitor and own client costs.

It is also true that ordinary court costs in England, taxable as between party and party, include various items of attorneys' fees, more or less nominal in amount. See

Aycкbourn, Practice of the High Court of Chancery, 7th Ed. (1861), p. 396; Daniell, Pleading and Practice of the High Court of Chancery, 4th Am. Ed. (1871), V. 2, p. 1439. These fees are taxable as costs in both legal and equitable actions, and in law actions go as of right to the prevailing party. They correspond to the various small fees, like the $20 docket fee under our Act of 1853, often taxable by virtue of statute or rule of court, as party and party costs in this country.

But the situation with respect to solicitor and client costs in England is identical with the situation here. They are taxed only in Chancery cases, and according to the conscience of the court. There is no fixed or established scale of charges. They are allowed only in the special types of cases herein discussed, principally in connection with litigation between fiduciaries. *Turner* v. *Collins*, L. R. 12 Eq. Cas. 438 (1871); *Mordue* v. *Palmer*, L. R. 6 Ch. A. C. 22 (1870); *Andrews* v. *Barnes*, L. R. 39 Ch. D. 133 (1887); *In re Foster* v. *Great Western Ry. Co.*, L. R. 8 Q. B. D. 515 (1882); Halsbury Laws of England, V. 23, p. 183; V. 26, p. 798.

XII.

Free access to the courts.

The Southern Company fears for the principle of free access to the courts if solicitor and client costs are taxed against it in this proceeding. But its argument proves too much.

This court has frequently sustained the constitutionality of statutes providing for an allowance of attorneys' fees as costs. *Chicago & N. W. R. Co.* v. *Nye-Schneider-Fowler Co.*, 260 U. S. 35, 43 S. Ct. 55 (1922); *Missouri, K. & T. R. Co.* v. *Cade*, 233 U. S. 642, 34 S. Ct. 678

(1914); *Farmers & Merchants Insurance Company* v. *Dobney*, 189 U. S. 301, 23 S. Ct. 565 (1902); *Home Life Insurance Co.* v. *Fisher*, 188 U. S. 726, 23 S. Ct. 380 (1902).

Congress evidently has not been much swayed by such an argument, for it has enacted several statutes allowing fees in particular types of cases. United States Code Annotated, Title 17, Section 40; Title 28, Sections 819, 824, 825, 829; Title 49, Sections 8, 16 (2) (sustained in *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 35 S. Ct. 328 [1914]).

We see no reason for contending that a taxation of solicitor and client costs works a denial of free access to the courts, more than does a taxation of party and party costs. The character of litigation in which solicitor and client costs are properly taxable must be borne in mind. If they are awarded under circumstances where the litigation is so unwarranted as to justify an implication of bad faith, certainly there is no substance to the argument that free access to the courts is unlawfully denied. No honest litigant is penalized.

Louisville & N. R. Co. v. *Stewart*, 241 U. S. 261, 36 S. Ct. 586 (1915), sustains a state statute which adds 10 per cent to the amount of a judgment appealed from, if affirmed on appeal.

Rule 23 of this court provides that in all cases where a writ of error shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment; and that the same rule shall be applied to decrees for the payment of money in equity cases. The rule has often been enforced. See *Southern Ry. Co.* v. *Gadd*, 233 U. S. 572, 34 S. Ct. 696 (1913); *Texas &*

Pacific Ry. Co. v. *Prater,* 229 U. S. 177, 33 S. Ct. 637 (1913); *Hennessy* v. *Sheldon,* 12 Wall. 440 (1870).

Moreover, the right of free access to the courts has an equally vital correlative—the right of freedom from court interference when nothing has been done to warrant being forced into court. The imposition of costs upon equitable principles is an instrument in the hands of the court for effecting justice between the parties. They may be imposed upon a defendant for an unconscionable defense, and on a plaintiff for a vexatious action. It is a shield to both parties against inequitable attacks.

If this court should hold that the District Court had no power to award attorney's fees to the Trust Company, and this court no power to authorize such an award, it would deliberately be putting out of its hands and placing beyond its reach, an effective weapon for the betterment of judicial administration. We cannot believe that the court will so deprive itself of power. It is a matter of concern not only to our client, but to all those litigants who may, in time to come, be in the same situation.

The "judicial power of the United States" is by the Constitution vested in this court and the lower Federal Courts. That is to say, *all* the judicial power of the United States. Is is possible that these courts are so devoid of power that they cannot regulate costs in proceedings before them? And, too, regulate costs as they have been regulated for centuries in the country from which our legal institutions were derived? Why should not the same policy which warrants this court in assessing penalties for frivolous appeals be available to District Courts to penalize the filing of frivolous or vexatious suits before them? Is not this power necessary to the

protection of those courts themselves from being used as instruments of oppression?

Justice and fairness under the circumstances demand that the Southern Company reimburse the Trust Company for the expenses of this litigation. It is urged that the amount of those expenses is very large. So it is. But still not so large as the damage to the Trust Company. The expense has been incurred and paid. Who should settle the bill? The Trust Company, which has been innocently dragged through the courts? Or the Southern Company, which instigated ten years of litigation to find one small error and brought about more than any other factor the financial ruin of the Trust Company?

The decision of the Circuit Court of Appeals, rendered after a most exhaustive examination of the facts and authorities, fully upholds the Trust Company's claim, and should be affirmed.

We are not confronted with any difficulties, suggested by counsel for the Southern Company, in arriving at the amount of solicitor and client costs which should be taxed. A master has heard evidence thereon and filed his report. The District Court should be directed to pass upon the exceptions thereto.

Respectfully submitted,

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Attorneys for Respondent.

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No. 22.

In the Supreme Court of the United States

October Term, 1929.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GUARDIAN TRUST COMPANY, *Respondent.*

PETITION FOR REHEARING OF RESPONDENT, GUARDIAN TRUST COMPANY.

JUSTIN D. BOWERSOCK,
ROBERT B. FIZZELL,
JOHN F. RHODES,
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PETITION FOR REHEARING OF RESPONDENT, GUARDIAN TRUST COMPANY.

Now comes Guardian Trust Company, respondent herein, and respectfully petitions the court to set aside the decision and judgment heretofore on February 24, 1930, rendered herein, and grant respondent a rehearing in this cause, for the reasons hereinafter stated:

The decision of this court gives effect to a decree of the Circuit Court of Appeals and holds such decree conclusive, upon an issue which this court expressly says was not before the Circuit Court of Appeals. This court says in its opinion:

> "For the proper construction of the decree under consideration, regard is to be had to the issues be-

> fore the court on appeal, the findings applied for and the directions given. *The proposed findings and additional recovery extended to matters not before the court.* * * * The merits of the claims on which they sought recovery against the Trust Company *were not before the court.*" (Italics ours.)

Nevertheless, this court says:

> "It is plain that the stockholders' application was denied and that the decree did not authorize or permit the taxation of costs as between solicitor and client."

If the former quotation correctly states the issues in the Circuit Court of Appeals, it follows that the stockholders' application was denied, not upon its merits, or because too late, but because the court could not pass upon a question which was not before it. The application there and the action taken upon it simply leave the situation as it was before—just as if the application had not been filed.

The action of the District Court in controversy in the present appeal, was based not upon the application filed in the Circuit Court of Appeals, but upon an application filed in the District Court after the case was remanded. To sustain the present decision, it must be held that the application was filed too late. If so, when should the question have been raised? How could it have been raised sooner?

A suit was filed by the Southern against a pledgor and a pledgee, claiming the pledged property. The pledgee defends and is defeated in the trial court. It appeals. The appellate court reverses the trial court and remands the case for the entry of a decree in favor

of the pledgee. The pledgee then moves that, in the decree, it be allowed its expenses in defending the pledged property. Can it be said that this is too late?

We submit, on the contrary, that this is the usual and proper procedure. It is followed in practically every foreclosure by a trustee of a mortgage or deed of trust securing bonds. The allowances are made and the costs adjudged after the entry of the decree. It has the support of all the authorities with which we are familiar.

Missouri Pacific Ry. Co. v. *Larabee*, 234 U. S. 459 (34 S. C. 979);
Ex Parte Union Steamboat Co., 178 U. S. 317;
In re Sanford Fork & Tool Co., 160 U. S. 247;
Sizer v. *Many*, 16 How. 98;
U. S. v. *Pan-American Petroleum Co.*, 24 Fed. (2d) 206;
Mills v. *Lehigh Valley R. Co.*, 226 Fed. 812;
St. Louis & San Francisco R. Co. v. *Barker*, 210 Fed. 902;
Kell v. *Trenchard*, 146 Fed. 245;
Clark v. *C. M. & St. P. Ry. Co.*, 105 Fed. 552;
Baltimore B. & L. Ass'n v. *Alderson*, 90 Fed. 489.

We think the question must be determined, not by the action taken by the Circuit Court of Appeals, on the first appeal, but on the merits of the application filed in the District Court and the authorities applicable thereto.

Respectfully submitted,

JUSTIN D. BOWERSOCK,
ROBERT B. FIZZELL,
JOHN F. RHODES,
Attorneys for Respondent.

Certificate.

I, of counsel for respondent, Guardian Trust Company, do hereby certify that in my opinion the foregoing petition is well founded in law and that the same is not made for vexation or delay.

JUSTIN D. BOWERSOCK.

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SUPREME COURT OF THE UNITED STATES.

No. 22.—October Term, 1929.

The Kansas City Southern Railway Company, Petitioner, *vs.* Guardian Trust Company, Henry C. Flower, Receiver.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 24, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

The question is whether the Guardian Trust Company, in addition to amounts taxable as costs between party and party, is entitled to recover anything on account of counsel fees or other expenses as costs between solicitor and client.

In a judgment creditor's suit brought in the United States Circuit Court for the Western District of Missouri by the Cambria Steel Company against the Kansas City Suburban Belt Railroad Company, receivers were appointed for the latter. It had given its notes for large amounts to the Trust Company and pledged stocks and bonds as collateral security. The Kansas City Southern Railway Company had acquired on mortgage foreclosures the properties of the Belt Company, and of the Kansas City, Pittsburg & Gulf Railroad Company.

The Trust Company claimed that the Southern Company, having succeeded to the properties of the Belt Company and of the Gulf Company on terms that preferred shareholders to creditors, became liable for their debts.* It brought three suits in a Missouri court to compel the Southern Company to pay the debts owing to it by them. Thereupon the Southern Company brought two suits against the Trust Company in the United States court to enjoin prosecution of the state court cases. One related to the actions on the debts of the Belt Company (146 Fed. 337) and the other to all the

*Northern Pacific Ry. *v.* Boyd, 228 U. S. 482, decided while this case was pending in the Circuit Court of Appeals on the first appeal.

actions. 171 Fed. 43. Injunctions granted by the lower court were dissolved by the Circuit Court of Appeals.

In the creditor's suit, the Belt Company and its receivers filed an ancillary bill against the Trust Company to have the claims of the latter against the former declared invalid, to recover the collateral security, and to have an accounting. The Southern Company intervened, claiming under the foreclosure, and sought to recover the collateral security and other property from the Trust Company. The decree of the Circuit Court, except as to matters not important here, denied relief against the Trust Company, established its claims against the Belt Company and, notwithstanding the Trust Company's contention that the issue was not before the court, adjudged that the Southern Company was not liable therefor, and ordered that one-third of the costs be borne by the Trust Company and two-thirds by the Southern and Belt Companies.

The matters adjudged in favor of the Trust Company were not taken to the Circuit Court of Appeals for review. The Trust Company appealed. It insisted that the lower court erred in holding that the Southern Company was not indebted to it. Preferring to pursue that company in the actions pending in the state court, it had not prayed judgment in this suit against the Southern Company. It also maintained that the lower court erred in holding it liable for any part of the costs.

After the case had been argued and submitted but before opinion was announced, owners of a small minority of the shares of the Trust Company were permitted to file a suggestion that the Trust Company should have judgment against the Southern Company for the debt of the Belt Company. The court reversed the decree below, decided the Southern Company became liable for that debt, postponed for further argument the question whether under the pleadings the Trust Company might have judgment therefor, and held it was entitled to recover its entire costs. 201 Fed. 811, 829.

Later the same stockholders by leave of the Circuit Court of Appeals filed, and at the final submission of the case were heard in support of, the following suggestions:

That the court embody in its order for reversal a special finding that the creditor's bill, ancillary bill and intervening petition were instigated and prosecuted by and for the Southern Company without good faith, and that the entire litigation was trivial, wanton and oppressive. That it direct the lower court to reserve juris-

diction to ascertain the amount of solicitors' fees and other expenses necessarily incurred by the Trust Company in making its defenses, to find the amount of such expenses, tax them as costs in the case and enter a further decree against the Southern Company therefor. Or in the alternative that the final decree below be without prejudice to the right of the Trust Company to sue the Southern Company for such expenses. That such additional decree also include the expenses and damages incurred by and resulting to the Trust Company from the second injunction suit (171 Fed. 43) and that it be without prejudice to the rights of the Trust Company to move for such damages and expenses in the first injunction suit. 146 Fed. 337.

In its second opinion the Circuit Court of Appeals dealt with these suggestions. 210 Fed. 696. It said (p. 723):

"A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them and as the evidence upon the issues tried in this case was not brought to this court, it would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules, and practice in equity." And, "as a conclusion of the whole matter," it gave directions for the entry of a specific decree with "costs."

And the court adjudged that the decree of the lower court be reversed and remanded the case "with directions to render a decree for the Trust Company in accordance with the views expressed in the opinion of this Court". The Southern Company appealed but did not raise any question concerning costs. And there was no cross-appeal. February 21, 1916, this court affirmed the decree of the Circuit Court of Appeals. 240 U. S. 166. The mandate set out the decree below, ordered that it be affirmed and remanded the case to the District Court.

April 15, 1916, pending exact determination of the amount conceded to be payable under the decree, the Southern Company paid

$821,623.28 to the Trust Company. Later the payment being found in excess of the amount required, the difference was adjusted. April 18, 1916, the mandate was filed in the District Court. October 4, 1922, the Trust Company applied to have final decree entered, and claimed not only such costs as are taxable as between party and party but also counsel fees and other expenses as costs between solicitor and client. The court construed the opinion of the Circuit Court of Appeals to find that in carrying on this litigation there was lack of good faith and a purpose on the part of the Southern Company to despoil the Trust Company, held itself bound by such findings, and interpreted the decree to require it to ascertain and tax against the Southern Company counsel fees and other expenses incurred by the Trust Company in making its defenses.

A special master was appointed to ascertain and report the amount of such expenses. The Trust Company presented items of its demand in two groups. The first included those claimed to be taxable as between party and party; the second included other expenses amounting to $319,829.97 of which $299,137.30 was attorneys' fees, the balance being to cover printing briefs, services of experts, miscellaneous and incidental disbursements. The master found the costs taxable as between party and party and as to that there is no controversy here. He also found the Trust Company entitled to counsel fees and other expenses amounting to $296,520.37 to be taxed as costs between solicitor and client. After hearing upon exceptions the court, contrary to its earlier decision, held that the proper construction of the decree of the Circuit Court of Appeals limited recovery of costs to those taxable between party and party, and entered decree accordingly.

The Trust Company again appealed. The Circuit Court of Appeals, apparently assuming that its decree and the mandate of this court authorized the District Court to allow the Trust Company costs as between solicitor and client, reversed the decree. 28 F. (2d) 233. It referred to the character of the litigation, held that federal courts of equity have jurisdiction to allow such costs citing the practice in the High Court of Chancery in England as applicable here, concluded that the Trust Company is entitled to such an allowance and remanded the case with directions to the lower court to make proper allowances for costs as between solicitor and client.

Did the mandate of this court authorize the District Court to make any allowance in favor of the Trust Company on account of attorneys' fees and other expenses to be taxed as costs between solicitor and client?

The decree here affirmed required the "taxation of costs . . . under the principles, rules and practice in equity". It undoubtedly covered ascertainment of amounts taxable between party and party. There was no specific reference to any additional allowance. The language used disclosed no intention to require more than the usual taxation. When used in a judgment or decree without qualification, the word "costs" means the amounts taxable as such under Acts of Congress, rules promulgated by its authority and practice established consistently with governing enactments. *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 83. *Ex parte Peterson*, 253 U. S. 300, 316. In actions at law costs follow the result as of course, but in equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case. The nominal amounts fixed by statute (28 U. S. C., §§ 571, 572) and taxable as attorneys' fees are not meant to cover the compensation to which lawyers in charge of the litigation are reasonably entitled. A decree merely allowing costs to be taxed does not mean that anything is to be included on account of counsel fees in addition to the amount specified in the statute. Even if it be assumed that federal equity courts have jurisdiction to allow costs as between solicitor and client and to include therein attorneys' fees in excess of the amount prescribed by statute—and as to that we express no opinion—the purpose to authorize such costs and to make such allowance should be clearly expressed in the decree. 2 Daniell's Chancery Pleading and Practice, 6th Ed., p. 1410.

For the proper construction of the decree under consideration, regard is to be had to the issues before the court on appeal, the findings applied for and the directions given. The proposed findings and additional recovery extended to matters not before the court. The costs taxable as between party and party were involved on the appeal and the court reversed the decree of the lower court which charged one-third against the Trust Company. No question of costs as between solicitor and client had been raised below. No issue of bad faith had been framed, and no such charge was suggested until after the filing of the first opinion. The stockholders'

second application, made pending rehearing, contained the first request for a finding of fact on which to base a decree for allowance of attorneys' fees and other expenses to the Trust Company. As there was no appeal by the Belt Company or the Southern Company, the merits of the claims on which they sought recovery against the Trust Company were not before the court.

The lateness of the application, the lack of evidence and danger of injustice mentioned in the opinion were good reasons why the court should deny the application. The suggested danger of prolonging the litigation by trial of new issues was a reason for refusing to direct the lower court to open the case and to make the requested determinations. The failure of the court to make the requested special finding, to adopt the alternative suggestion or to take any action in reference to the parts of the application relating to the Trust Company's damages and expenses in the injunction suits goes to show a purpose to deny any recovery of expenses in addition to the costs which under established practice are taxable as between party and party. And the opinion makes it clear that the decree directed to be entered below was intended to be an end of the whole matter. It is plain that the stockholders' application was denied and that the decree did not authorize or permit the taxation of costs as between solicitor and client.

The mandate required the execution of the decree. The District Court could not vary it or give any further relief. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255. *Gaines* v. *Rugg*, 148 U. S. 228, 241. *In re Washington & Georgetown R'd. Co.*, 140 U. S. 91, 96. *Ex parte The Union Steamboat Company*, 178 U. S. 317, 319. That court was right in holding that, by the decree of the Circuit Court of Appeals and the mandate of this court, the costs recoverable by the Trust Company were limited to those taxable between party and party.

Decree of the Circuit Court of Appeals reversed and that of the District Court affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.